IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 55

Civil Appeal No 208 of 2015

Between

DYNASTY LINE LIMITED
(in liquidation)

… *Appellant*

And

(1) SUKAMTO SIA
(2) LEE HOWE YONG

… *Respondents*

Civil Appeal No 223 of 2015

Between

LEE HOWE YONG

… *Appellant*

And

DYNASTY LINE LIMITED
(in liquidation)

… *Respondent*

JUDGMENT

[Damages]—[Computation]

[Equity]—[Breach of fiduciary duty]—[Joint and several liability]

[Damages]—[Interest]

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v
Sukamto Sia and another and another appeal

[2016] SGCA 55

Court of Appeal—Civil Appeals Nos 208 and 223 of 2015
Chao Hick Tin JA and Steven Chong J
13 May 2016

9 September 2016 Judgment reserved.

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

1 These are two cross-appeals, one by the plaintiff and the other by the second defendant, against the decision of the High Court Judge ("the Judge") in *Dynasty Line Limited (in liquidation) v Sukamto Sia and another* [2015] SGHC 286 ("*Judgment (Assessment)*"), in relation to an assessment of equitable compensation payable by the defendants to the plaintiff in respect of their breaches of fiduciary duty. Civil Appeal No 208 of 2015 ("CA 208") is the appeal by the plaintiff against both the defendants, while Civil Appeal No 223 of 2015 ("CA 223") is the appeal by the second defendant against the plaintiff. Both appeals raise a gamut of issues, some of which overlap.

Facts and Decision Below

2 We now set out the facts and the decision below, which are undisputed unless we indicate otherwise.

The parties

3 The plaintiff (who is the appellant in CA 208 and respondent in CA 223) is Dynasty Line Limited ("Dynasty"). It is a British Virgin Islands ("BVI") company which was ordered on 22 December 2009 by the BVI courts to be wound up. It is the liquidators of Dynasty who are having the conduct of the present litigation.

4 Dynasty was the corporate vehicle for investments of its sole shareholder, Mr Sukamto Sia ("Sia"), the first defendant and the first respondent in CA 208. Sia persuaded one Mr Lee Howe Yong ("Lee"), a Singaporean who resided in Hong Kong ("HK") at the material time, to join his ventures. In return for his agreeing to be a co-director of Dynasty, Sia promised Lee 20% of Dynasty's profits. They were Dynasty's only directors. Lee is the second defendant, the second respondent in CA 208, and the appellant in CA 223.

Events constituting Sia and Lee's breach of fiduciary duty

5 In 1996, Sia wanted to buy shares in China Development Corporation Limited ("CDC"), a company then listed on the HK Stock Exchange. Using Dynasty as the investment vehicle, he acquired 29,537,367 shares in CDC (representing 30.9% of its issued share capital) from several vendors by way of seven distinct sale and purchase agreements dated 5 February 1996. The agreed sale price was HKD7.80 per share, amounting to a total of HKD230,391,462.60 for the purchase. The vendors transferred the CDC

shares to Dynasty on or before the intended completion date of 2 May 1996. However, only HKD64,459,317.16 (or about 27.98%) of the purchase price was paid. This sum was allegedly advanced as a loan to Dynasty from Sia after the latter had taken out certain loans, to which we now turn.

6 Between April 1996 and November 1997, Dynasty pledged almost all of those CDC shares to various financial institutions as security for loan facilities granted *not* to Dynasty *but* to Sia and his business associates (Lee was not a recipient of the loan facilities). Four pledges were made in total; the first, to Commerzbank (South East Asia) Limited ("Commerzbank"), was executed by both Lee and Sia while the three later pledges were executed solely by Sia. It should be noted that, sometime in June 1997 (*ie*, between the time of second and third pledges), CDC implemented a 5:1 stock split. The details of the pledges, which have been adjusted to disregard the stock split, are as follows:

No	Date	Financial Institution	No of Shares	% of Shares
1	23 Apr 1996	Commerzbank	12,032,302	40.74%
2	6 Nov 1996	Société Générale (Labuan branch)	5,600,000	18.96%
3	29 Aug 1997	KG Investments Asia Limited	9,764,400	33.06%
4	3 Nov 1997	Creditanstalt Bankverein	2,140,525	7.25%
		Total	29,537,227	100.00%

7 As Sia and his business associates defaulted on the loans, the financial institutions sold the pledged shares and applied the proceeds to satisfy the

debts owed to them. These forced sales took place between June 1998 and February 2000. The shares pledged to Commerzbank in particular were sold in February 2000 for a total of HKD31,560,885.15, which works out to be HKD2.623 per share or, if the stock split is taken into account, HKD0.5246 per share.

