

Falmac Limited v Cheng Ji Lai Charlie  
[2013] SGHC 113

**Case Number** : Suit No 935 of 2009  
**Decision Date** : 23 May 2013  
**Tribunal/Court** : High Court  
**Coram** : Belinda Ang Saw Ean J  
**Counsel Name(s)** : Winston Quek Seng Soon (Winston Quek & Co) for the plaintiff; Harpal Singh (KhattarWong LLP) for the second defendant.  
**Parties** : Falmac Limited — Cheng Ji Lai Charlie

*Companies – Directors – Duties*

[LawNet Editorial Note: The appeal to this decision in Originating Summons No 1125 of 2013 and Summons No 1410 of 2014 was dismissed by the Court of Appeal on 8 April 2014. See [\[2014\] SGCA 42.](#)]

23 May 2013

Judgment reserved.

**Belinda Ang Saw Ean J:**

**Introduction**

1 The plaintiff, Falmac Limited ("Falmac"), was a Catalist Sponsor-supervised company at the time it was de-listed by the Singapore Exchange Securities Trading Ltd ("SGX-ST") on 22 August 2011. Prior to de-listing, Falmac's business operations were mainly carried out in Tianjin, People's Republic of China, through two subsidiaries, namely Falmac Machinery (Tianjin) Ltd ("Falmac Machinery") and Falmac Textile (Tianjin) Co Ltd ("Falmac Textile"). For ease of reference, I shall refer to the two subsidiaries collectively as the "Tianjin subsidiaries". Each subsidiary owned a factory in Tianjin (hereafter collectively referred to as "the Tianjin factories").

2 This Writ of Summons was filed on 30 October 2009. It named five individuals who constituted Falmac's board of directors during the relevant period in question as the defendants (hereafter collectively referred to as "the former board"). The first defendant, Cheng Ji Jiang ("Ji Jiang"), the third defendant, David Lu Hai Ge ("David Lu"), and the fifth defendant, Yu Wei Ying ("Wei Ying") were independent directors of Falmac. The second defendant, Charlie Cheng Ji Lai ("D2") was, at all material times, a director and the Chief Executive Officer of Falmac. The fourth defendant, Fei Xue Jun ("Fei"), was a director and shareholder of Falmac.

3 Falmac did not serve proceedings against Ji Jiang, David Lu and Wei Ying, and the proceedings against Fei were formally discontinued on 13 July 2010. The present action continues against D2.

4 Mr Winston Quek ("Mr Quek") represents Falmac. During the first tranche of the trial, D2 was represented by Mr L Devadason ("Mr Devadason") who was assisted by Mr Harpal Singh ("Mr Singh"). Mr Devadason fell seriously ill shortly thereafter and Mr Singh took over the conduct of the proceedings.

**Overview of the proceedings**

5 In this action, Falmac pleaded a number of breaches of fiduciary duties on the part of D2 involving a range of transactions, dealings and matters. It was alleged, amongst other things, that Falmac under the stewardship of D2 made losses yearly and was heavily indebted to banks and other creditors, and that D2 had managed, conducted and administered Falmac's affairs without due care and diligence to the extent that the company became financially crippled and could not pay its employees' salaries. [\[note: 1\]](#)

6 At the end of the first tranche of the trial on 20 July 2011, Falmac's core complaint was that D2 still controlled the Tianjin subsidiaries through his nominee, Leon Zhao whose appointment as the legal representative of the Tianjin subsidiaries was unauthorised as it was without the knowledge and consent of Falmac ("the unauthorised legal representative argument"). Falmac averred that Leon Zhao's appointment enabled D2 to continue to control the Tianjin subsidiaries for his own personal interest and to the detriment of Falmac. As a result, Falmac lost effective control of its principal assets which were the Tianjin subsidiaries. [\[note: 2\]](#) Attempts by two new Falmac board members to gain access to the Tianjin factories in late October 2009 were unsuccessful. To Falmac, this incident demonstrated Falmac's loss of physical control of the Tianjin factories.

7 According to Falmac, Leon Zhao was a total stranger. Not only was his appointment as the legal representative of the Tianjin subsidiaries unauthorised, the change of legal representative was not disclosed to Falmac's shareholders. [\[note: 3\]](#) In addition, Falmac was unable to remove Leon Zhao as legal representative. Consequently, it was compelled to write off the entire value of the Tianjin subsidiaries in its financial statements for the financial year ended 31 December 2009 ("the 2009 financial statements"). Falmac holds D2 responsible for the loss of the Tianjin subsidiaries by reason of D2's breach of fiduciary duty and/or breach of trust. [\[note: 4\]](#)

8 Sometime after the first tranche of the trial, Falmac obtained leave of court to re-amend its Statement of Claim (Amendment No 1) on 17 November 2011. With the new amendments (*ie*, Statement of Claim (Amendment No 2) filed on 21 November 2011), the case against D2 took on a different dimension, namely that D2 had disposed of the Tianjin subsidiaries to a company known as Sino Vision (HK) Ltd ("Sino Vision") in contravention of s 160(1) of the Companies Act (Cap 50, Rev Ed 2006) and in breach of his fiduciary duties owed to Falmac (collectively referred to as "the s 160 complaint"). Falmac is therefore seeking damages based on the net asset value of the Tianjin subsidiaries, or alternatively for damages to be assessed. [\[note: 5\]](#)

9 D2 has denied any wrongdoing. His pleaded defence is that the appointment of Leon Zhao as the legal representative of the Tianjin subsidiaries was not unlawful as it was approved by the former board, and that the appointment was recognised and accepted by the authorities in China. In relation to the s 160 complaint, D2's defence is that the debt-for-share transaction was approved by the former board in the interest of Falmac. However, the former board had no role in the implementation of the debt-for- share transaction.

10 According to D2, Business Corporate Services Pte Ltd ("BCS") and Peter Choo Chee Kong ("Choo") were interested in Falmac for a reserve takeover. In this case, the plan was to use Falmac as the "shell" company for the reverse takeover. Divesting Falmac of all its debt-ridden and loss-making businesses (*ie*, the Tianjin subsidiaries) was thus part of the overall strategic restructuring of Falmac. [\[note: 6\]](#)

11 D2's overall position in his Closing Submissions is that he is being made a scapegoat for the divestment of the Tianjin subsidiaries now that the reverse takeover has fallen through and the white

knights (*ie*, BCS and Choo) have lost money in the process. It is D2's contention that Falmac needed an excuse for disposing the Tianjin subsidiaries for a consideration of S\$2 to Unitex Global Limited ("Unitex"). Thus, apart from the Tianjin subsidiaries being loss-making, the easy way out was to blame D2 by alleging loss of effective control of the Tianjin subsidiaries.

12 In this action, D2 counterclaims against Falmac for various payments due to him such as unpaid salary as Falmac's Chief Executive Officer and unpaid director's fees.

13 At this juncture, I propose to comment on the state of the pleadings after the last round of late amendments in November 2011. First, the unauthorised legal representative argument (see [6] above) and the s 160 complaint (see [8] above) appear to be advanced as discrete stand-alone pleas. Falmac has not in its pleadings linked the unauthorised legal representative argument to the s 160 complaint and the subsequent registration of Sino Vision as the legal owner of Falmac's shares in the Tianjin subsidiaries. Falmac has not gone further to assert, and it is not Falmac's pleaded case, that D2 continues to be in effective control of the Tianjin subsidiaries despite the registration of Falmac's shares in Sino Vision's name. Falmac is neither disavowing the Sino Vision transaction, nor arguing that Sino Vision's involvement was a sham or disguise to cover up D2's unlawful appropriation of the Tianjin subsidiaries. Simply put, it is not Falmac's pleaded case that D2 has an interest in Sino Vision, and hence D2 has control of the Tianjin subsidiaries through Sino Vision and Leon Zhao. In the absence of any plea of a causal link between the unauthorised appointment of Leon Zhao on 1 September 2009 and the s 160 complaint they remain discrete stand-alone pleas.

14 Second, it is difficult for the court to work out exactly what fiduciary obligation D2 had not observed, and the consequences of any deviation from the same. Mere recitals of the various duties of a director in paragraphs 4 and 5 of Statement of Claim (Amendment No 2), and mere statements of conclusion that D2 had breached fiduciary duties owed to the company do not suffice. The pleadings did not expressly identify the particular obligation that D2 had supposedly breached as a fiduciary to the facts in support of the complaint in question. Falmac's Opening Statement referred to a director's duty to act honestly (*ie*, to act *bona fide*) at all times in the interests of the company. This was similar to the plea that D2 owed to Falmac a fiduciary duty of good faith. An allegation of breach of duty of good faith is essentially a charge of dishonesty. Like fraud, dishonesty must be distinctly alleged and proved, and it is not permissible for a charge of dishonesty to be inferred from the pleaded facts alleged against D2 in respect of either the unauthorised legal representative argument or the s 160 complaint.

15 Third, liability in the main action must therefore be decided on the narrow formulation of the claims as pleaded and upon the existence of cogent facts in evidence to support these claims.

16 Finally, the declaration sought by Falmac in this court – that D2 was in breach of his duties as a director – does not seem to be sought in respect of any loss suffered by Falmac or to claims that might have been made to Falmac. There is a separate claim for damages to be assessed. This claim, which is for common law damages, is not intended as "the other relief" that follows a declaration of right but is to recover compensation for breach of fiduciary duty owed to Falmac. Accordingly, Falmac has to show that there is a causal connection between the breach of fiduciary duty (*ie*, the relevant wrong) and the relevant loss, if proved. Plainly, it is only in respect of the unauthorised legal representative argument and the s 160 complaint that Falmac is claiming damages based on the net asset value of the Tianjin subsidiaries and the expenses incurred in attempting to recover the Tianjin subsidiaries. For the other alleged claims described in [59] below, the sum total of the evidence is that Falmac did not suffer any pecuniary loss. As Falmac is not asking this court to declare contested legal rights of the parties, whether subsisting or in the future, the relief in the form of a declaration of right is superfluous.

## **Chronology of relevant events**

17 A proper understanding of this action requires the background facts of the case to be set out in some detail. A chronological account of the relevant events is as follows.

### ***Former board comprising the five named defendants***

18 At all material times, the primary business of Falmac was in the manufacture of precision engineering circular knitting machines and production of cotton yarn in Tianjin. It is common ground that Falmac's business was entirely derived from the Tianjin subsidiaries.

19 In October 2004, three of the named defendants were on Falmac's board: D2, David Lu and Fei. At that time, there was another independent director, Lu Jing, on Falmac's board. The fifth director, Wei Ying, was appointed in March 2005.

20 Lu Jing retired from the board in 2006. In March 2006, Fei was appointed executive chairman of the board. However, he stepped down as executive chairman in August 2007, but remained on the board as executive director. Ji Jiang, the first defendant, was appointed a director on 15 August 2007.

21 D2 was appointed director on 27 October 2004 and, as Falmac's Chief Executive Officer on 15 December 2004. According to D2, it was Fei who brought him into Falmac. In 2004, Falmac was in need of a capital injection as well as a restructuring of loans with its creditor banks amongst others. Fei as director of Sino Equity Group Limited ("Sino Equity"), the investment vehicle of the Jianwei Group in China, of which Fei was also the chairman, Chief Executive Officer and controlling shareholder made a cash injection into Falmac through an issue of new shares in Falmac. Fei, through his interest in Sino Equity, became the largest shareholder holding 29% of the issued shares in Falmac as at 12 March 2007. [\[note: 7\]](#)

22 D2 resigned as the Chief Executive Officer of Falmac on 20 July 2009. On 30 July 2009, the three independent directors on the former board also resigned from their positions. This left D2 and Fei as the only two members on Falmac's board of directors at the end of July 2009.

23 D2 and Fei were removed as directors on 5 October 2009.

### ***Falmac's continuous financial woes***

24 Besides the capital injection and loan restructuring mentioned earlier, Falmac had to, *inter alia*, sell off its assets to pay off its indebtedness. Note 3 of the auditor's notes to the financial statements dated 31 December 2005 stated: [\[note: 8\]](#)

...

c) On 27 October 2004, the Company issued 44,975,120 ordinary shares of \$0.01 each at par for cash for an aggregated cash consideration of \$1,700,000. The proceeds have been utilised for the reduction of certain amounts owing to the creditor banks and payment of all professional fees in relation to the restructuring. ...

d) On 27 October 2004, the Company issued 34,448,000 ordinary shares of \$0.01 each at an issue price of \$0.311 per share as settlement for its partial outstanding loans of \$10,713,430 owing by the Company and the Group to the creditor banks.

Each of the creditor banks has undertaken not to dispose of any of the conversion shares for a period of six months from 27 October 2004, and not to dispose more than 25% of the conversion shares held by each of the creditor banks for a period of 12 Months from 27 October 2004.

25 Furthermore, Note 5 on bank loans and overdrafts said: [\[note: 9\]](#)

...the Directors believe that a core part of the overall restructuring plan to revive and strengthen the Company's and the Group's financial position is to implement the debt conversion to reduce its current liabilities and hence immediate cash requirements. As a result, debts owing by the Company and the Group as of 27 October 2004 to the creditor banks amounting to approximately \$10.7 million had been capitalised into new ordinary shares in the capital of the Company Note 3(d). The remaining balance of about \$4.1 million and \$3.9 million will be repaid by way of: disposal of assets in Singapore ... and ... restructuring of the repayment obligations of the Company in respect of \$3.9 million of the aggregate outstanding owing to the creditor banks over a 3-year period into the restructured loan and is repayable by 12 equal quarterly instalments.

26 Note 5 also disclosed that the Company was in the process of re-negotiating with the creditor banks for a revised bank borrowings repayment scheme.

27 As things turned out, Falmac's sale of assets in Singapore was insufficient to repay the requisite S\$2.1m leaving a shortfall of S\$250,000 unpaid. Falmac also defaulted in payment of three of the repayment instalments that had fallen due and payable as of 31 December 2005. Therefore, on 20 February 2006, the creditor banks demanded repayment of the entire restructured loan together with interest amounting to a total of about S\$3.97m.

28 Falmac's defaults in payments under certain indebtedness agreements were disclosed in Note 6 to the financial statements for the financial years ended 31 December 2006 [\[note: 10\]](#) and 31 December 2007. [\[note: 11\]](#)

29 It is clear that the ability of Falmac to continue business as a going concern depended on the company realising assets to discharge its liabilities in the normal course of business, but as the current liabilities of both Falmac and its subsidiaries continue to exceed its current assets over the years, the auditors in Singapore found it increasingly difficult to support the going concern basis of the company and its subsidiaries. [\[note: 12\]](#)

30 Despite the fact that Falmac and its Tianjin subsidiaries had crippling liabilities, Falmac was still an attractive target to a white knight (in this case BCS and Choo) who perceived Falmac as a cheap and easy way to secure a Catalist listing via a reverse takeover.