Litigation history

Vendors sue Dynasty for balance of purchase price in HK

8 On 10 June 1999, the vendors commenced proceedings against Dynasty in HK for the unpaid balance of the purchase price. Dynasty countersued, alleging that one of the vendors, Low Tuck Kwong ("Low"), made misrepresentations to Sia about CDC. On 6 April 2001, the HK High Court allowed the vendors' claim and dismissed Dynasty's counterclaim. Judgment was awarded against Dynasty as follows:

No	Component	Sum (HKD)
1	Unpaid balance of purchase price	166,042,936.79
2	Pre-judgment interest	88,437,488.09
	Total	**254,480,424.88**

Creditors apply to wind up Dynasty in HK & BVI

9 On 27 June 2007, Low commenced liquidation proceedings against Dynasty in HK, but these were stayed on 14 September 2009, upon Sia's application, on the ground of *forum non conveniens*.

10 On 29 October 2009, Low commenced liquidation proceedings in BVI. He succeeded; on 22 December 2009, Dynasty was ordered to be wound up. William Tacon and Lau Wu Kwai King Lauren were appointed as liquidators.

Liquidators sue Lee & Sia for breach of fiduciary duty in Singapore

11 On 14 April 2010, the liquidators sued Sia and Lee in Singapore for breaches of fiduciary duty under BVI law as Dynasty's directors. Dynasty says that the loss suffered was as follows (and that Lee and Sia should be jointly and severally liable for the loss attributable to the Commerzbank pledge):

No	Component	HKD	HKD
1.	HK Judgment Sum, *comprising*:		
	– Balance of purchase price	*166,042,936.79*	
	– Pre-judgment interest	*88,437,488.09*	254,480,424.88
2.	6 years' (post-judgment) pre-liquidation interest		138,030,956.35
3.	(Post-judgment) post-liquidation interest		114,007,230.35
Total loss			**506,518,611.58**
	– Attributable to Commerzbank pledge (39.13%)		*198,200,732.71*

The decisions in the Singapore courts

Liability

12 The action was bifurcated. The issue of liability was tried before the Judge and her decision was reported as *Dynasty Line Ltd (in liquidation) v Sia Sukamto and another* [2013] 4 SLR 253 ("*Judgment (Liability) (HC)*"). Cross-appeals were brought against that decision to the Court of Appeal. Dynasty prevailed before the Court of Appeal (in Civil Appeal No 105 of 2013). For completeness, we should add that Sia's counterclaims (*ie*, against Low for an

alleged breach of the terms of a settlement agreement, and against Dynasty, Low and the liquidators for conspiracy to injure) failed before both the High Court and the Court of Appeal. The Court of Appeal decision was reported as *Dynasty Line Ltd (in liquidation) v Sia Sukamto and another and another appeal* [2014] 3 SLR 277 ("*Judgment (Liability) (CA)*").

13 The important findings for present purposes are as follows:

(a) At the material time, there were ample grounds for Dynasty's directors to think that Dynasty would be approaching insolvency if it made the pledges. Dynasty had had significant liabilities which could be met only by the CDC shares, its only asset. By pledging the shares, Dynasty essentially imperilled its ability to meet its liabilities (*Judgment (Liability) (CA)* at [36]).

(b) Sia breached his fiduciary duties as director. By pledging the shares, he disregarded the interests of Dynasty's creditors (whose interests, under BVI law, had come to the fore in the light of mounting concerns over Dynasty's financial health) (*Judgment (Liability) (CA)* at [34]–[35] and [39]–[41]).