### ***Enter Wong Lock Chee and Choo***

31 BCS was a private investment company that was owned and controlled by Wong Lock Chee ("Wong") and Yeoh Wee Liat ("Yeoh"). Wong, acting through BCS, bought over Falmac's outstanding debts at a discount from the creditor banks. [\[note: 13\]](#) After 31 December 2008, the creditor banks assigned all their interests and rights in relation to the bank loans, thus making BCS a 16.5% shareholder as well as a substantial creditor in respect of an outstanding loan of approximately S\$4.5m. [\[note: 14\]](#) Falmac confirmed in its Closing Submissions that this move by BCS to acquire 16.5% of the equity was "to enable [Falmac] to undergo a debt restructuring plan and to negotiate with corporate entities for a reverse takeover of [Falmac]." [\[note: 15\]](#) BCS saw its role as a white knight

and committed funds to Falmac in a bid to buy time to implement its plan to restructure the company's debts for a reverse takeover. Wong had approached Choo, a director and shareholder of CNMC Goldmine Limited ("CNMC") on the possibility of a reverse takeover of [Falmac] by CNMC. Choo was said to be "keen on the proposal", [\[note: 16\]](#) the "proposal" was for Falmac to acquire the entire stake in CNMC in exchange for the issuance of new shares in Falmac, effectively allowing CNMC to achieve a "backdoor-listing". This ambition to buy Falmac for a "backdoor-listing" naturally required the agreement and cooperation of the former board of Falmac. In fact, there were e-mails from Choo to D2 expressing his seriousness in Falmac and that he needed D2 to work with him. For a flavour of the overtures, some of these e-mails are reproduced below. In an e-mail dated 20 January 2009 to D2, Choo wrote: [\[note: 17\]](#)

Charlie,

I am very serious about Falmac. I have spent about S\$80,000 so far. So there is no reason to doubt my interest.

But I need you to help us. There is good money to be made if you work with me.

Falmac is not as clean as told to me earlier.

BTW, you are already guilty of violation of Singapore Companies Act by not filing annual accounts with ACRA. Singapore courts are in close touch with China's law ministry. For example, China Aviation Oil's CEO Chen was jailed in Singapore with the help of China's courts (Chen was released from Changi prison today). So you and I should work closely to close the current chapter on Falmac and then you move on.

I am thinking now to assume the role of Chairman of Falmac. This will enable us to move faster. If you are suspicious of my intentions, please tell me.

You must quickly proceed to get the 3 IDs [independent directors] to resign as time is running out.

Everyday creditors are calling and scolding us. A creditor even came to UIC Building office to ask for payments. Falmac owes money to almost ALL the professionals in Singapore...even US law firm like Baker Mckenzie, Tan Swee Sze etc.

The banks' deadline is 20 Feb to pay S\$512,000.

Are you happy working with me??

32 On 28 January 2009, Choo e-mailed D2 as follows: [\[note: 18\]](#)

Dear Charlie,

...

We already spent more than S\$100,000 and this shows you we are serious. We will soon pay for the banks settlement on 20 Feb...SO I MUST FEEL COMFORTABLE TO PROCEED WITH THIS BIG STEP. Once signed with banks, I am also committed to your junior staff past salaries which is also big sum.

Below list of issues we must settle with you during your coming visit in Singapore.

(1) PrimePartners say they are only keen to sponsor Falmac if I am key driver of the deal.

...

(2) Immediately do a share placement to raise some money to pay Citibank(S\$3,000 and they are going to sue you), pay professionals etc...Wee Wong Hong & Partners has been appointed to do the placement documentation.

...

(5) Buyer for ALL ex-Singapore businesses.

...

(9) Moving out of Princeton by Feb 4 (need to arrange movers, and move the Xerox machine to CNMC and the PCs to be installed in new apartment-cum-office. Existing starhub internet to be transfer (sic) to new apartment)

...

(13) Announcement of deal to be transparent and early ie. Acquisition of CNMC by Falmac to announced when I take over the banks' loans.

...

33 On 26 February 2009, Choo wrote to D2. His e-mail reads: [\[note: 19\]](#)

Charlie,

Please tell Fei that CNMC gives him a good chance to make money. There is NO hope if things continue in Falmac. You can look for RTO targets and I can look for other shells.

I must sign agreements with you and Fei next week.

Such a simple idea and Fei is unsure. No wonder he is in trouble according to my checks.

34 On 24 March 2009, Choo wrote to D2. His e-mail reads: [\[note: 20\]](#)

hi Charlie,

...

SGX called this morning to ask why Peter Choo is not buying Falmac.

Anyway Charlie, I am serious to grow CNMC into a big company especially when we do have high gold deposits. In fact six geologist from Henan's largest gold mining co. are flying to Kelantan around mid-April to discuss mining the gold.

I am planning to sign a non-legal conditional MOU with Falmac to acquire CNMC Goldmine. This will

prove that I am serious. OK??

35 On 30 March 2009, Choo e-mailed D2 in the following terms: [\[note: 21\]](#)

hi Charlie,

How (sic) things? CNMC Goldmine is progressing well and on target to produce our first gold pour in 3Q this year.

Today newspapers in Singapore are reporting many failures of China-linked companies and this caused many investors to avoid investing in such counters.

Let's work quickly on Falmac. Wong Lock Chee has compiled the various simple agreements to enable us to trust each other and move ahead.

36 It is not disputed that in practice, the debts of the target company (*ie*, Falmac) have to be restructured and a debt conversion exercise undertaken [\[note: 22\]](#) in order to turn the target company into a shell company before injection of a new business into the target company. In this case, the plan was to use Falmac as the shell company for the reverse takeover. Divesting Falmac of all its debt-ridden and loss-making businesses (*ie*, the Tianjin subsidiaries) was thus part of the overall strategic restructuring of Falmac. [\[note: 23\]](#)

37 On 30 March 2009, Wong from BCS sent D2 five draft agreements via e-mail. Wong also sought D2's cooperation in his e-mail. He wrote: [\[note: 24\]](#)

Dear Charlie,

Please see attached 5 simple Agreements...You have seen 3 of these. 2 are new simple agreements for Superway and Kanbo.

Two new agreements are –

(1) Letter of Agreement to buy all subsidiaries

(2) Sale & Purchase Agreement to buy half of the bank loans.

...

Charlie, we are serious about re-making Falmac. Today Singapore stock market does not like China concepts due to many failures of China concepts. With Mr Peter Choo's leadership, a gold mine business and a non-China concept, Falmac has a good chance for share price to jump.

If you have been following stock news lately, you will realise that there has been very bad publicity on S-Chips counter. ... Many of the CEOs in these Companies have been implicated for mismanagement and accounting irregularities. The current state of Falmac definitely requires a change. We seek your cooperation to move forward and achieve our mutual objective in reviving this very sick Company.

38 Wong's first draft agreement was a Memorandum of Understanding ("MOU") between Falmac and CNMC for the reverse takeover. Recitals D and E of the MOU state: [\[note: 25\]](#)



(D) Falmac is currently being restructured into a shell company with insignificant businesses and with old businesses to be divested and all debts and obligations including banks, employees, shareholders loans being settled amicably and so that it is clean and with no liability.

(E) This MOU is meant to facilitate the legal, financial and operational due diligence investigations to be mutually conducted by parties hereto ("Due Diligence Investigation") and signing of a formal sale and purchase agreement ("S&P Agreement") and is subject to the terms and conditions of the S&P Agreement.

39 The second and third agreements were settlement agreements offered by BCS to D2 and Fei respectively in respect of certain sums owed to them by Falmac. [\[note: 26\]](#) With regards to Fei, the draft settlement agreement related to an outstanding shareholder's loan. The draft settlement agreement between D2 and BCS was for salary arrears capped at S\$1m and the settlement amount was to be paid upon completion of the reverse takeover. [\[note: 27\]](#) Notably, it was a condition of the proposed settlement with D2 that he, amongst other things, supported and procured the support of Fei to vote in favour of the reverse takeover. Unfortunately, these two draft agreements were never finalized and executed.

40 The fourth draft agreement was between BCS and a company called Tianjin Kanbo Machinery Ltd ("Tianjin Kanbo") for the purchase of the Tianjin subsidiaries for a nominal fee of S\$1. [\[note: 28\]](#) The name "Tianjin Kanbo" as appears in the draft was provided by D2 to Choo in an e-mail of 25 March 2009. In that e-mail, D2 informed Choo of Tianjin Kanbo's interest to buy the Tianjin subsidiaries at S\$1, and that a Hong Kong company by the name of "Superway Logistics Limited" would pay S\$100,000 for half of the six banks' loan to Falmac. In the same e-mail, D2 requested Choo to pass on this information to Wong who had called him earlier that morning for the names. [\[note: 29\]](#)

41 The fifth draft agreement related to a proposed sale of certain loans that BCS had earlier acquired from the creditor banks of Falmac. [\[note: 30\]](#) The name "Superway Logistics Limited" appears in the fifth draft.

42 In the interim period while administrative steps were being taken for the reverse takeover, Choo and BCS provided financial support to Falmac. For instance, Choo advanced loans to Falmac to settle salaries and CPF contributions for Falmac's employees. Choo also engaged an independent firm, Bizcorp Management Pte Ltd ("Bizcorp") to take over Falmac's financial reporting functions after the resignation of Falmac's finance personnel in late 2008. Due to these changes and other difficulties in preparing financial statements, Falmac had sought and obtained extensions of time to announce its 2008 financial results and hold its 2009 Annual General Meeting ("AGM"). Bizcorp was thus in charge of preparing Falmac's 2008 management accounts for the AGM.

43 The relationship between D2, Choo and Wong appeared to have deteriorated after D2 refused to sign off on the 2008 management accounts ("2008 accounts") prepared by Bizcorp. As a result, the AGM could not be held by the required deadline (ie, 31 July 2009).

44 As stated, the defendant resigned as CEO of Falmac with immediate effect on 20 July 2009. On 30 July 2009, the three independent directors on the former board also resigned from their positions. This left D2 and Fei as the only two members on Falmac's board of directors.

45 After his resignation, D2 purportedly made some statements that appeared in an article published by *The Edge Singapore* magazine ("*The Edge*") on 17 August 2009. The article contained

statements relating to “accounting irregularities” and “false accounting” within Falmac. [\[note: 31\]](#) A trading halt on Falmac’s shares was called that same day. The next day, SGX-ST reprimanded Falmac for lack of public disclosure in breach of the Listing Rules (the “Listing Rules”), and asked Falmac to clarify the purported accounting irregularities. On 21 August 2009, trading of Falmac’s shares was suspended, allegedly causing negotiations on the proposed reverse takeover to come to a temporary standstill.

### ***New board of directors***

46 D2’s refusal to sign the 2008 accounts provoked Choo and Wong into removing D2 as a director. On 5 August 2009, BCS requisitioned an Extraordinary General Meeting (“EOGM”) to remove D2 and Fei as directors of Falmac and appoint a new board of directors.

47 As a point of reference, the trading halt and suspension (on 21 August 2009) occurred in the interim period between the requisition for the EOGM and the subsequent election of the new board on 5 October 2009.

48 Initially, the EOGM was fixed for 28 September 2009. However, on 4 September 2009, D2 and Fei passed a resolution appointing the firm of M/s Bih Li & Lee to apply for an injunction on behalf of Falmac to stop the convening of the EOGM (“the Bih Li & Lee resolution”). [\[note: 32\]](#) D2 and Fei’s attempt to completely stop the EOGM failed. D2 and Fei merely secured a postponement of the EOGM for one week to 5 October 2009. At the EOGM held on 5 October 2009, D2 and Fei were removed as directors of Falmac and a new board of directors was constituted. The board members comprised Choo, Wong, Yeoh and Kuan Cheng Tuck (“Kuan”) (hereafter collectively referred to as “the new board”).

### ***The first tranche of the trial***

49 After the new board was appointed on 5 October 2009, Falmac brought the present suit against the former board on 30 October 2009, alleging a host of breaches of director’s duties such as the failure to convene Falmac’s Annual General Meeting (“AGM”) and present the financial statements within the required deadlines. Falmac also alleged that D2 in particular was in breach of fiduciary duties owed to Falmac by, *inter alia*, failing to renew his employment pass and making unwarranted statements about Falmac in *The Edge*.

50 On 8 September 2010, Falmac amended its Statement of Claim to include allegations that D2 had unlawfully changed the legal representative of the Tianjin subsidiaries, which resulted in the loss of control of the Tianjin subsidiaries. It was alleged that D2 had resigned as the legal representative of the Tianjin subsidiaries in favour of one Leon Zhao whose appointment was on 1 September 2009. [\[note: 33\]](#) The Chinese authorities approved the change of legal representative to Leon Zhao on 13 October 2009. [\[note: 34\]](#) According to Falmac, Choo and Kuan were denied access and could not gain entry to the Tianjin factories to retrieve the accounting and financial records of the Tianjin subsidiaries. Consequently, the accounts of the Tianjin subsidiaries for the financial year ended 31 December 2009 were not audited, thereby hampering Falmac’s preparation of its own consolidated financial statements for the same financial year. It was also Falmac’s case that the loss of effective control of the Tianjin subsidiaries caused the company to write off the entire value of the Tianjin subsidiaries in Falmac’s 2009 financial statements.

51 It is pertinent to note that on 1 December 2009, Falmac passed two shareholder’s resolutions removing Leon Zhao as the legal representative of the Tianjin subsidiaries in favour of one Pua Yeow

Seng [\[note: 35\]](#) who is the brother of Pua Yeow Chuan ("PYC"), a witness for Falmac at the trial. PYC is the owner of Unitex Global Limited ("Unitex") with whom Falmac signed a sale and purchase agreement for the disposal of Falmac's shareholding in the Tianjin subsidiaries on 11 July 2011 (see [127] below).

52 On 29 October 2010, Falmac commenced legal proceedings in China against D2 and Leon Zhao, seeking to invalidate the change of legal representative of the Tianjin subsidiaries. [\[note: 36\]](#) On 5 November 2010, the Tianjin subsidiaries filed civil indictments against Leon Zhao for the return of the company seals, business licences and other documents. [\[note: 37\]](#) However, all the legal proceedings in China were withdrawn on 3 December 2010. [\[note: 38\]](#)

53 The first tranche of the trial, which took place in July 2011, was thus advanced on the basis that Leon Zhao was D2's nominee and that D2 was unlawfully controlling the Tianjin subsidiaries to the exclusion of Falmac.

### ***The second tranche of the trial***

54 Before the second tranche of the trial, Falmac amended its case again, alleging that D2 had breached his fiduciary duties by reason of the transfer of Falmac's shares in the Tianjin subsidiaries to Sino Vision without the approval of the shareholders of Falmac (*ie*, the s 160 complaint). Furthermore, Falmac pleaded that D2 was in breach of his fiduciary duty for failing to disclose the transfer to the shareholders of Falmac ("the non-disclosure argument"). [\[note: 39\]](#)

55 This non-disclosure argument is a non-starter. On Falmac's own case, the organ of the company to which disclosure of the transfer should have been made was the shareholders. It is settled law that a director owes fiduciary duties to his company, not to the shareholders (see *Walter Woon on Company Law* (Tan Cheng Han SC gen ed) (Sweet & Maxwell, 2009) at para 8.127 ("*Walter Woon*").).

56 Returning to the narrative, D2 explained that on 9 July 2009, the former board had passed a resolution to transfer the entire equity in the Tianjin subsidiaries to Sino Vision by way of converting debts for shares in the Tianjin subsidiaries. [\[note: 40\]](#) It is significant that Falmac is not challenging this resolution. Its case is simply that shareholders' approval must be sought, and no such approval was obtained.

57 According to D2, Leon Zhao was a director of Tianjin Kanbo and he was its representative in the negotiations with D2 in July 2009. [\[note: 41\]](#) Subsequently, Tianjin Kanbo used Sino Vision as the contracting party because of the debts the latter entity had acquired from the creditors of the Tianjin subsidiaries. Pursuant to the resolution of 9 July 2009, Falmac entered into two separate Equity Transfer Agreements ("the Equity Agreements") on 30 July 2009 with Sino Vision to transfer Falmac's shares in the Tianjin subsidiaries to Sino Vision. The Equity Agreements were signed on behalf of Falmac by Wei Ying, one of the independent directors on the former board (presumably before her resignation). D2 accepted that the Equity Agreements were subject to formal approval of shareholders, and that insofar as shareholders' approval was concerned, it was not for him to follow up on the formalities in the Equity Agreements as he was no longer with Falmac as of 5 October 2009.

58 As proof of the completion of the share transfer in the absence of shareholders' approval, Falmac produced documents ostensibly from the Commercial and Industrial Bureau of Tianjin, the authenticity of which was disputed by D2.

## **The parties' claims**

59 Falmac alleged numerous breaches of fiduciary duty on the part of D2, and they are grouped under the following categories:

- (1) Failure to comply with various provisions of the Companies Act and the Listing Rules relating to the convening of an AGM and the preparation of financial statements;
- (2) Failure to comply with the provisions of the Companies Act and the Listing Rules relating to directors of Falmac;
- (3) Non-disclosure to SGX-ST of a Chinese judgment against Falmac Machinery;
- (4) Passing of the resolution on 4 September 2009 to appoint Bih Li & Lee to act for Falmac without the consent or approval of Falmac;
- (5) Disclosure of information to *The Edge* which resulted in the suspension of Falmac's shares;
- (6) Causing Falmac to lose control and ownership over the Tianjin subsidiaries; and
- (7) Transfer of Falmac's shareholding in Tianjin subsidiaries to Sino Vision without shareholders' approval.

60 Conversely, D2 averred that he had at all times complied with his duties as a director to Falmac. In addition, D2 brought a counterclaim for salary arrears and other sums owed under his employment contract with Falmac.

## **Directors' duties: the legal framework**

61 It should be noted at the outset that the Companies Act and the Listing Rules apply here, as this case primarily concerns the relationship between a Singapore-incorporated company listed on the SGX-ST and its former board of directors. This is notwithstanding the fact that certain underlying contracts were governed by Chinese law, or that some of the parties involved were foreign nationals.

62 It is trite law that every director owes certain duties as a fiduciary to his company. As Millet LJ explained in *Bristol and West Building Society v Mothew* [1998] 1 Ch 1 at 18:

The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.

63 In addition to these general duties are the specific duties imposed on directors by statute. Under s 157(1) of the Companies Act, a director has the duty to "act honestly and use reasonable diligence in the discharge of the duties of his office". The duty to act honestly has been interpreted as referring to the common law duty of a director to act *bona fide* in the interests of the company (see *Lim Weng Kee v Public Prosecutor* [2002] 2 SLR(R) 848 ("*Lim Weng Kee*" at [32])).

64 The Court of Appeal in *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] 2 SLR (R) 597 ("*Townsing*") held that s 157 (1) duty to act honestly in discharge

of his duties as a director is equivalent to the common law duty to act *bona fide*, and that the duty of honesty and duty to act *bona fide* may be regarded as a composite obligation. The two duties “impose a *unitary* obligation to act *bona fide* in the interests of the company *in the performance of the functions attaching to the office of director*” (Townsing at [59]).

65 The duty to exercise reasonable diligence also encompasses the duties of care and skill (*Walter Woon* at para 8.13). The relevant standard of care and diligence is objective, *ie*, whether the director has exercised the same degree of care and diligence as a reasonable director found in his position, and may be raised if the director possesses some special knowledge or experience (see *Lim Weng Kee* at [28]).

66 Other specific duties imposed on directors by statute include the requirements to make and retain adequate financial records.

67 Notably, a breach of a director’s statutory duty, which may well give rise to certain consequences under statute, does not *ipso facto* result in a breach of fiduciary duty. Persistent failure to comply with obligations as regards the filing of accounts and returns may amount to unfitness to hold appointment as a director under s 155 of the Companies Act. Such failures, however, need not involve any dishonest intent; nor would such conduct constitute a breach of fiduciary duty. Thus, it is necessary to have in mind that in order for a particular act or omission to constitute a breach of fiduciary duty, it must fall within the various obligations of a fiduciary that reflect the core duty of loyalty recognised at common law, or the duties that fall within the scope of director’s duties as defined under s 157 of the Companies Act.

68 In reviewing the conduct of a director in relation to decisions of a business and commercial nature, the court does not substitute its own judgment for that of the directors. As stated in *ECRC Land Pte Ltd v Ho Wing On Christopher* [2004] 1 SLR(R) 105 at [49]:

The court should be slow to interfere with commercial decisions taken by directors ... It should not, with the advantage of hindsight, substitute its own decisions in place of those made by directors in the honest and reasonable belief that they were for the best interests of the company, even if those decisions turned out subsequently to be money-losing ones.

69 With the legal framework in mind, I now turn to consider the various allegations against D2.

## **Outline of discussion**

70 It is plain from the way Falmac developed its case that many of the alleged breaches of fiduciary duty that kicked off the litigation on 30 October 2009 were ill-conceived, and the company in its Closing Submissions continued to pursue them even though there was no related monetary loss to the company. These alleged breaches are those grouped under the first four categories (items (1) to (4)) in [59] above (hereafter collectively referred to as “the secondary claims”). I propose to deal with these secondary claims later.

71 This judgment will first discuss the main areas of dispute based on the development of the case each time the pleadings were amended by Falmac. The main areas of dispute are:

- (1) The suspension of trading in August 2009; and
- (2) Loss of the Tianjin subsidiaries by reason of:

- (i) The unauthorised legal representative argument; and
- (ii) The s 160 complaint.

## **Suspension of trading in August 2009**

7 2 *The Edge* published an article on 17 August 2009 containing certain controversial statements apparently made by D2. The relevant portion from the article is set out below: [\[note: 42\]](#)

... Even more worrying, Cheng says that he discovered a lot of accounting irregularities after being hired to run the company in 2004.

"When I came in, there was a lot of false accounting and the company owed money to suppliers and banks," Cheng says. "They reported huge receivables and inventory, but it was all fake. The receivables were more than 90 months old and the inventory was full of obsolete machinery." Cheng adds that he even discovered that some of Falmac's customers didn't exist. "I reported that to the Commercial Affairs Department, but they told me it's a civil matter." According to Cheng, Falmac's employees also filed a complaint with the Ministry of Manpower late last year after the company failed to settle their back wages.

...

73 This article resulted in a trading halt that was followed by a suspension of Falmac's shares three days later. The trading halt was called on Falmac's shares on 17 August 2009; the next day, the SGX-ST asked Falmac to make an announcement to clarify the statements made in the article. D2 responded on 19 August 2009. On 21 August 2009, trading of Falmac's shares was suspended, as there was a limit of three days for a trading halt. After the suspension, D2 responded to the SGX-ST and later sent a draft announcement to the SGX-ST to clarify his comments in the article on 23 August 2009. The draft announcement prepared by D2 was not satisfactory and SGX-ST asked Choo to assist on 28 August 2009. [\[note: 43\]](#) After D2 was removed as director, the new board provided the clarification sought by SGX-ST on 7 January 2010. [\[note: 44\]](#) Wong confirmed that SGX-ST was finally satisfied with Falmac's explanation as there was no further inquiry thereafter. [\[note: 45\]](#)

74 It is noteworthy that when the Writ of Summons was filed on 30 October 2009, Falmac's main grievance with D2, in reality, was the article itself that was published in *The Edge*. What D2 did was perceived by Wong to be a spiteful attempt to sabotage BCS and Choo's reverse takeover. It was seen as D2's way of retaliating against BCS who had requisitioned for an EOGM to remove D2 as a director. [\[note: 46\]](#) The concern then was that the suspension could jeopardise the reverse takeover. As such, Falmac's pleaded case concentrated on the suspension in the following terms: [\[note: 47\]](#)

The suspension had affected the reputation and valuation of [Falmac]. Potential investors are shying away from investing in Falmac. If the suspension is not lifted and it leads to the ultimate de-listing of [Falmac] from the Stock Exchange, the value of [Falmac] will become practically worthless. The Defendants' gross negligence and lack of due care has caused [Falmac] to lose its only and most valuable asset which is its listed status in Singapore.

75 Although the new board's clarification on 7 January 2010 was accepted by SGX-ST, trading of Falmac's shares remained suspended. It is important to note that the suspension continued for different reasons. Simply put, although the article in *The Edge* was the spark that triggered Falmac's trading suspension, it was not the factor that eventually brought about Falmac's de-listing on 22

August 2011.

76 I start with the requirement to submit a resumption proposal to lift the suspension after SGX-ST accepted Falmac's explanation of the matters reported in *The Edge*. Pursuant to Rule 1304(1) of the Listing Rules, Falmac was required to submit a resumption proposal to SGX-ST to resume trading of Falmac's shares within 12 months of the date of suspension, ie, by 21 August 2010. During the period of suspension, however, Wong and Choo still worked towards accomplishing the reverse takeover. As an illustration, Falmac announced on 9 March 2010 the execution of the contract with CNMC to acquire all the shares in CNMC on 8 March 2010 ("the CNMC contract"). Subsequently, on 24 December 2010, Falmac announced the agreement of Falmac and CNMC to extend the Long-Stop Date under the CNMC contract from 31 December 2010 to 31 March 2011 with a further option to extend the Long-Stop Date by another three months to 30 June 2011. [\[note: 48\]](#)

77 Falmac needed time to complete the due diligence exercise for the reverse takeover by CNMC. This included geological survey reports and the audit of CNMC's financial statements. [\[note: 49\]](#) Hence, on 22 December 2009, Falmac applied for time extension until 30 April 2011 to submit the resumption proposal as it could not submit a resumption proposal by the original deadline of 21 August 2010.

78 Contemporaneously, as part of Choo's asset injection plan, the new board announced on 28 December 2009 that it intended to divest Falmac's shareholding in the Tianjin subsidiaries. As mentioned earlier, BCS and Choo were interested in Falmac as a shell in order to inject a new business into Falmac. Falmac thus resolved to divest the loss-making Tianjin subsidiaries and to write off the investment costs of the Tianjin subsidiaries. [\[note: 50\]](#) Such a move was risky in that Falmac might not be able to satisfy SGX-ST that it was a "going concern" pursuant to Rule 1303(3) of the Listing Rules, which was one of the criteria for resuming trading in Falmac's shares, as Falmac had no other business in Singapore. [\[note: 51\]](#) So as not to fall foul of the relevant Listing Rules, it was imperative that Falmac submitted the resumption proposal with a viable business before the deadline of 30 April 2011. Wong himself agreed in cross-examination that Falmac would have been queried and would be de-listed if the Tianjin subsidiaries were disposed of without a viable replacement business. In other words, SGX-ST had to be satisfied with Falmac's resumption proposal involving CNMC.

79 On 28 April 2011, Falmac submitted its resumption proposal in relation to the CNMC contract to acquire 100% of the share capital of CNMC to SGX-ST. [\[note: 52\]](#) Unfortunately, Falmac's resumption proposal was not acceptable to SGX-ST. As a result, SGX-ST duly de-listed Falmac on 22 August 2011.

80 In these circumstances, the delays in getting the suspension lifted were *not* due to D2. There was clearly no causal link between the trading suspension arising from the article in *The Edge* and the factors that led to eventual de-listing on 22 August 2011.

81 It is now convenient to look at Wong's explanation in cross-examination regarding the resumption of trading proposal: [\[note: 53\]](#)

Q: ...Since the 7<sup>th</sup> of January 2010, which is the day your board wrote that letter and clarified with the SGX on their letter of 18<sup>th</sup> of August, what has your board done to get Falmac relisted?

A: Ever since we were appointed to the board, we ...we work towards our primary objective of acquiring Falmac, which is to inject a viable business, er...er...I was talking to others like

coal mining, and you know, not just the gold parts, CNMC, there were other business opportunity which I have, er contacts with. So the..that is the primary objective, so ...

...

82 Wong also explained the difficulty faced in justifying to SGX-ST the viability of the resumption proposal (that was later rejected and resulted in Falmac's de-listing): [\[note: 54\]](#)

Q: So, why is it so difficult to find a viable business then if CNMC has actually struck gold?

A: I beg your pardon?

Q: Your intention is to IPO with CNMC, being that viable business, and this is has been Peter Choo's intention since 2008...

A: Correct.

Q: ... so why is it so difficult? Why is it taking so long?

A: MOG companies, er, have a new set of rules and gold mining, if we were to get listed, will be the first of its kind. Er, SGX has send representative to Australia, several countries, to study so that it... there is a set of rules that is put up for gold mining operation because, er a lot of companies in Hong Kong get listed as a gold mining company because of the price of gold went up from 300 over to now, 1580. Er...public get excited and then they blindly invest, so the job report required by SGX, a lot of details, that's why it's been very difficult for Falmac to ...to, er, justify.

Q: All right, okay. So, then I just confirm with you, one more time, all this has nothing to do with Charlie, yes? The delays.

A: The delays of the injured ...

Q: Getting relisted [*ie*, the suspension lifted]

A: You can say, yes, it has nothing to do with him.

83 For the reasons above, there is no merit in Falmac's contention that D2 was responsible on account of the article in *The Edge* for Falmac's diminished reputation and value as a result of the trading suspension.

## **Loss of the Tianjin subsidiaries**

### ***Observations***

84 The Statement of Claim was amended on 8 September 2010 (*ie*, Statement of Claim (Amendment No 1)) to introduce another cause of action. By this amendment, Falmac claimed that it lost control of the Tianjin factories due to D2's unlawful change of the legal representative of the Tianjin subsidiaries to his nominee, Leon Zhao. It was argued that D2 continued to control the Tianjin subsidiaries as their *de facto* legal representative.



85 The material facts must be borne in mind in assessing the veracity of this plea. Based on the documentary evidence, the new board was aware of Leon Zhao's appointment at least since 1 December 2009 but did not amend the Statement of Claim until 9 months later. On 1 December 2009, Falmac as the 100% shareholder of the two Tianjin subsidiaries passed two resolutions removing Leon Zhao as the legal representative of the Tianjin subsidiaries in favour of Pua Yeow Seng. On 20 March 2010, Falmac announced in the Straits Times that the appointment of Leon Zhao was unauthorised. [\[note: 55\]](#)

86 Falmac raised no objection or protest to D2 that Choo and Kuan had been denied access to the Tianjin factories on 20 October 2009. Apparently, no subsequent attempts were made to visit the Tianjin factories. In fact, Falmac filed the amendments on 8 September 2010 even before Falmac sued D2 and Leon Zhao in China on 29 October 2010 and before the Tianjin subsidiaries sued Leon Zhao for the return of the company seals and business licences on 5 November 2010.

87 Falmac claimed that it lost effective control of the Tianjin subsidiaries by reason of the unauthorised change of the legal representative, and denial of access to the Tianjin subsidiaries including D2's refusal to return the company seals and business licences. Therefore, Falmac's aggregate loss which is based on the net assets of the Tianjin subsidiaries is RMB 47,435,365. 92 (for ease of reference and reading, this figure is rounded down to RMB 47m in this Judgment).