(c) Lee breached his fiduciary duties as director. It was incumbent on him to know Dynasty's assets and liabilities. He must have been aware of the nature of the Commerzbank pledge since he signed the documents relating thereto. At that time, he should at least have made the necessary inquiries; had he done so, he would have known that Dynasty was pledging a significant portion of the shares as security for a loan facility to Sia (*Judgment (Liability) (CA)* at [46]–[48]). However, his liability was limited only to the Commerzbank pledge as

his signature was not found on the three later pledges and there was no evidence that he knew about them (*Judgment (Liability) (CA)* at [49]).

14 Accordingly, the Court of Appeal ordered damages to be assessed by a High Court Judge (*Judgment (Liability) (CA)* at [72]). In this regard, it seems to us that "damages" is strictly speaking mere shorthand for equitable compensation, which is awarded for a breach of fiduciary duty, and we will hereinafter be using these two terms interchangeably.

Assessment of damages

15 The issue of assessment of damages was heard by the Judge in Assessment of Damages No 23 of 2015. Her decision and written grounds (in the *Judgment (Assessment)*) were released on 6 November 2015 and the decision on costs was made on 18 November 2015. The present appeals relate to both those decisions.

16 The Judge held that Lee and Sia were jointly and severally liable for the loss in respect of the Commerzbank pledge, assessed at HKD6,569,636.89. Since Sia was absent from the assessment proceedings, Lee would be entitled to seek contribution or indemnity from Sia once Dynasty's claim has been satisfied. Additionally, Sia was also liable for the loss in respect of the three other pledges, assessed at HKD35,558,427.45. Pre-liquidation interest (accruing post-HK judgment) of 5% per annum for four years was claimable, while post-liquidation interest was claimable only if Dynasty had a surplus of assets after paying the claims of all its creditors (*Judgment (Assessment)* at [32] and [72]). The findings of the Judge relating to the merits included the following:

(a) Lee and Sia were jointly and severally liable for the Commerzbank pledge since both signed off on the Commerzbank pledge. Their joint participation fell within the principle in *Re Carriage Co-operative Supply Association* (1884) 27 ChD 322 ("*Re Carriage*") that fiduciaries' liability for a breach of duty will be joint and several where the fiduciaries jointly participated in the act leading to that breach. We note that in *Judgment (Liability) (HC)* the Judge appeared to have proceeded on the assumption that issue estoppel did not arise as to joint and several liability; neither did the Court of Appeal in *Judgment (Liability) (CA)* explicitly address it.

(b) Lee's breach caused Dynasty's loss. The "but for" test, which was applicable under BVI law to determine causation, was satisfied since Lee's signing of the pledge was part of a single cause. It would have been speculative to say what would otherwise have happened if Lee did not sign the pledge. The Judge held that the *Judgment (Liability) (CA)* could not have resulted in issue estoppel as to causation, because the fourth requirement of identity of subject matter (see *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2005] 3 SLR(R) 157 at [14]–[15] and *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 at [98]) was not satisfied.

(c) As regards Dynasty's losses, the Judge made the following holdings:

(i) First, the loss was caused by pledging the shares as security for another entity's loan rather than by selling it away.

The date on which the shares should be valued (and at which Dynasty's losses should be assessed) was the date the shares would have been sold. This date would not have been before 6 April 2001 (*ie*, the date of the HK judgment in favour of the vendors for the balance of the purchase price) because Sia was holding on to the shares until 29 December 1997 to wrest control of CDC from one Oei Hong Leong ("Oei") and, from 1998 to 2001, Dynasty was actively contesting Low's claims on the ground of misrepresentation. The valuation adopted should be that of Lee's expert, whose opinion on the volume-weighted average share price in April 2001 was accepted by Dynasty as a "reasonable valuation". Dynasty's expert valuation had to be rejected as it proceeded on the footing that the shares were to be valued as at April 1996. Accordingly, the loss attributable to the Commerzbank pledge was only HKD6,569,636.89 while the loss attributable to the other pledges was HKD35,558,427.45.