88 There was a further amendment to the Statement of Claim in November 2011 (*ie*, Statement of Claim Amendment No 2)) such that by the second tranche of the trial, Falmac was claiming that D2 had transferred Falmac's shares in the Tianjin subsidiaries to Sino Vision in breach of s 160 of the Companies Act and in breach of his fiduciary duties owed to Falmac (*ie*, the s 160 complaint). Section 160 of the Companies Act read as follows:

Approval of company required for disposal by directors of company's undertaking or property

**160.**—(1) Notwithstanding anything in a company's memorandum or articles, the directors shall not carry into effect any proposal for disposing of the whole or substantially the whole of the company's undertaking or property unless those proposals have been approved by the company in general meeting.

...

(3) A transaction entered into in contravention of subsection (1) shall, in favour of any person dealing with the company for valuable consideration and without actual notice of the contravention, be as valid as if that subsection had been complied with.

...

89 I commented on the state of the pleadings after Falmac's last amendment in November 2011 in [13] above. It must again be remembered that there is no averment of a causal link between the two complaints, namely the unauthorised appointment of Leon Zhao as legal representative of the Tianjin subsidiaries on 1 September 2009 and the s 160 complaint. Notably, it is not Falmac's pleaded case that D2 has an interest in Sino Vision and that he continues to have *de facto* control of the Tianjin subsidiaries through Sino Vision and Leon Zhao.

## ***Analysis***

### *The unauthorised legal representative argument*

(1) Whether D2 was the *de facto* legal representative of the Tianjin subsidiaries after 1 September 2009

90 Falmac contended that the change of legal representative was unlawful, and that it was D2's way of controlling the Tianjin subsidiaries even after his departure from Falmac. Falmac's pleaded case is that the change of legal representative was effected without the approval and knowledge of the Falmac's board of directors and/or shareholders. It is worth noting that it was only in the Reply and Defence to Counterclaim (Amendment No 2) that Falmac asserted that Leon Zhao was D2's nominee, that D2 appointed Leon Zhao as the legal representative in order to gain control of the Tianjin subsidiaries, and that D2 was the *de facto* legal representative of the Tianjin subsidiaries. [\[note: 56\]](#)

91 Mr Quek in his Closing Submissions referred to the respective Articles of Association of the Tianjin subsidiaries, which prescribed that approval of a change of legal representative must be given by the shareholders. In this case, it was Falmac who had to give the approval but contrary to D2's assertion, there was no board resolution from Falmac to this effect. Mr Quek relied on the evidence of Dorothy Ho, the company secretary, who testified that she had not seen such a board resolution.

92 Mr Quek relied on several matters to prove that D2 remained in control of the Tianjin subsidiaries as *de facto* legal representative after 1 September 2009. They are as follows:

(1) Absence of knowledge on the part of Falmac as to who Leon Zhao was. Moreover, Leon Zhao had never reported to Falmac since his appointment as legal representative.

(2) Falmac was unable to change the legal representative from Leon Zhao to Falmac's authorised representative, Pua Yeow Seng, because it did not have the company seals and business licences. D2 did not return these items to Falmac following his departure from the company.

(3) On the instructions of D2, Choo and Kuan were prevented from gaining access to the Tianjin factories on 20 October 2009. [\[note: 57\]](#)

(4) D2 was seen at a trade exhibition held in Shanghai on 14 June 2011. The Tianjin subsidiaries had a booth at this exhibition, and D2 was introduced to PYC of Unitex as the boss of the Tianjin subsidiaries.

93 First of all, the plea that Leon Zhao was D2's nominee whom he used in order to gain control of the Tianjin subsidiaries to Falmac's detriment is essentially a charge of dishonesty. As stated by the Court of Appeal in *Townsing* at [60], a director's duty of honesty (or the duty to act in good faith) is a facet of a fiduciary's core duty of loyalty. In its Closing Submissions, Falmac maintains that D2 changed the legal representative to Leon Zhao "in order to keep [the Tianjin subsidiaries] out of the reach of [Falmac] whilst he still remains in control of the said subsidiaries through Leon Zhao." [\[note: 58\]](#)

94 In the context of pleadings involving fraud and dishonesty, the following observations of Millet LJ in *Paragon Finance Plc v BB Thakerar* [1999] 1 All ER 400 (at 407) are apposite here:

It is well established that fraud must be distinctly alleged and as distinctly proved, and that if the facts pleaded are consistent with innocence it is not open to the court to find fraud. An allegation that the defendant 'knew or ought to have known' is not a clear and unequivocal allegation of actual knowledge and will not support a finding of fraud even if the court is satisfied

that there was actual knowledge. An allegation that the defendant had actual knowledge of the existence of a fraud perpetrated by others and failed to disclose the fact to the victim is consistent with an inadvertent failure to make disclose and is not a charge of fraud. It will not support a finding of fraud even if the court is satisfied that the failure to disclose was deliberate and dishonest. Where it is expressly alleged that such failure was negligent and in breach of a contractual obligation of disclosure but not that it was deliberate and dishonest, there is no room for treating it as an allegation of fraud.

95 The plea that Leon Zhao was D2's nominee was premised on the assertion that Leon Zhao was a stranger to the new board. Such a plea is not enough to satisfy the rules of pleadings elucidated above. There must be something about the appointment of Leon Zhao, some conduct which is dishonest before a breach of fiduciary duty of good faith can be established.

96 It is pertinent to note that dishonesty as director was not put to D2 in cross-examination nor specifically alleged against D2 in pleadings. Like fraud, dishonesty must be distinctly alleged and proved, and it is not permissible for a charge of dishonesty to be inferred from the pleaded facts alleged against D2 (*ie*, to be inferred from the pleaded facts such as Leon Zhao was a stranger, that D2 acted without Falmac's consent or knowledge and that the change of legal representative was done surreptitiously).

97 In addition, there is the principle that the more serious the allegation, the more cogent the evidence required must be to prove dishonesty, even on the balance of probabilities. In assessing the evidence, I bore in mind this principle.

98 Wong's evidence is that Leon Zhao never contacted Falmac. Zhang Shuren ("Zhang"), the former General Manager of Falmac Machinery, said that whilst he was still employed by Falmac Machinery, he never saw Leon Zhao. On the other hand, D2 denies any involvement or interest whatsoever in the Tianjin subsidiaries. [\[note: 59\]](#) D2's evidence is that Leon Zhao was Fei's choice as legal representative. According to D2, Leon Zhao was a director of Tianjin Kanbo. D2 was not particularly challenged on this aspect of his testimony. Moreover, I was not persuaded that Choo, who had previously spoken to Fei, had actually checked this important matter with Fei. Choo claimed to have asked Fei who Leon Zhao was but could not remember Fei's answer because it was not clear. If as Choo reasoned that the identity of Leon Zhao was an obvious point to raise with Fei, and that upon checking Fei did not give him a clear answer, the natural thing to do was to press for a comprehensible answer. [\[note: 60\]](#) This was not done.

99 In my view, Falmac has not established on the evidence that the appointment of Leon Zhao as the legal representative of the Tianjin subsidiaries was unlawful. As of 1 September 2009, only D2 and Fei were the remaining board members of Falmac; both had approved Leon Zhao's appointment. [\[note: 61\]](#) I have earlier mentioned D2's evidence that it was Fei who had chosen Leon Zhao as the legal representative (see [98] above). During cross-examination, Wong conceded that the change of legal representative from D2 to Leon Zhao was approved by Falmac's former board of directors. [\[note: 62\]](#)

100 Having regard to the fact that the change of legal representative took place during the incumbency of the former board, it is not surprising that Falmac's pleaded case is that D2 was in breach of fiduciary duty for not informing the shareholders of the change of legal representative (see [7] above). This plea is a non-starter seeing that directors of a company generally do not owe any fiduciary duties to the shareholders (see *Walter Woon* at para 8.127).

101 I noticed that with the exception of D2, the board members of the Tianjin subsidiaries were

apparently different from the former board. Although the minutes of the former board's resolution had not been discovered, the minutes of the resolutions passed by the board members of the Tianjin subsidiaries together with Falmac's letters of appointment (signed by D2) approving the appointment of Leon Zhao were disclosed. [\[note: 63\]](#) Notably, Falmac accepted the authenticity of the minutes of the board resolutions of the Tianjin subsidiaries that approved Leon Zhao's appointment as legal representative of the Tianjin subsidiaries as well as the authenticity of Falmac's letters of appointment approving the appointment of Leon Zhao. All these documents were put together in an Agreed Bundle of documents whereby authenticity of the documents was accepted by consent but not the contents thereof. See generally *Goh Ya Tian v Tan Song Gou and others* [1981]-[1982] SLR(R) 193 on meaning and effect of agreed bundles of documents at trial. The appointment of Leon Zhao was approved by the Commerce Commission of Ninghe. [\[note: 64\]](#) Again, Falmac accepted the authenticity of the Commerce Commission's certificate in the Agreed Bundle. [\[note: 65\]](#)

102 Falmac's case is that the change of legal representative was to pre-empt the removal of D2 as a director of Falmac. Mr Quek pointed to the timing of the change of legal representative which took place immediately after BCS requisitioned for the EOGM on 5 October 2009 to remove D2 and Fei as directors of Falmac. It is unclear how this contention assists Falmac. If D2 had wanted to retain control of the Tianjin subsidiaries, there was really no need for D2 to relinquish his position as legal representative to Leon Zhao. The loss of directorship in the holding company, Falmac, would not have any practical effect on his status as legal representative seeing that: (a) the board members of the Tianjin subsidiaries were different from the former board save for D2, (b) D2 was a board member of the Tianjin subsidiaries, and (c) on Falmac's own case, D2 retained the company seals and business licences of the Tianjin subsidiaries.

103 There is evidence that D2 advised Falmac's external auditors in Singapore that he had stepped down as Chairman of the Tianjin subsidiaries and held no other appointment. In an e-mail dated 19 October 2009 to Celine Lim, the manager of Falmac's external auditors (who had earlier written to D2 for information on 15 October 2009), D2 wrote: [\[note: 66\]](#)

I refer to your email on 15 October 2009.

Please note that I have resigned in September this year, as the Chairman of the Board of Directors of both Falmac Textile (Tianjin) Co Ltd and Falmac Machinery (Tianjin) Limited. I no longer have any appointment in the two companies. My appointment as Chief Executive Officer and director of Falmac Limited has also ceased.

104 Falmac was aware of Leon Zhao's appointment before 1 December 2009. But Falmac only announced that D2 had changed the legal representative without the approval of Falmac on 9 March 2010. It also made the same announcement in the Straits Times on 20 March 2010. Wong admitted that the new board never wrote to D2 objecting to Leon Zhao's appointment. [\[note: 67\]](#)

105 Mr Singh, acting for D2, drew the court's attention to Falmac's misleading evidence. The impression Falmac wanted to give the court was that it had tried to get back the Tianjin subsidiaries but was unsuccessful. This impression was untrue. First, the civil indictments in China were not even served against D2 and Leon Zhao. The inability to serve the civil indictment on D2 to invalidate Leon Zhao's appointment had nothing to do with D2 evading service, as Falmac led the court to believe. D2 had given to the company secretary his residential address in Shanghai which was the same address Wong used to communicate with D2 on 29 October 2009 to advise him of his removal as legal representative of the Tianjin subsidiaries. However, Falmac did not give D2's residential address in Shanghai to its lawyers in China from Tianjin Yidao Law Firm. This was confirmed by the witness, Liu

Yan, a lawyer from Tianjin Yidao Law Firm. [\[note: 68\]](#) Second, while the civil indictment against Leon Zhao was for the return of the common seals, [\[note: 69\]](#) no such claim was made against D2. Third, no police report was made in China that the Tianjin factories were wrongfully taken by Leon Zhao or D2 as Wong admitted in cross-examination. [\[note: 70\]](#)

Q: And you did this not by filing a claim in for theft but to invalidate an appointment. Is it right?

A: Er, theft comes later because we have to have control of the factory.... We cannot accuse somebody of theft even before we make entry to the factory. You agree with me?

Q: No, Mr Wong. I'm suggesting to you on the basis if there're no police reports whatsoever and these are important documents to show somebody has hijacked your factory because they're serious charges to make against Charlie that he has hijacked two big factories worth, as you say, [\$]9.5 million, I'm not suggesting to you on the basis there're no...police reports, right, that you are making it up.

A: It's not true...

106 In my view, Falmac's overall evidence lacked probative value such that Falmac had not discharged its legal and evidential burden of proving that Leon Zhao was D2's nominee, that the use of a nominee was to disguise D2's *de facto* control of the Tianjin subsidiaries, or that D2 had deliberately misled the Commerce Commission of Ninghe to believe that D2 had resigned as legal representative when he knew or must have known that this was false.

(2) Denial of access to the Tianjin factories and loss of effective control of the same

107 Falmac's case was essentially that D2 had prevented Choo and Kuan from gaining access to the Tianjin factories (see [6] above). [\[note: 71\]](#) Falmac's version of events was as follows. On 20 October 2009, Choo and Kuan made a trip to China to visit the Tianjin factories and to obtain the financial records of the Tianjin subsidiaries in order to prepare Falmac's consolidated financial statements. [\[note: 72\]](#) Choo and Kuan first visited the Falmac Textile factory but were denied access by the security guard at the entrance. [\[note: 73\]](#) Having no choice but to leave, Choo and Kuan then proceeded to visit the nearby Falmac Machinery factory, whereupon they were attended by the factory's then General Manager, Zhang, who allowed Choo and Kuan into the factory but he later instructed them to leave after receiving a telephone call from D2 who directed Zhang to ask them to leave immediately. [\[note: 74\]](#)

108 D2 rejected Falmac's version of events. D2 contended that he did not prevent or exclude Falmac's Choo or Kuan from the Tianjin factories. D2 also challenged the sufficiency and reliability of the evidence of Falmac's witnesses, in particular Zhang's evidence.

109 Dealing first with the Falmac Textile factory, I was of the view that Falmac had not made out its claim. On the evidence of Falmac's own witnesses, there was nothing to link the events of 20 October 2009 at the Falmac Textile factory to D2. Rather, the evidence suggested that at the time of the visit, the factory had been locked up by a creditor bank after Falmac Textile defaulted on a loan. I refer to the minutes of the meeting held by Falmac's new board of directors on 14 December 2009 wherein Choo informed the new board as follows: [\[note: 75\]](#)

The Chairman [*ie*, Choo] then proposed to the Board to rationalise the textile businesses which

would include the disposal of the continuous loss-making business activities in the subsidiaries in China. He informed that both the PRC subsidiaries have also defaulted on their loans with their existing financiers, namely Avenue Asia Mauritius Ltd (in the case of Tianjin Falmac Machinery Company Limited); and the Agricultural bank of Tianjin Falmac Textile Company Limited. ...

110 To clarify, Avenue Asia Mauritius Ltd had obtained judgment against Falmac Machinery in June 2009, and D2 had informed the company secretary of this judgment on 21 and 26 July 2009. [\[note: 76\]](#)

111 A SGX announcement on 11 July 2011 by the new board on the proposed divestment of the Tianjin subsidiaries contained the following statement: [\[note: 77\]](#)

To the best of the Board's knowledge, the Tianjin Subsidiaries had incurred significant amount of debts. Avenue Asia Mauritius Limited has obtained a judgment on Falmac Machinery (Tianjin) Ltd with respect to an outstanding debt of approximately RMB12.1 million as at 31 December 2008 and had begun to sell some of the assets of Falmac Machinery (Tianjin) Ltd including, *inter alia*, the two staff apartments in Tianjin. ***Falmac Textile (Tianjin) Co. Ltd owed approximately RMB19.2 million to Agricultural Bank of China as at 31 December 2008 resulting in its factory being locked up by Agricultural Bank of China ;***

[emphasis added in bold italics]

112 While the evidence was unclear as to the exact date of the foreclosure, this must have been soon after 31 December 2008. [\[note: 78\]](#) As such, it was likely that Falmac's alleged loss of control of the Falmac Textile factory was due to the Agricultural Bank of China's seizure of the property, rather than D2's actions.

113 As for the Falmac Machinery factory, there was conflicting evidence on whether Choo and Kuan were denied access to the Falmac Machinery factory on D2's instructions. Zhang gave evidence that D2 had telephoned him soon after Choo and Kuan had entered the factory, instructing him to ask them to leave immediately. [\[note: 79\]](#) According to Zhang, because of this, he was fired by D2 the next day because he allowed Choo and Kuan to enter the factory. [\[note: 80\]](#) On the other hand, D2 flatly denied these allegations at trial. [\[note: 81\]](#) D2 explained that Zhang was dismissed on the ground of conflict of interest involving his wife's business.

114 D2 argued that Zhang was not an independent witness because he was being paid by Falmac to give evidence. [\[note: 82\]](#) After Zhang ceased to work for Tianjin Machinery, Falmac employed Zhang as a "representative for China" from late October 2009 to August 2011. [\[note: 83\]](#) Apparently, Zhang's job was to assist with Falmac's lawsuits in China. [\[note: 84\]](#) However, in cross-examination, Choo and Zhang seemed to agree with counsel for D2 that Zhang was also engaged to give evidence in the present proceedings in Singapore. Choo's explanation in cross-examination was as follows [\[note: 85\]](#):

A: He [Zhang] is just there to help us with our---our lawsuit, er, the legal writ, er, er, working with our lawyer.

Q: Lawsuit in Singapore or in China?

A: In China.

Q: And in Singapore as well because he's coming to give evidence?

A: Yah. We---we thought that, er, maybe he will give a better, you know, er, affidavit---I mean witness here.

115 Zhang's evidence in cross-examination was similar [\[note: 86\]](#):

Q: So my question is during all this period and even today, you [Zhang] were engaged primarily to give evidence in this Court against Charlie, right?

A: Yes, I'm here to testify.

Q: So I suggest to you that your evidence here today is unreliable and it's not to be believed because you have been paid to lie?

A: I disagree.

While I would not go so far as to conclude that Zhang's evidence was entirely fabricated, it was nevertheless unsafe to rely solely on his evidence that it was D2 who had denied Choo and Kuan access to the Falmac Machinery factory. The need to exercise caution stems from my observation that despite the incident, Falmac did not protest at any time after the visit. The incident was not given any prominence and significance until Falmac amended its pleadings on 8 September 2010. Furthermore, now that the reverse takeover had failed, the tendency to point the finger of blame at others is conceivable. In any case, the incident at the Falmac Machinery factory is now a secondary issue as the crux of Falmac's case on the Tianjin subsidiaries seems to be the s 160 complaint – that D2 had caused Falmac's shareholding in the Tianjin subsidiaries to be transferred to a third party without the approval of shareholders.

116 Before I move on to deal with the s 160 complaint, there is the matter of PYC's evidence. PYC was Falmac's witness. He was called to testify that D2 was still in control of the Tianjin subsidiaries as late as 14 June 2011 (see [92 (4)] above). PYC was at a Shanghai trade exhibition on 14 June 2011 and he met D2 there. He testified that the Tianjin subsidiaries were participants and had set up a booth at the trade exhibition. PYC was introduced to D2 by one Wu Qin Piao who referred to D2 as the "boss" of the Tianjin subsidiaries. Falmac also relied on D2's name that was handwritten on the back of the business card of the General Manager of the Tianjin subsidiaries. PYC got the card from his customer who enquired of the General Manager as to the owner of the Tianjin subsidiaries and he wrote down D2's name on the back of his name card. D2 has refuted PYC's evidence in his second Affidavit of Evidence-in-Chief. First, he denies "any involvement or interest whatsoever, whether as shareholder or director or legal representative or employee, in Falmac Machinery (Tianjin) Ltd and/or Falmac Textile (Tianjin) Co Ltd." [\[note: 87\]](#) Second, he denies meeting or talking to PYC. [\[note: 88\]](#) He said that he was at the exhibition to meet his former colleagues who had earlier told him that they would be in Shanghai for the exhibition. In my view, PYC's evidence is hearsay and has no evidential value. Even if PYC's evidence is admissible, it is not relevant since it is not Falmac's pleaded case that D2 has an interest in Sino Vision and controlled the Tianjin subsidiaries through Leon Zhao and Sino Vision.

117 There is another related plea in the form of a general assertion in paragraph 4(8) of the Statement of Claim (Amendment No 2) that D2 was under a duty to manage and deal with Falmac's property in a trustee-like manner. It was stated that the loss of effective control of the Tianjin factories was due to D2's breach of trust by reason of the unlawful appointment of Leon Zhao as legal representative. I make two points. First, this plea is premised on the appointment of Leon Zhao being unlawful. I have already explained that Falmac has not established this assertion (see [99] above).



Second, the general assertion in paragraph 4(8) of the Statement of Claim (Amendment No 2) is simply unhelpful. A legal representative supposedly holds the company seals of the subsidiary, which owns the property (the Tianjin factories in this case). A holding company like Falmac is not the owner of the subsidiary's assets. That being the law, no duty of trusteeship is applicable here (see *Townsing* at [57]).

#### *The s 160 complaint*

118 Under s 160 of the Companies Act, the directors of a company are prohibited from carrying into effect any proposals for disposing of the whole or substantially the whole of the company's undertaking or property unless those proposals have been approved by the company in general meeting. The issue here was whether the former board (D2 included) acted in breach of this provision in passing the board resolution to transfer the equity in the Tianjin subsidiaries to Sino Vision and signing the Equity Agreements without any shareholders' approval. In the present action, Falmac is not disavowing the equity transfer to Sino Vision.

119 In the first place, it is worth noting that far from D2 acting purely of his own volition, the divestment of the Tianjin subsidiaries appears to have originated from Wong and Choo in relation to plans for the reverse takeover. In March 2009, before the new board had assumed its responsibilities, Wong, Choo and D2 were working towards the disposal of the Tianjin subsidiaries for a nominal sum of S\$1 (see [40] above). I also refer to the various e-mails in [31] to [35] above. This activity was consistent with the reverse takeover plan whereby Falmac was to be restructured into a shell company. [\[note: 89\]](#)

120 One of the main points of contention regarding this issue was the admissibility and authenticity of documents known as "Basic Information of Foreign Investment Enterprise" ("the Basic Information documents") lodged with the Commercial & Industrial Bureau of Tianjin, China ("the Tianjin Commercial Bureau"). Falmac introduced these documents to show that Sino Vision had become the registered shareholder of the Tianjin subsidiaries. The Basic Information documents, being copies of the originals, constituted secondary evidence and thus would only be admissible in evidence if falling within one of the exceptions in s 67(1) of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA"). Mr Quek submitted that the exception for public documents in s 67(1)(e) of the EA applied. The Basic Information documents were thus admissible under s 67(4) of the EA because they had been certified as true copies, as evidenced by the red seal of the Tianjin Commercial Bureau on the documents. On the other hand, Mr Singh submitted that the Basic Information documents were not certified copies within the meaning of s 78 of the EA, as there was neither a certification at the foot of the documents that they were true copies of the originals nor a date on the seal.

121 I agreed with Mr Singh that the Basic Information documents could not be produced as proof of the truth of the contents. Under s 64 read with s 66 of the EA, the general rule is that documents must be proved by primary evidence, *ie*, the document itself must be produced for the inspection of the court. The Basic Information documents did not constitute primary evidence and thus had to fall within the exceptions in s 67 of the EA, the "public document" exception in s 67(1)(e) being the most relevant exception. The Basic Information documents were public documents within the meaning of s 76 of the EA as they were records of public officers in a foreign country. Moreover, it appeared that they were documents intended for public reference (see *Lim Weipin and another v Lim Boh Chuan and others* [2010] 3 SLR 423 at [44]). However, as for the means of proof of such documents, the applicable provision is s 80(g) of the EA, rather than s 78. Section 80(g) of the EA provides that public documents in a foreign country may be proved in the following manner:

... by the original or by a copy certified by the legal keeper thereof, with a certificate under the



seal of a notary public or of a consular officer of Singapore that the copy is duly certified by the officer having the legal custody of the original and upon proof of the character of the document according to the law of the foreign country.

122 In this case, the Basic Information documents did not contain such a certification under the seal of a notary public or consular officer of Singapore and were thus not proved.

123 Be that as it may, Falmac's Chinese lawyer from Tianjin Yidao Law Firm, Mr Xu Bo ("Mr Xu"), testified that he had attended at the Tianjin Commercial Bureau to inspect the original documents lodged there. Mr Xu is permitted to give an eye-witness account of what he saw (see s 65 (e) of the EA), but not secondary evidence as to the truth of the contents of the documents he inspected. For example, he is able to testify that he saw the name Sino Vision, that he saw the shares registered in the name of Sino Vision and that he saw the date 18 August 2011. (I accept the evidence that Sino Vision is the translation in English of the name of the company in Chinese.) However, he was not in a position to testify as to the truth of what he had seen.

124 Returning to the substantive complaint, I find that Falmac has not proven that D2 was in breach of s 160 of the Companies Act or in breach of fiduciary duty. I accept D2's evidence that the Equity Agreements between Falmac and Sino Vision were conditional contracts. There were two separate Equity Agreements: one for each Tianjin subsidiary, although they were otherwise identical. Article 7 in both Equity Agreements provided as follows:

#### **Article 7 Effecting Transfer of Equity**

1. Both parties shall, within 12 months after this Agreement is signed and comes into effect, start and complete the formalities to effect the transfer of the equity.
2. [Falmac] shall be responsible for completing the formalities to effect the transfer of equity, including but not limited to preparing a board of directors' resolution of the [Tianjin subsidiaries] consenting to the transfer and other necessary documents, recording the name of [Sino Vision] and its shareholding in the shareholders' register of the Target Company and completing the commercial and industrial registration of changes, etc. [Sino Vision] shall be responsible for submitting the relevant information necessary for completing the formalities to effect the transfer and performing its other obligations to render assistance and cooperation.
3. [Sino Vision] shall enjoy various legal rights and assume the obligations of a shareholder upon completion of the formalities to effect the transfer of equity according to this agreement.

125 The effect of Article 7, in particular sub-clauses (1) and (2), was that the Equity Agreements were conditional on the approval of Falmac's shareholders, amongst other things. The terms of the Equity Agreements indicate the parties' understanding that the Equity Agreements were a provisional arrangement, pending the actual validation of the transfer by the relevant authorities and corporate organs of the parties involved. Article 7(1) provides a time frame of 12 months for the completion of "formalities to effect the transfer of the equity". Article 7(2) gives some examples of such necessary formalities, *including but not limited to* a board resolution consenting to the transfer and completing the registration of changes in Falmac's shareholding, etc. Logically speaking, such formalities would also include shareholder approval of the equity transfer as required by law, and this was confirmed by D2 in the witness stand. In other words, the Equity Agreements were expressed to take effect after formal approvals (including shareholders' approval) have been obtained. This position was confirmed by D2's testimony during the trial. [\[note: 90\]](#) This being the case, the Equity Agreements being conditional contracts did not evidence an effective disposal of the Tianjin subsidiaries by D2.

126 I now come to Mr Xu's eye-witness testimony. He saw the date 18 August 2011 and the name of Sino Vision in Chinese. Assuming for the sake of argument that this date, 18 August 2011, was the registration of the shares, this would have been more than two years after the Equity Agreements were signed on 30 July 2009. It was envisaged in the Equity Agreements that the formalities would be attended to and completed within one year failing which the Equity Agreements would come to an end. Mr Singh surmised that since the date 18 August 2011 exceeds the stipulated period of one year, the only explanation is that the Equity Agreements were extended with the involvement of the new board.

127 I noted that the new board passed a resolution to divest the Tianjin subsidiaries on 14 December 2009 and the divestment was subject to shareholders' approval. [\[note: 91\]](#) Despite claiming to have lost effective control of the Tianjin subsidiaries with the appointment of Leon Zhao, and the subsequent exclusion of Choo and Kuan from entering to the Tianjin factories, Falmac still treated the Tianjin subsidiaries as company assets. It went ahead with the divestment of the loss-making Tianjin subsidiaries, which was an integral part of the reverse takeover plan. Falmac signed a memorandum of understanding with Unitex on 21 May 2010 and a sale and purchase agreement with Unitex on 11 July 2011 ("the Unitex SPA"). Under the Unitex SPA, the aggregate sale consideration for 100% equity interest in the Tianjin subsidiaries was S\$2. [\[note: 92\]](#) The Unitex SPA was conditional upon: (a) shareholders' approval; (b) successful acquisition of the entire issued share capital of CNMC; and (c) resumption of trading of Falmac's shares on Catalist. Under the Unitex SPA, the effective date of the transfer of the entire equity interest in the Tianjin subsidiaries from Falmac to Unitex was 11 July 2011 even though the actual transfer had not taken place. As Falmac did not have any business other than the Tianjin subsidiaries, it became a shell company which would be de-listed if it remained without any viable business. [\[note: 93\]](#)

128 After executing the Unitex SPA, the reverse takeover was eventually derailed. As it turned out, there were delays in resumption of trading. Falmac was de-listed on 22 August 2011 for the reason that Falmac had difficulties persuading SGX-ST to accept its resumption proposal submitted on 28 April 2011. [\[note: 94\]](#)

129 Despite admitting under oath on 18 July 2011 that the de-listing had to do with Falmac's resumption proposal that involved CNMC, Wong (as Falmac's Managing Director) disingenuously announced in the company's Notification of Delisting Date sometime after the 22 August 2011 that the company had become a shell company with no business due to the inability of the company to access the Tianjin factories as a result of the change of legal representative by D2.

130 Furthermore, there was no issue of non-disclosure of the Equity Agreements to the new board in this case. The Equity Agreements were approved by the former board in July 2009. The new board took over on 5 October 2009. By the time the new board was appointed on 5 October 2009, D2 had himself been removed on the same date.

131 Notably, it is not Falmac's case that the resolution passed by the former board in July 2009 was fraudulent or otherwise invalid. Neither is it Falmac's case that there was a causal link between the unauthorised appointment of the legal representative argument and the s 160 complaint.

132 Anyhow, for the sake of argument, even if the appointment of Leon Zhao was misguided or negligent, this would not expose D2 to a charge of breach of fiduciary duty. As stated above, the various obligations of a fiduciary merely reflect different aspects of the core duty of loyalty. A breach of fiduciary obligation connotes disloyalty and beyond mere neglect. In any case, the court usually does not inquire into the merits of a management decision honestly arrived at (see [68] above). In

this case, there were ostensibly management reasons for the former board to approve the Equity Agreements to avoid litigation, and seeing that Sino Vision would then take over and be responsible for the liabilities of the Tianjin subsidiaries. [\[note: 95\]](#)

### ***Conclusion on the unauthorised legal representative argument and the s 160 complaint***

133 Having regard to the matters discussed above, the overall conclusion reached in this Judgment is that Falmac has not proven its case against D2 under these two heads of complaints – the unauthorised legal representative argument and the s 160 complaint.