(ii) The pre-judgment interest of HKD88,437,488.09 was not claimable as against Sia and Lee because the loss caused by them accrued only after the issuance of the HK Judgment. It was also not caused by the pledging of the shares *per se*, but by Sia and Lee's failure to pay the vendors punctually; they would not have been wrong not to have sold the shares until the issuance of the HK judgment as Dynasty was pursuing a counterclaim against Low.

(iii) The (post-judgment) pre-liquidation interest was based on a "written instrument" rather than an agreement between the

parties. Accordingly, s 153(3)(a) rather than s 153(2) of the BVI Insolvency Act (Act No 5 of 2003) would apply such that the applicable interest rate was the "court rate" of 5% per annum. However, in view of Low's delay in initiating winding-up proceedings in the BVI, the appropriate period for which interest was claimable was reduced to four years.

(iv) The (post-judgment) post-liquidation interest would be claimable in the event that Dynasty had a surplus after paying all claims in liquidation.

(d) Lee was not entitled to an equitable allowance on a *pari passu* basis in respect of the alleged loan made by Sia to Dynasty. Even though Sia paid the vendors part of the purchase price in the form of the alleged loan to Dynasty, the Judge declined to exercise her discretion to apply the rule in *In Re VGM Holdings, Limited* [1942] Ch 235 ("*Re VGM Holdings*") that a trustee-beneficiary liable to pay a sum to his trust fund should not be ordered to pay that part of it which would be distributed to him *qua* beneficiary. It was unclear whether Sia's payment was a loan to Dynasty or was it to constitute part of his equity in Dynasty, and it was also unclear what the costs of liquidation proceedings would be.

(e) Lee and Sia were jointly and severally liable to Dynasty for all the disbursements incurred by Dynasty in relation to the assessment and for 50% of Dynasty's costs for the assessment on a standard basis.

The issues and arguments on appeal

17 As noted above, CA 208 and CA 223 are cross-appeals which raise a number of granular issues, some of which overlap and many of which pertain to the main issue of how much damages should Dynasty be entitled to claim from Sia and Lee. Accordingly, we will set out the issues raised in both appeals as well as the parties' arguments relating to each.

18 The first issue is whether Lee and Sia should be jointly and severally liable for the losses flowing from the Commerzbank pledge. Lee argues that he should have been severally liable only, given his more limited role. Dynasty argues that the Court of Appeal had in *Judgment (Liability) (CA)* effectively found that Sia and Lee were jointly and severally liable in relation to the loss arising from the Commerzbank pledge. Accordingly, the Judge was precluded from re-opening that issue. To this, Lee's reply is that no issue estoppel can be raised for lack of identity of subject-matter.

19 The next issue, of whether Sia's and Lee's breach of fiduciary duty *caused* the losses, is moot and was not pursued in oral argument before us. Dynasty argues that the Court of Appeal must have found causation in the *Judgment (Liability) (CA)* since causation was logically prior to quantification of damages and, accordingly, the Judge was precluded from re-opening that issue. Lee, while arguing that no issue estoppel can be raised for lack of identity of subject-matter, accepts that causation is satisfied.

20 The third and most substantial issue is the amount of damages to be awarded to Dynasty. The arguments are essentially as follows:

(a) As regards the date on which the shares should be valued, Dynasty argues that the date of valuation should be the date on which

the shares would have been sold had there been no breach of fiduciary duty—23 April 1996, the date of the pledge; to value it as at April 2001 would be to quantify Dynasty's loss by reference to further hypothetical breaches of fiduciary duty. As at 23 April 1996, the share value would have been HKD5.40 per share or, based on the valuation of Mr Searby (*ie*, Dynasty's expert), HKD4.30 per share. On the other hand, Lee argues that the court's task is merely to ascertain what Dynasty would (and not could or ought to) have done and, in any event, there was no basis to say that it ought to have sold the shares on 23 April 1996. Moreover, Mr Searby's valuation was unrealistic and speculative.