### **The secondary claims against D2**

134 I now come to other breaches of fiduciary duty alleged in respect of D2. I have referred to these complaints as secondary claims (see [70] above). I have also explained in [16] that the declaratory relief that Falmac is seeking is superfluous. Although the action continued against D2, the secondary claims were alleged against *all* the directors. In my view, it is not enough to look at what happened in the company and to simply say that as all the directors are to be blamed D2 must therefore be in breach of directors' duties.

### ***Non-compliance with rules on AGM and financial statements***

135 Falmac alleged various breaches of the rules relating to the convening of an AGM and the presentation of financial statements, namely:

- (1) Failure to convene Falmac's AGM for the year ending 31 December 2008 by the statutory deadline;
- (2) Failure to present the financial statements to Falmac's shareholders as required under s 201(1) of the Companies Act, Rule 707(1) of the Listing Rules and article 152 of the Articles of Association of Falmac;
- (3) Failure to comply with s 201(3A) of the Companies Act in failing to prepare the financial statements of Falmac in accordance with the Accounting Standards;
- (4) Failure to present the financial statements at an AGM accompanied by a director's statement as required by s 201(15) of the Companies Act.

136 The failure to convene the AGM by the statutory deadline did not give rise to a breach of fiduciary duty on the part of D2. Section 175(1) of the Companies Act provides that an AGM of a company must be held once every calendar year and not more than 15 months after the last AGM. Rule 707(1) of the Listing Rules further provides that the AGM must be held within four months of the end of the company's financial year. In this case, the deadline for the AGM for the year ended 31 December 2008 was 30 April 2009. The Accounting & Corporate Regulatory Authority ("ACRA") and SGX-ST granted a two-month extension (*ie*, until 30 June 2009) for the AGM to be held, which was not complied with. Subsequently, SGX-ST (but not ACRA) granted a further extension until 31 July 2009, which was also not met.

137 However, Falmac's AGM was delayed due to events not entirely within D2's control. At the start of 2009, Falmac was in financial difficulty and faced problems in performing its accounting and finance functions following the resignation of Falmac's financial controller and her assistant. [\[note: 96\]](#) Choo and BCS then engaged Bizcorp to take over Falmac's accounts in February 2009. [\[note: 97\]](#)

Thereafter, the further extension was requested due to a breakdown of Falmac's hard disk. [\[note: 98\]](#) According to D2's evidence, the 31 July 2009 deadline was also not met because he was not able to verify the financial statements prepared by Bizcorp without the source documents. [\[note: 99\]](#) It is not disputed that Falmac's accounting records, papers and documents were stored in a property owned by CNMC "to facilitate due diligence for the purpose of RTO [reverse takeover] consideration." [\[note: 100\]](#) To this end, given that the accounting records and other papers were not readily available to D2 without some cooperation from Choo, and under s 199 of the Companies Act, a director is entitled to documents, D2's insistence on verification with the source documents was an approach he was entitled to take and adopt.

138 In any case, the AGM to approve Falmac's 2008 financial statements was eventually held on 14 December 2009 [\[note: 101\]](#), without any monetary loss to Falmac [\[note: 102\]](#) for missing the deadline.

139 In relation to the alleged breaches of duty relating to the financial statements of Falmac, one preliminary point arises. Falmac's pleadings which asserted breaches of ss 201(1), 201(3A) and 201(15) were flawed. Section 201(1) of the Companies Act provides that the directors shall lay before the company at its AGM a profit and loss account for the relevant period. However, s 201(3A) provides that directors of a *holding company* must ensure that consolidated accounts and a balance sheet complying with the requirements of the Accounting Standards are laid out before the company at its AGM, and expressly excludes the need to comply with s 201(1). It is thus impossible to be in breach of both s 201(1) and s 201(3A) at the same time. Since Falmac appears to fall within the definition of a holding company in s 5 of the Companies Act, only s 201(3A) and s 201(15) remain to be considered. Section 201(15) of the Companies Act provides that every balance sheet and profit and loss account laid before a company in general meeting shall be accompanied by a statement signed by two directors.

140 While directors have a statutory duty to ensure that the company's accounts are properly prepared, a breach of the latter does not automatically result in a breach of fiduciary duty (see [67] above). The essential question to be considered is whether D2 acted honestly and with the same degree of care and skill as a reasonable director in his position. With regards to s 201(3A) of the Companies Act, Falmac pleaded that D2 had not given available information on the Falmac's subsidiaries to the auditors for the purpose of preparing the consolidated financial statements. However, Falmac failed to show that D2 in fact held back such information from the auditors, and also did not specify any breach of the Accounting Standards. As for s 201(15), viz, the requirement to present a company's financial statements accompanied by a directors' statement at an AGM, D2 did not act unreasonably or in breach of his fiduciary duties for the same reasons above. There were significant difficulties in preparing Falmac's accounts at the relevant time, such as the departure of financial personnel, the delegation of accounting functions to Bizcorp as well as the breakdown of Falmac's hard disk. I also accepted D2's evidence that he and the former board had refrained from signing the financial statements prepared by the auditors until they had ascertained for themselves the veracity of the financial statements. In any case, it was again not disputed that Falmac did not suffer any monetary loss as a result of the delay in presenting its accounts. [\[note: 103\]](#)

### ***Non-compliance with directorship requirements***

141 Falmac alleged that D2 was in breach of his fiduciary duties by failing to ensure that Falmac complied with the directorship requirements in the Listing Rules. The three independent directors on the former board had resigned on 30 July 2009, leaving D2 and Fei on Falmac's board of directors until the new board took over on 5 October 2009. In particular, Falmac alleged the following breaches of

the Listing Rules on the part of D2:

- (1) Failure to provide reasons for the cessation of David Lu and Wei Ying as directors of Falmac on 30 July 2009.
- (2) Failure to make the necessary announcement despite SGX-ST query on 31 July 2009.
- (3) Failure to appoint independent directors.
- (4) Failure to appoint at least one independent director resident in Singapore.
- (5) Failure to meet the minimum number (not less than three) required for an audit committee.

142 In addition, Falmac also alleged that D2 had breached his fiduciary duty by allowing his employment pass to expire without renewal and had instead updated ACRA with his foreign address, thereby causing Falmac to be in breach of the legal requirement for Falmac to have a resident director.

143 The Listing Rules prescribe certain procedures and requirements to be met regarding directors in a listed company. Under Rule 720 read with Rule 210(5)(c) and Rule 221 of the Listing Rules, the company's board must have at least two independent non-executive directors resident in Singapore. Rule 704(8) of the Listing Rules provides that in the event of any resignation that renders the audit committee unable to meet the minimum requirements of three directors, the company must endeavour to fill the vacancy within two months, but in any case not later than three months. Further, Rule 704(7) read with Appendix 7.4.2 of the Listing Rules provides that any cessation of service of key persons such as directors must be announced together with detailed reasons for the cessation.

144 While it was clear that there was non-compliance with the Listing Rules with regard to the minimum number of resident and independent directors of Falmac, this did not automatically result in a breach of D2's fiduciary duty as a director. This complaint did not take off as Falmac did not (although it was required to) identify the specific fiduciary obligation of which D2 is alleged to have been in breach.

145 As for the requirements for the audit committee and independent directors of Falmac under Rule 704(8) of the Listing Rules, it was clear that in early 2009, Choo was pushing for the independent directors to resign so that he and two others could take over. In Choo's earlier e-mail to D2 dated 20 January 2009, D2 was asked to get the three independent directors to resign (see [31] above). His second e-mail reads: [\[note: 104\]](#)

Dear Charlie,

This email is to inform you that I have (sic) going to send the Attached Forms to the 3 new director to fill up in preparation for the resignation of Falmac's incumbent IDs.

The 3 new directors are myself, KK Teo and Kuan Cheng Tuck.

146 On 23 January 2009, the resignation of the three independent directors was again raised by Choo. He informed D2 that the resignation letter should be undated. [\[note: 105\]](#) There were further communications on the resignation of the independent directors. Apparently the undated resignation letters were submitted to the company secretary but not acted upon. It appears from D2's e-mail to the company secretary that the resignations were being held up until the 2008 accounts were

completed. [\[note: 106\]](#)

147 Eventually, the three independent directors decided to proceed with the resignations on 30 July 2009. [\[note: 107\]](#) D2 could hardly retain them as directors against their will and Falmac was in no financial position to appoint new directors. Regarding the provision of reasons for cessation of service of directors under Rule 704(7) of the Listing Rules, it was the three independent directors themselves who had cited “personal reasons” for their resignations and refused to provide any further details. [\[note: 108\]](#) Further, it was the company secretary who omitted to record “personal reasons” in the announcement made to the SGX-ST. [\[note: 109\]](#)

148 As for two independent directors resident in Singapore pursuant to Rule 720 read with Rule 210(5)(c) and Rule 221 of the Listing Rules, again, Falmac had not identified the fiduciary obligation of which he is alleged to have been in breach. In any case, D2 had made arrangements to renew his employment pass. [\[note: 110\]](#) However, according to D2, the Ministry of Manpower refused to renew D2’s employment pass due to Falmac’s poor track record in paying their CPF contributions for its employees. [\[note: 111\]](#) It was also unclear how a breach of fiduciary duty was made out on the basis that D2 had updated his address to a foreign address. Rather, the true nature of Falmac’s complaint appeared to be that D2 breached his fiduciary duty by failing to appoint another local director before his own status as a resident director lapsed. This complaint was unsustainable because there were plans to sign in the new board as directors since early 2009, which would have fulfilled the requirements for a resident director, although there were setbacks due to disagreements between the former board and the new board.

149 In any case, Falmac did not plead any incidental financial loss or consequences for the above breaches of directorship requirements, which have already been rectified with the appointment of the new board.

### ***Non-disclosure of the judgment against Falmac Machinery to SGX-ST***

150 Falmac’s complaint was that D2 failed to disclose to the SGX-ST the fact that a judgment for RMB12.1m in the Chinese courts had been obtained in June 2009 against Falmac Machinery by a creditor, Avenue Asia Mauritius Ltd. [\[note: 112\]](#) On 21 July 2009, D2 had sent the original judgment to the company secretary’s assistant, Lynette Tan, who then asked D2 for an official translation of the judgment in the English language. [\[note: 113\]](#) D2 replied on 26 July 2009, providing the main points of the judgment translated into English and explaining that Falmac could not afford to obtain an official translation of the judgment. [\[note: 114\]](#) Eventually, D2 wrote to SGX-ST itself in an e-mail dated 15 August 2009 mentioning the court order. [\[note: 115\]](#) At that time, Falmac was already in financial difficulty and could not afford to have the Chinese judgment translated officially. In these circumstances, D2 did what he could to disclose the Chinese judgment. There is no justification for treating D2’s actions as demonstrating non-disclosure or a failure to act with reasonable diligence. In any event, Falmac again did not plead any financial consequences or loss in respect of this non-disclosure.

### ***The Bih Li & Lee resolution***

151 Falmac’s complaint here was that D2, together with Fei, had passed a directors’ resolution appointing Bih Li & Lee to act for Falmac without Falmac’s consent or approval. This resolution was passed on 4 September 2009 for the purposes of applying for an injunction restraining BCS and the



company secretary from convening an EOGM. [\[note: 116\]](#) With respect, this claim was a non-starter. As of 4 September 2009, Falmac's board of directors consisted of only D2 and Fei, both of whom signed the above resolution. Indeed, in cross-examination, Wong accepted that Bih Li & Lee were duly appointed to act with the consent and approval of Falmac. [\[note: 117\]](#)

### **Other matters: Falmac's claim of RMB 47m for the Tianjin subsidiaries**

152 Having regard to the conclusions reached in this judgment, Falmac's claim for damages falls on the wayside. However, for the sake of completeness, I propose to comment on the claim for damages mainly from the perspective of causation.

153 In relation to the question of what remedy is available in respect of a breach of fiduciary duty, in claiming common law damages, Falmac has to prove that the breach of the particular fiduciary obligation caused the loss alleged. In other words, there must be a causal link between the relevant wrong and the relevant loss, if proved. In my view, the casual link is missing in this case.

154 Besides, proof of loss is difficult. According to D2, the debt-for-share transaction involved the discharge of debts owed by the Tianjin subsidiaries and acquired by Sino Vision as well as the discharge of Falmac's indebtedness to the Tianjin subsidiaries. [\[note: 118\]](#) In addition, under the Equity Agreements, Sino Vision assumed responsibility for the remaining debts owed by the Tianjin subsidiaries to other creditors. In other words, the debt-for-share transaction would have provided relief to the balance sheet of the Tianjin subsidiaries and in turn that of Falmac's.

155 With regards to the net asset value of the Tianjin subsidiaries, the aggregate figure of RMB 47m was derived from the audited financial statements of the Tianjin subsidiaries for the year ended 31 December 2008 ("the 2008 Tianjin financial statements"). In the course of answering counsel's question on legal steps taken to regain control of the Tianjin subsidiaries, Wong conceded that the new board could not ascertain whether the aggregate figure of RMB 47m as shown in accounts of the Tianjin subsidiaries was true or false. [\[note: 119\]](#) He also confirmed that Falmac's auditors in Singapore had disclaimed the accuracy of the 2008 Tianjin financial statements. [\[note: 120\]](#)

156 Whilst the 2008 Tianjin financial statements showed that the net asset or net equity of Falmac Textile was as RMB 22,929,287 and that of Falmac Machinery as RMB 24,506,075, [\[note: 121\]](#) Falmac's 2008 consolidated financial statements, which were based on the 2008 Tianjin financial statements, showed the value of the net assets of the Tianjin subsidiaries at only S\$28,000. [\[note: 122\]](#) That is not the end of the discrepancy. D2 pointed out that Falmac's 2008 consolidated financial statements contained a disclaimer regarding the financial statements of the Tianjin subsidiaries [\[note: 123\]](#) and that the Singapore auditors responsible for Falmac's 2008 consolidated financial statements had highlighted to him certain issues that were not considered by the Chinese auditors in the 2008 Tianjin financial statements. [\[note: 124\]](#) In other words, the figures in the 2008 Tianjin financial statements as well as Falmac's consolidated financial statements have not been verified and cannot be safely relied upon as evidence of the value of the Tianjin subsidiaries.

157 Moreover, Wong in cross-examination accepted that the figure of RMB 47m in the 2008 Tianjin financial statements would not have included the judgment debt of RMB 12.1m in favour of Avenue Asia Mauritius Ltd or the RMB 19.2 m owed to the Agriculture Bank of China, and that the value of the assets was practically zero according to Falmac's Singapore auditors. [\[note: 125\]](#) However, Kuan disagreed, maintaining that RMB 47m took into account the Tianjin subsidiaries' indebtedness to two creditors. In short, Falmac's own witnesses provided contradictory evidence on the same matter.

158 The fallback position is that value of the Tianjin subsidiaries must be at least RMB 11m seeing that the Equity Agreements provided for a total consideration of approximately RMB 11m for Falmac's shareholding in the Tianjin subsidiaries. However, it is not clear how RMB 11m would prove the loss in value of the Tianjin subsidiaries when the Equity Agreements were each structured as a debt-for-share transaction and the responsibility for the remaining debts owed to other creditors was assumed by Sino Vision.

### **The Counterclaim**

159 D2's counterclaim is for a total sum of S\$1,839,033.25 for breach of his written employment contract with Falmac, and the particulars of which are as follows:

- (1) Salary as at end December 2008 of S\$942,186.40;
- (2) Salary between 1 January 2009 to 20 July 2009 of S\$183,333.33;
- (3) Loan to Falmac on 24 January 2008 of S\$30,000;
- (4) Approved director's fees for the years 2006 to 2008 of S\$45,000;
- (5) Credit card expenses of S\$56,202.23;
- (6) Reimbursement for amounts paid to the Inland Revenue Authority of Singapore ("IRAS") of S\$24,530.94;
- (7) Further amounts owed to IRAS of S\$57,780.35;
- (8) Severance compensation of S\$500,000; and
- (9) An indemnity for interest and/or legal costs or penalties which may be imposed by IRAS or the credit card companies.

160 D2 was appointed as the Chief Executive Officer of Falmac pursuant to an employment contract dated 15 December 2004 (the "Employment Contract"), which was signed by D2 and by David Lu on behalf of Falmac. The Employment Contract contained the following material clauses:

[\[note: 126\]](#)

...

#### **4. Base Compensation**

As base compensation, you will receive a gross salary of S\$280,000 per annum paid to you equally on a monthly basis. You have the option to elect to have the money paid to you in Singapore (in Singapore dollars) or in People's Republic of China (in RMB) or a combination of both.

...

#### **9. Travel Allowance**

You will be entitled to the same travel allowances (and other benefits) enjoyed by the Singapore-



based Company employees while travelling outside of Singapore.

## 10. Bonus

The Company will pay you a one-time sign-on bonus of US\$25,000.

The Company will pay you an annual Performance Bonus equal to 3% of the Company's net profit. The Performance Bonus is payable within fifteen (15) days after the filing of the Company's year-end financials with the SGX.

## 11. Taxation

The Company will be responsible for your personal income tax liabilities in PRC and/or Singapore. The Company will exercise its best effort to help you minimize your personal income taxes as long as the Company is not disadvantaged by such acts. The Company will pay for all your personal income tax preparation and filing, both foreign and local.

...

## 14. Severance Compensation

14.1... [Y]ou will be entitled to Severance Compensation upon the termination of your employment with the Company calculated according to the following formula:

$$\text{Total Severance Compensation} = \text{S\$150,000} + (\text{Three Months' Base Salary}^*) \times (\text{Number of years of Service with the [plaintiff]})$$

\*Defined as the last drawn monthly Base Salary immediately prior to the time of termination

14.2 You will forfeit the Severance Compensation should the termination of your employment be due to:

(i) voluntary resignation by the [defendant]; or

(ii) dismissal for cause as provided by Clause 15.2; or

...

## 16. Termination of Contract

15.1 Either party may terminate your employment with the Company by giving three (3) months' notice to the other party, or by payment in lieu of notice.

...

161 Falmac's objection is in relation to the Employment Contract, which Falmac contends was not formally approved by the board of directors or the remuneration committee. [\[note: 127\]](#) There was also no board resolution authorising David Lu to sign the Employment Contract. Falmac also asserts that D2's salary was intended to be paid by the Tianjin subsidiaries but it led no evidence in support of this assertion.

162 D2's case is that his Employment Contract was negotiated and approved by the remuneration

committee, as represented by Fei, David Lu, and Lu Jing (another independent director of Falmac at that time), at a meeting in December 2004. [\[note: 128\]](#) As such, the former board had been fully apprised of the terms of his employment, as evidenced by various documents such as Falmac's annual reports and financial statements covering the relevant periods.

### **Board approval of the Employment Contract**

163 Under Falmac's Articles of Association, the board of directors had the power to determine the remuneration of a director in respect of his service as employee, without the need for approval of Falmac's members in general meeting. [\[note: 129\]](#) In addition, the board of directors also had the power to approve travel expenses and other fees for an executive director. [\[note: 130\]](#) However, in the present case, the Employment Contract was signed on behalf of Falmac by an individual independent director, David Lu. There was no documented evidence in the form of board resolution approving D2's Employment Contract or authorising David Lu to sign the Employment Contract.

164 The general principle of company law is that the directors must act collectively through resolutions at proper board meetings, unless specifically authorised to act individually (see *SAL Industrial Leasing Ltd v Hydtrolmech Automation Services Pte Ltd and others* [1997] 3 SLR(R) 676 at [42]; *Agency Law* (Roger Billins) (Longman, 1993) at [B1.28]). However, there is no general requirement that the remuneration of a normal employee must be formally approved by the board of directors (see *Scintronix Corp Ltd (formerly known as TTL Holdings Ltd) v Ho Kang Peng and another* [2013] SGHC 34 at [29]). Where all the directors informally assent to an agreement which is signed by one of the directors on behalf of the company, such assent is as binding as a board resolution and the agreement will be binding on the company (see *SAL Industrial Leasing Ltd v Lin Hwee Guan* [1998] 3 SLR(R) 31 at [27]). In other words, where the board of directors informally acquiesces to an individual director's acceptance of a contract on behalf of the company, this is sufficient to vest authority in that director (see *Kwee Seng Chio Peter v Biogenics Sdn Bhd* [2003] 2 SLR(R) 482 ("Kwee Seng Chio") at [27]-[29]). As such, in order for D2's counterclaim to succeed, it had to be shown that Falmac's board had informally assented to: (1) the terms of D2's Employment Contract; and (2) David Lu's acceptance of the Employment Contract on behalf of Falmac.

165 I am satisfied that the evidence in this case is sufficient to bear out D2's claim based on the Employment Contract. I accept D2's evidence that the terms of his Employment Contract was negotiated and agreed upon by Falmac's then board of directors, and also that David Lu had signed the Employment Contract with the assent of the rest of the directors. This was what D2 said in his cross-examination: [\[note: 131\]](#)

Q: 15th of December 2004, you were appointed as the company CEO?

A: Yes.

Q: Who appointed you?

A: Mr Fei and a few of the other directors then, Mr David Lu and another by the name of Lu Jing. ... [T]here were three directors and a financial controller, the four of them.

Q: These people are not coming to Court to testify on your behalf, are they?

A: I don't know.

Q: Now Mr Cheng, I understand that there is no board resolution to your appointment, do you agree?

A: I disagree.

Q: Meaning you have a board resolution on your appointment as CEO?

A: When I came, there was a board and then they had a meeting. After discussions, the three of them and David checked my employment contract.

166 Despite the absence of any minutes of board meetings or corroborating testimony, D2's version of events was credible in light of the contemporaneous documentary evidence. First of all, Falmac's annual reports from 2005 to 2007 showed D2's remuneration at above S\$250,000 for each respective year, [\[note: 132\]](#) indicating that Falmac's board of directors must have agreed on D2's salary of S\$280,000 as provided for in the Employment Contract. A board resolution on D2's appointment serves as documentary evidence approving such an agreement; in its absence, other forms of documentary evidence, such as the annual reports, may be relied upon. In *Auston International Group Ltd and another v Ng Swee Hua* [2009] 4 SLR(R) 628 ("*Auston International*"), the Court of Appeal held that the respondent was the owner of certain convertible bonds on the basis of the company's annual accounts, even though the company had not issued the physical bond certificates. The reasoning in *Auston International* was as follows (at [26]):

26 Counsel for the appellants has not produced any statutory or case authority to show that because the bond certificates had not been issued, *Auston's acknowledgement in its books that the respondent was the owner of the Convertible Bonds* could not provide a legal basis upon which the respondent could convert them into the Conversion Shares. We agree with the Judge that the bond certificates in the *present case* were only *documentary* evidence of the respondent's ownership of the bonds. The failure of the appellants to procure the issue of the certificates could not be a ground for depriving the respondent ownership of the Convertible Bonds.[emphasis added]

167 In *Greene King plc v Harlow District Council* [2004] 1 WLR 2339, Goldring J upheld a lower court's decision that the appellant company was a "proprietor of a food business" for the purpose of food safety regulations based primarily on statements made in the appellant's annual report.

168 Similarly, Falmac's annual reports can be said to have acknowledged D2's appointment as Chief Executive Officer on the terms of the Employment Contract. The annual reports stated D2's designation as Chief Executive Officer and showed his salary as above S\$250,000. The annual reports contained a directors' statement that the accompanying financial statements in the reports gave a "true and fair view of the state of affairs" of Falmac. [\[note: 133\]](#) Moreover, as the annual reports stated that the function of the remuneration committee was to review the remuneration packages of each executive director and executive officers of Falmac, in the ordinarily course of things, the remuneration committee would have reviewed and consented to the terms of D2's appointment on the terms in the Employment Contract.

169 However, there were certain ostensible inconsistencies in the annual reports that needed to be clarified. The 2005 annual report contained the following statement [\[note: 134\]](#):

As the Company has incurred a loss for the year ended 31 December 2005, only the Executive Director, Mr Charlie Cheng Ji Lai *received remuneration of not more than \$300,000*. No other

remuneration in the form of salary were paid or declared to the other directors, namely, Mr Fei Xue Jun, Mr David Lu Hai Ge, Ms Lu Jing and Ms Yu Wei Ying in the financial year ended 31 December 2005. A breakdown, showing the level and mix of each individual director's remuneration *paid or payable* for the financial year ended 31 December 2005 is as follows: [emphasis added]

170 Similar statements were also found in the 2006 and 2007 annual reports. [\[note: 135\]](#) This gave rise to two possible interpretations: (1) remuneration of not more than S\$300,000 was *actually paid* to D2; or (2) remuneration of not more than S\$300,000 was *payable*, but unpaid. After examining the annual reports in greater detail, I accepted version (2) as the more accurate interpretation. The notes to the financial statements in the 2005 annual report recorded an amount of S\$390,000 due to Falmac's directors, which was stated to be unsecured, interest-free and repayable on demand. [\[note: 136\]](#) This amount increased to S\$570,000 in the 2006 annual report [\[note: 137\]](#) and to S\$945,000 in the 2007 annual report. [\[note: 138\]](#) Falmac's 2008 annual report showed a sum of S\$1,363,000 owing to the directors for the financial year ended 31 December 2008 [\[note: 139\]](#), which was confirmed by the 2009 annual report as the total amount owing to the "former directors". [\[note: 140\]](#) These sums could not have been references to accruals for directors' fees, as these were recorded separately. Rather, the logical inference was that these sums referred to directors' salaries that were deferred from 2005 onwards. [\[note: 141\]](#) Given that the only salaried director was D2, the conclusion must be that D2's remuneration was payable, but not paid to him.

171 I should add at this point that Wong in his oral testimony conceded that the new board was not disputing what is recorded in the accounting records and submitted to the public in the annual reports. [\[note: 142\]](#)

172 The second category of documentary evidence that I considered was Falmac's 2008 management accounts, also known as statements of account. Falmac's 2008 annual report, which was only published on 18 November 2009 [\[note: 143\]](#), did not reflect D2's salary for 2008. This was because by that time, the new board had taken over Falmac's affairs and was disputing D2's salary. [\[note: 144\]](#) However, Falmac's statements of account as at 31 December 2008 showed D2's salary at S\$280,000, as well as travelling allowances. [\[note: 145\]](#) These statements of account were prepared by Falmac's finance personnel, one Lim Shwu Peng, and I accepted her evidence that they were verified and prepared in accordance with normal company procedures. [\[note: 146\]](#)

173 Thirdly, correspondence between IRAS and various representatives of Falmac also confirmed D2's salary as stated in the Employment Contract, and that his salary had not been paid by Falmac. Falmac's financial controller had written to IRAS in April 2008 confirming D2's annual salary at S\$280,000. [\[note: 147\]](#) In April 2009, Fei, the other executive director on the former board, had also written to IRAS confirming that D2's salary and directors fees for the financial years 2007 and 2008, as well as any prior outstanding amounts owing to D2, had not been paid. [\[note: 148\]](#)

174 Finally, the evidence adduced in the course of the trial indicated on the whole that Falmac and its staff regarded D2 as its Chief Executive Officer and Executive Director from 2004 to 2009. For example, an "Employee Resignation Agreement", dealing with the resignation of one of Falmac's former employees, was signed off by D2 as Chief Executive Officer of Falmac. [\[note: 149\]](#) Much of the correspondence relied upon by the parties in the course of the trial was also signed off by D2 as Chief Executive Officer, or referred to him in that capacity. [\[note: 150\]](#) For instance, D2 corresponded

frequently with SGX-ST regarding Falmac's compliance matters. [\[note: 151\]](#)

175 Based on the overall evidence before me, I find that the Employment Contract was valid and had full binding effect on Falmac. Similar to the factual scenarios in *Kwee Seng Chio*, the reasonable inference from the evidence was that David Lu signed the Employment Contract with the consent and authority of the board, even though there was no formal board resolution authorising him to do so. Consequently, I also dismissed Falmac's argument that D2 was intended to be paid by the Tianjin subsidiaries as a bare assertion.

### **Director's fees**

176 The issue regarding D2's claim for directors' fees of S\$45,000 was whether such fees had been separately approved by Falmac in general meeting. Wong's concession narrated in [171] above extends to this claim for unpaid director's fees. Equally, Mr Quek in his Closing Submissions did not dispute and take issue with this claim for S\$45,000.

177 In Falmac's 2006 and 2007 annual reports, the range of directors' fees due to D2 was stated to be 5% of his total remuneration and "subject to approval by shareholders at the Annual General Meeting". [\[note: 152\]](#) The 2006 and 2007 annual reports each contained a notice of AGM, and stated that all shareholders would receive the annual report and be given the opportunity to air their views at the AGM. [\[note: 153\]](#) This was in line with the statutory requirement in s 201(1) of the Companies Act that the directors lay the accounts before the company at the AGM.

178 In the present case, there is no suggestion at all that the AGMs called for the periods in question did not take place. Relying on s 116 (f) of EA that the common course of business has been followed, the court is permitted to presume that resolutions authorising the directors to receive remuneration as in director's fees, had been passed in the general meetings of the company. Directors' fees for the years 2006 to 2007 were in all likelihood approved and carried into effect in the relevant general meetings.

179 D2's director's fees for the year 2008 were reflected in Falmac's 2008 statements of account together with the outstanding fees from 2006 and 2007, which came up to a total sum of S\$45,000. [\[note: 154\]](#) The AGM for the 2008 financial year was called by the new board on 14 December 2009. [\[note: 155\]](#) Again, in the absence of any evidence to the contrary, the 2008 directors' fees were likely approved at the AGM.

180 Accordingly, I accept D2's claim for S\$45,000 as proven.

### **Severance compensation**

181 Similar to directors' fees, the issue regarding D2's severance compensation under clause 14 of the Employment Contract (see [160] above) is whether it had been approved by the company in general meeting. Section 168(1) of the Companies Act prohibits any payment by a company to any director by way of compensation for loss of office as an officer of the company or as consideration for or in connection with his retirement from any such office, unless the particulars of the proposed payment, including the amount thereof, have been disclosed to the members of the company and the proposal has been approved by the company in general meeting. Payment to an executive director as compensation for the loss of his employment was compensation for the loss of office as an officer of the company within the meaning of s 168 of the Companies Act (see *Goh Kim Hai Edward v Pacific Can Investment Holdings Ltd* [1996] 1 SLR(R) 540).