(b) As regards pre-judgment interest, Dynasty argues that such interest should have been awarded as it was claimed as a proportion of the HK judgment based on the proportionate value of the share pledges. However, in oral submission before us, Dynasty recognised that pre-judgment interest would not be claimable if the shares were valued as at April 2001.

(c) As regards post-judgment pre-liquidation interest, Dynasty argues that the rate should be the HK rate (which fluctuated between 8.00% and 12.08% per annum) because s 153(2) of the BVI Insolvency Act applied, and that interest should run for six years (*ie*, from 6 April 2001 to 5 April 2007) instead of four as the parties had agreed on that. Lee argues that the Judge was correct in applying the BVI rate of 5% per annum as s 153(3)(a) of the BVI Insolvency Act applied, and that there was no agreement that the interest should run for six years.

(d) As regards post-judgment post-liquidation interest, Dynasty argues that it should be claimable from Sia and Lee independent of

whether it is payable to the creditors subsequently, and that the rate should be the HK post-judgment interest rate of 8% per annum. However, Lee argues that post-liquidation interest is precluded by s 153 of the BVI Insolvency Act, and, in any case, the rate should be the BVI rate of 5% per annum.

21 The fourth issue is whether Lee was entitled to an equitable allowance in the amount of the *pari passu* value ascribed to the alleged loan given by Sia to Dynasty. Lee argues that the Judge erred in over-emphasising the uncertainty and impracticality involved in determining an appropriate value to be attributed to the alleged loan. Dynasty argues that Sia's claim is uncertain because he has not filed a claim in liquidation and his entitlement is uncertain because payments which rank prior remain unascertained. In addition, it argues that Sia's alleged loan cannot be used to set off any equitable compensation payable by Sia/Lee in view of s 150 of the BVI Insolvency Act.

22 The fifth and final issue concerns the amount of costs to which Lee or Dynasty should be entitled for the assessment hearing. Lee argues that he should be awarded his costs and disbursements for the assessment hearing because Dynasty obtained a sum in substance less than Lee's offer to settle ("OTS"), which was a genuine attempt at compromise and which in substance complied with O 22A r 10 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"), and because the main issue was the valuation issue and it was decided in Lee's favour. Dynasty argues that the Judge's decision to award costs in its favour was correct (see above at [16(e)]). First, Lee's OTS breached O 22A r 10 and the costs consequences under O 22A r 9 therefore did not apply; secondly, the Judge found for Dynasty on the other main issues; and, thirdly, having regard to the litigation as a whole, costs should follow the event.

Our Decision

Issue 1—Joint and Several Liability for the Commerzbank pledge

23 This issue raises two sub-issues, namely, whether the Judge was precluded from re-opening the issue on joint and several liability and, if not, whether Lee and Sia should be made jointly and severally liable for the Commerzbank pledge.

Issue 1.1—Was the Judge precluded from deciding on joint and several liability?

24 Dynasty argues that the Court of Appeal had effectively found Sia and Lee jointly and severally liable in the *Judgment (Liability) (CA)* at [30], [48] and [71]. Lee argues to the contrary.

25 In our view, no issue estoppel can arise from the *Judgment (Liability) (CA)*. We reproduce the relevant passages below:

> 30 … The fact is that Sia, and in relation to the first pledge, Lee, had caused Dynasty to place the shares with the banks to secure loans and advances to Sia and his associates. If Sia and Lee were contending that the amounts of such loans were so small that there was ample residual value in the pledged shares, it was incumbent on them to prove this. This, they did not do.

> …
>
> 48 … For the same reasons that Sia was liable for a breach of fiduciary duties, we are of the view that Lee too breached his fiduciary duties in signing the first pledge.
>
> …
>
> 71 For the foregoing reasons, we find that Sia and Lee had breached their fiduciary duties owed as directors of Dynasty. However, Lee's liability for breach only extends to the first pledge because there was no evidence that he knew of the other pledges. …

26 In our opinion, these passages, taken at face value, can only mean that Lee and Sia had breached their fiduciary duties in relation to the Commerzbank pledge. There is no basis to read these passages to mean that the court had held that Lee and Sia were *jointly and severally* liable to Dynasty for their breach. First, the Judge, in the *Judgment (Liability) (HC)*, did not make any ruling as to the nature of Lee's liability to Dynasty and, in the absence of express language, the *Judgment (Liability) (CA)* should not be interpreted as broadly as Dynasty contends. Secondly, as a matter of logic, it is not inconsistent with these passages to posit that Lee is severally liable to Dynasty in a proportion to be determined at the assessment hearing. Thirdly, where two persons are liable for a wrong that was committed and the trial is bifurcated, the question of whether liability between them should be several, or joint and several, could be raised at the assessment stage even though it is usually determined at the liability stage.

27 In the circumstances, we take the view that the Judge was not precluded from ruling on this issue and, accordingly, turn to the next sub-issue: whether the Judge was correct in holding Lee and Sia jointly and severally liable for the Commerzbank pledge.

Issue 1.2—If not, should Lee and Sia be jointly and severally liable for the Commerzbank pledge?

28 Lee argues that he should only have been severally liable, given his more limited role. In particular, he says that joint and several liability is not mandatory under BVI law and that he did not act in concert with Sia. He argues that several liability would be fair and just. Dynasty argues, however, that the Judge was right to hold Lee jointly and severally liable. In particular, Lee had acted in concert with Sia and Lee's "fairness and justice" argument is neither fair nor just.

29 It seems to us that both parties agree (on a broad level) that joint liability, while not mandatory for every breach of fiduciary duty, remains the starting point, and that it is possible in principle to depart from it by holding the fiduciaries severally liable instead. Such a starting point was stated by Pearson J in *Re Carriage* at 331, a statement which the Judge at [25] of the *Judgment (Assessment)* took to mean that liability would be joint and several if the directors acted in concert or jointly participated in the act leading to the breach of fiduciary duty. We reproduce Pearson J's statement as follows:

> The other question is this: there were four other directors who accepted in the same way, and on the same day, and at the same time, and all in the presence of each other and of General *Roberts,* a transfer to each of them of twenty shares in the same way that General *Roberts* did, and unfortunately those gentlemen have never paid for those shares. That they are liable to pay for them is beyond dispute. **The question is whether or not General *Roberts* is liable also with them, whether they are all jointly and severally liable, or whether each director is only liable to pay in respect of his own shares. I have, with regret and after consideration, come to the conclusion that they are jointly and severally liable**, I say with regret as regards General *Roberts,* because I am satisfied, from the whole statement of the case, that **General *Roberts* did not intend to do anything that was wrong, still less anything that was fraudulent. I am satisfied that he intended to act as a man**

> **of honour in the transaction, and I regret, therefore, being obliged to come to the conclusion that all the directors are jointly and severally liable for what is due in respect of those shares**, and it was for that reason that I called attention to the article in the agreement which shews most distinctly that these shares were taken as cash. They were taken in part payment of the £7500, which was the sum that was to be paid. [emphasis added in bold]

30 Lee argues that the position of joint and several liability could be departed from. Lee's expert, Mr Prudhoe, gave evidence that if the directors were not acting in concert, it was "highly possible" that the BVI court would differentiate between a more culpable director and a less culpable one, and that it "would be possible" for the court to apportion liability on a "sliding scale" based on "the extent to which one director caused the problem as opposed to the other". Dynasty appears to concede the same—its response is only that Lee must distinguish the present case from those in which joint and several liability was ordered.

31 That said, we make three more observations about Lee's arguments.

32 First, we reject Lee's attempt to restrict the situations in which joint and several liability would be ordered when he says that it applied *only if* the directors were acting "in concert". Very simply, and unfortunately, the passage in *Re Carriage* is not phrased so restrictively.

33 Secondly, we also reject Lee's attempt to extend the situations where several liability is ordered by analogy to awards for contribution on a several basis in cases of fraudulent or wrongful trading under ss 255 and 256 of the BVI Insolvency Act and ss 213 and 214 of the UK Insolvency Act 1986 (c 45). Dynasty would be prejudiced as this was not raised below and Dynasty could neither lead evidence from its expert nor cross-examine Lee's expert. In any event, the analogy is inappropriate since the issue at hand concerns

directors' liability in equity for breach of fiduciary duty, while the provisions concern statutory liability of any person who was knowingly party to fraudulent/wrongful trading. We note also that those statutory provisions presuppose a starting point of several liability whereas the starting point in the present case is joint and several liability.