182 In this case, there was no evidence that D2's severance compensation was disclosed to or approved by Falmac in general meeting. As D2's claim could only have arisen after he resigned as Chief Executive Officer in July 2009, this amount also did not appear in any of Falmac's annual reports. Thus, D2 has not established his claim to severance compensation of S\$500,000.

### ***Loan, credit card expenses, and amounts to IRAS***

183 D2 had provided supporting documents in the form of Falmac's monthly statements of account ending with the statement of account as at 31 December 2008 for these claims. As the debts were recognised in the accounting records of Falmac, Wong conceded to the claims in his oral evidence. [\[note: 156\]](#) Notably, Mr Quek in his Closing Submissions did not take issue with the loan and amounts paid to IRAS. However, he objected to the credit card charges as D2 did not produce credit card statements to show details of the transactions. In my view, this objection was thin in the light of evidence adduced by D2. Moreover, the expenses were verified by Lim Shwu Peng, a former accounts executive of Falmac as well as Falmac's financial controller.

### ***Outcome of D2's counterclaim: a summary***

184 In light of the discussion above, I now summarise my findings on D2's Counterclaim:

( 1 ) *Salary arrears*: D2 succeeds in his claim for the amounts of S\$942,186.40 and S\$183,333.33 being salary arrears as of 20 July 2009, which was the date of D2's cessation of service.

(2) *Loan to Falmac*: This loan amount of S\$30,000 was reflected in Falmac's 2008 statements of account [\[note: 157\]](#) and also confirmed by Lim Shwu Peng, a former accounts executive of Falmac. [\[note: 158\]](#) The loan was also not disputed by Wong in cross-examination. [\[note: 159\]](#) Accordingly, this claim of S\$30,000 is allowed.

(3) *Director's fees*: This claim of S\$45,000 is allowed.

(4) *Severance compensation*: This claim of S\$500,000 is dismissed.

(5) *Credit card expenses*: This amount of S\$56,202.23 for the reimbursement of travelling and other expenses incurred on his credit card is allowed. [\[note: 160\]](#)

( 6 ) *Reimbursement for amounts paid to IRAS*: The reimbursements are for the amount of S\$57,780.35 being income tax payments to IRAS, as well as the amount of S\$24,530.94 being payments to IRAS which had allegedly been deducted from D2's personal accounts. Pursuant to clause 11 of the Employment Contract (see [160] above), Falmac was responsible for D2's liability. Thus, D2's claim for S\$57,780.35, which was evidenced by an IRAS statement of account dated 12 January 2011 is allowed. [\[note: 161\]](#) With regard to the amount of S\$24,530.94 claimed by D2, the IRAS statement of account dated 11 April 2009 produced only indicated a balance of S\$21,123.62 but as Wong accepted the claim figure of S\$24,530.94, and Mr Quek did not object to this item of claim and quantum in his Closing Submissions, the claim of S\$24,530.94 is allowed.

(7) *Indemnity from IRAS or credit card companies*: This relief is sought in D2's pleadings but it was not developed and pursued in Mr Singh's Closing Submissions. Accordingly, no order is made.

## Conclusion

185 In conclusion, Falmac's action against D2 is dismissed. As for D2's Counterclaim, there is judgment in favour of D2 in the total sum of \$1,339,033.25 together with interest thereon at the rate of 5.33% per annum from the date of the Writ to payment. Falmac is to pay D2's costs of the action and counterclaim.

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[\[note: 1\]](#) Statement of Claim (Amendment No 2) at [18] and Reply and Defence to Counterclaim (Amendment No 2) at [21].

[\[note: 2\]](#) Reply and Defence to Counterclaim (Amendment No 2) at [27]-[29].

[\[note: 3\]](#) Reply and Defence to Counterclaim (Amendment No 2) at [6].

[\[note: 4\]](#) Statement of Claim (Amendment No 2) at [17].

[\[note: 5\]](#) Falmac's Closing Submissions at [155].

[\[note: 6\]](#) Transcripts of Evidence dated 18.9.12 at pp 4, 6 & 82.

[\[note: 7\]](#) 1AB 115.

[\[note: 8\]](#) 1AB 34.

[\[note: 9\]](#) 1AB 35.

[\[note: 10\]](#) 1AB 93-94.

[\[note: 11\]](#) 1AB 157.

[\[note: 12\]](#) 1AB 138.

[\[note: 13\]](#) Transcripts of Evidence dated 18.9.12 at p 81.

[\[note: 14\]](#) 1AB 246.

[\[note: 15\]](#) Falmac's Closing Submissions at [6].

[\[note: 16\]](#) Falmac's Closing Submissions at [7].

[\[note: 17\]](#) 3AB 767.

[\[note: 18\]](#) 3AB 769.

[\[note: 19\]](#) 3AB 803.

[\[note: 20\]](#) 3AB 836.

[\[note: 21\]](#) 3AB 835.

[\[note: 22\]](#) Transcripts of Evidence dated 18.9.12 at p 82.

[\[note: 23\]](#) Transcripts of Evidence dated 18.9.12 at pp 4, 6 & 82.

[\[note: 24\]](#) 3AB 842.

[\[note: 25\]](#) 3AB 728.

[\[note: 26\]](#) 3AB 847-849.

[\[note: 27\]](#) 3AB 847-849.

[\[note: 28\]](#) 3AB 843-844.

[\[note: 29\]](#) 3AB 838.

[\[note: 30\]](#) 3AB 855-856.

[\[note: 31\]](#) 4AB 1058.

[\[note: 32\]](#) 2AB 326, 336-340.

[\[note: 33\]](#) 2AB 439, 445.

[\[note: 34\]](#) 2AB 435, 441.

[\[note: 35\]](#) 2AB 612-615; 4AB 1129.

[\[note: 36\]](#) 2AB 414-423.

[\[note: 37\]](#) 2AB 424-433.

[\[note: 38\]](#) Liu Yan's AEIC dated 16.5.11 at [14].

[\[note: 39\]](#) Statement of Claim (Amendment No 2) at [27].

[\[note: 40\]](#) Xu Bo's 2<sup>nd</sup> AEIC dated 6.9.12 at p 10.

[\[note: 41\]](#) Transcripts of Evidence dated 19.9.12 at p 6.

[\[note: 42\]](#) 2AB 357.



[\[note: 43\]](#) 4AB 1267.

[\[note: 44\]](#) 2DB at pp 5-6.

[\[note: 45\]](#) Transcripts of Evidence dated 18.7.11 at p 59.

[\[note: 46\]](#) Transcripts of Evidence dated 18.7.11 at p 59.

[\[note: 47\]](#) Statement of Claim filed on 30.10.09 at [14].

[\[note: 48\]](#) 4AB 1140.

[\[note: 49\]](#) 4AB 1167-1169.

[\[note: 50\]](#) 1AB 259.

[\[note: 51\]](#) 1AB 259; Transcripts of Evidence dated 18.7. 11 at pp 69-70.

[\[note: 52\]](#) 4AB 1186.

[\[note: 53\]](#) Transcripts of Evidence dated 18.7.11 at p 61.

[\[note: 54\]](#) Transcripts of Evidence dated 18.7.11 at 70.

[\[note: 55\]](#) 4AB 1329.

[\[note: 56\]](#) Reply and Defence to Counterclaim (Amendment No 2) at [27] & [29].

[\[note: 57\]](#) 4AB 1303.

[\[note: 58\]](#) Falmac's Closing Submissions at [98].

[\[note: 59\]](#) D2's 2<sup>nd</sup> AEIC dated 12.7.11 at [8].

[\[note: 60\]](#) Transcripts of Evidence dated 20.7.11 at pp 6-7.

[\[note: 61\]](#) Defendant's AEIC dated 8.3.11 at [191].

[\[note: 62\]](#) Transcripts of Evidence dated 19.7.11 at pp 7 & 34.

[\[note: 63\]](#) 2AB 437,443, 439 & 445.

[\[note: 64\]](#) 2AB 435 & 441.

[\[note: 65\]](#) 2AB 435-346.

[\[note: 66\]](#) 4AB 1298.

[\[note: 67\]](#) Transcripts of Evidence dated 19.7.11 at p 14.

[\[note: 68\]](#) Transcripts of Evidence dated 20.7.11 at pp 36-37.

[\[note: 69\]](#) Transcripts of Evidence dated 19.7.11 at p 45.

[\[note: 70\]](#) Transcripts of Evidence dated 19.7.11 at p 42.

[\[note: 71\]](#) Wong's AEIC dated 13.5.11 at [12]; Falmac's Closing Submissions at [104].

[\[note: 72\]](#) Kuan's AEIC dated 11.2.11 at [6]; Choo's AEIC dated 11.2.11 at [4].

[\[note: 73\]](#) Kuan's AEIC dated 11.2.11 at [7].

[\[note: 74\]](#) Zhang's AEIC dated 21.7.11 at [8]-[9].

[\[note: 75\]](#) 4AB 1304.

[\[note: 76\]](#) 4AB 1002 & 1015.

[\[note: 77\]](#) DB 12.

[\[note: 78\]](#) Transcripts of Evidence dated 18.9.12 at p 69.

[\[note: 79\]](#) Zhang's AEIC dated 21.7.11 at [8]-[9].

[\[note: 80\]](#) Zhang's AEIC dated 21.7.11 at [10].

[\[note: 81\]](#) Transcripts of Evidence dated 19.9.12 at p 16.

[\[note: 82\]](#) D2's Closing Submissions dated 8.11.12 at [119], [128(g)].

[\[note: 83\]](#) Transcripts of Evidence dated 20.7.11 at p 25; Transcripts of Evidence dated 17.9.12 at pp 20, 23.

[\[note: 84\]](#) Transcripts of Evidence dated 20.7.11 at p 25; Transcripts of Evidence dated 17.9.12 at p 21.

[\[note: 85\]](#) Transcripts of Evidence dated 20.7.11 at pp 25-26.

[\[note: 86\]](#) Transcripts of Evidence dated 17.9.11 at pp 23-24.

[\[note: 87\]](#) D2's 2<sup>nd</sup> AEIC dated 12.7.11 at [8].

[\[note: 88\]](#) D2's 2<sup>nd</sup> AEIC dated 12.7.11 at [6].

[\[note: 89\]](#) 4AB 1304; Transcripts of Evidence dated 19.9.12 at p 19.

[\[note: 90\]](#) Transcripts of Evidence dated 19.9.12 at pp 38-39.

[\[note: 91\]](#) 4AB 1304.

[\[note: 92\]](#) DB 11.

[\[note: 93\]](#) 4AB 1304.

[\[note: 94\]](#) Transcripts of Evidence dated 18.7.11 at p 70.

[\[note: 95\]](#) D2's 3<sup>rd</sup> AEIC dated 20.2.12 at [7].

[\[note: 96\]](#) 2AB 346-347; Transcripts of Evidence dated 18.7.11 at p 30.

[\[note: 97\]](#) 3AB 896; Transcripts of Evidence dated 20.7.11 at p 9.

[\[note: 98\]](#) D2's AEIC dated 8.3.11 at pp 293-294.

[\[note: 99\]](#) D2's AEIC dated 8.3.11 at [168]; Transcripts of Evidence dated 18.9.12 at pp 109-110.

[\[note: 100\]](#) 4AB 1193.

[\[note: 101\]](#) DB 8.

[\[note: 102\]](#) Transcripts of Evidence dated 18.7.11 at pp 30-31.

[\[note: 103\]](#) Transcripts of Evidence dated 18.7.11 at p 33.

[\[note: 104\]](#) 3AB 749.

[\[note: 105\]](#) 3AB 830.

[\[note: 106\]](#) 4AB 995.

[\[note: 107\]](#) 4AB 994.

[\[note: 108\]](#) 4AB 1046-1047.

[\[note: 109\]](#) 4AB 1034-1040, 1048.

[\[note: 110\]](#) 3AB 900, 955.

[\[note: 111\]](#) Transcripts of Evidence dated 18.9.12 at pp 100-101.

[\[note: 112\]](#) 4AB 1003-1013, 1308-1328.

[\[note: 113\]](#) 4AB 1002.

[\[note: 114\]](#) 4AB 1015.

[\[note: 115\]](#) 4AB 1056.

[\[note: 116\]](#) 2AB 326, 336-340.

[\[note: 117\]](#) Transcripts of Evidence dated 18.7.11 at p 47.

[\[note: 118\]](#) D2's 3<sup>rd</sup> AEIC dated 20.2.12 at [7].

[\[note: 119\]](#) Transcripts of Evidence dated 19.7.11 at p 24.

[\[note: 120\]](#) Transcripts of Evidence dated 19.7.11 at p 58.

[\[note: 121\]](#) 2AB 565, 471.

[\[note: 122\]](#) Transcripts of Evidence dated 19.7.11 at p 59; 1AB 240.

[\[note: 123\]](#) 1AB 202.

[\[note: 124\]](#) 4AB 1298.

[\[note: 125\]](#) Transcripts of Evidence dated 19.7.11 at p 63.

[\[note: 126\]](#) 3AB 694-702.

[\[note: 127\]](#) Falmaç's Closing Submissions at [140].

[\[note: 128\]](#) D2's AEIC dated 8.3.11 at [11]-[12]; Transcripts of Evidence dated 18.9.12 at p 88.

[\[note: 129\]](#) Art 102(4) of Falmaç's Articles of Association.

[\[note: 130\]](#) Art 103 of Falmaç's Articles of Association.

[\[note: 131\]](#) Transcripts of Evidence dated 18.9.12 at p 88.

[\[note: 132\]](#) 1AB 10, 67, 131.

[\[note: 133\]](#) 1AB 17, 74, 137.

[\[note: 134\]](#) 1AB 10.

[\[note: 135\]](#) 1AB 67, 131.

[\[note: 136\]](#) 1AB 37.

[\[note: 137\]](#) 1AB 95.

[\[note: 138\]](#) 1AB 159.

[\[note: 139\]](#) 1AB 226.

[\[note: 140\]](#) 1AB 299.

[\[note: 141\]](#) D2's AEIC dated 8.3.11 at [19].

[\[note: 142\]](#) Transcripts of Evidence dated 18.7.11 at p12.

[\[note: 143\]](#) 1AB 201, 202.

[\[note: 144\]](#) DB 4.

[\[note: 145\]](#) 3AB 721.

[\[note: 146\]](#) Transcripts of Evidence dated 19.9.12 at p 44.

[\[note: 147\]](#) 3AB 865.

[\[note: 148\]](#) 3AB 864.

[\[note: 149\]](#) 3AB 742.

[\[note: 150\]](#) 4AB 994.

[\[note: 151\]](#) 2AB 344-347.

[\[note: 152\]](#) 1AB 67, 131.

[\[note: 153\]](#) 1AB 68 & 132.

[\[note: 154\]](#) 3AB 721.

[\[note: 155\]](#) DB 8; Transcripts of Evidence dated 18.7.11 at p 33.

[\[note: 156\]](#) Transcripts of Evidence dated 18.7.11 at pp 13-15.

[\[note: 157\]](#) 3AB 716-721.

[\[note: 158\]](#) Lim Shwu Peng's AEIC dated 5.7.11 at [11]; Transcripts of Evidence dated 19.9.12 at p 48.

[\[note: 159\]](#) Transcripts of Evidence dated 18.7.11 at p 13.

[\[note: 160\]](#) 4AB 1126-1127.

[\[note: 161\]](#) 4AB 1125.

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