34 Thirdly, Lee's arguments that equitable remedies are flexible in nature and, in particular, that the right of contribution between participants in a joint breach is founded in similar equitable doctrines do not, in our view, have much force or traction. The cases Lee relies on for the latter proposition do not assist much. First, his reference to *Ramskill v Edwards* [1881] 31 Ch 100 is unhelpful because that decision pertained to the liability of a director defendant towards a co-director plaintiff (rather than the company). Next, the cases of *Dubai Aluminium Co Ltd v Salaam and others* [2003] 2 AC 366 and *Pulvers (A Firm) v Chan* [2007] EWHC 2406 concerned *disgorgement of gains* arising from *secondary liability* for dishonest assistance and/or knowing receipt whereas the present case concerns *equitable compensation for losses* arising from *primary liability* for breach of fiduciary duty. Finally, his reference to *Re-Source America International Ltd v Platt Site Services Ltd and another, Barkin Construction Ltd* [2004] EWCA Civ 665 is also irrelevant since it concerns negligence at common law.

35 We now turn to the facts of the present case. Lee argues that he did not act "in concert" with Sia, unlike the directors in *Re Carriage*, *Bishopsgate Investment Management Ltd v Maxwell* [1993] BCC 120 ("*Bishopsgate*") and *Gluckstein v Barnes (Official Receiver and Official Liquidator of Olympia, Limited)* [1900] AC 240 ("*Gluckstein*"). Specifically, Lee did not conceive of the Commerzbank pledge with Sia, was not privy to Sia's basis for executing the Commerzbank pledge, and gained no benefit from signing the pledge. In

fact, Dynasty was Sia's personal investment vehicle and Sia was its moving force. Such facts are wholly distinct from the above cases:

(a) In *Re Carriage*, each of the directors in question had jointly approved the allotment of shares in the company for no consideration, and each of those directors had received 20 shares.

(b) In *Bishopsgate*, one director had failed to take steps to prevent a co-director (his brother) from dissipating assets of a pension scheme over which the company was trustee. The assets were dissipated and transferred across a number of transactions to other companies belonging to the director's family, of which both were also directors.

(c) In *Gluckstein*, the directors sold to the company a property they owned, for a higher price than they had paid, to obtain a secret profit to be shared among them.

Lee further argues that several liability would also be fairer because Sia had absconded and was absent, and an order for joint and several liability would in effect be imposing the entire burden for the loss from the Commerzbank pledge on Lee.

36 In our view, Lee's arguments should be rejected largely for the reasons that Dynasty has pointed out.

37 First, Lee's expert, Mr Prudhoe, effectively conceded that there was no real distinction between the present case and *Re Carriage*; he accepted that where a breach of fiduciary duty was effected by two individual directors signing a document, both would be jointly and severally liable.

38 Secondly, Lee has not shown any principle under BVI law that the "conceiver" of the breach should be more culpable. In principle, the question of who conceived of the breach is distinct from the question of whether the parties ultimately acted in concert in effecting the breach. In fact, the passage in *Re Carriage* cited at [29] above suggests that even a director who acted honourably would be jointly and severally liable. Therefore, even if we were to assess the relative culpability of Lee and Sia, we find it difficult to say that they were of such disparity as to displace the starting position of joint and several liability. That Lee was not privy to Sia's basis for the Commerzbank pledge was precisely the point—he should have made the necessary inquiries but failed to do so. In fact, it seems to us that Lee himself was also found to have acted less than honourably (see *Judgment (Liability) (CA)* at [44]–[49] and [55]–[57]). This is in sharp contrast to the factual matrix in *Re Carriage* where even though one of the directors (*ie*, General Roberts) was found to have acted honourably, he was still held to be jointly and severally liable with the other directors.

39 Thirdly, it does not lie in Lee's mouth to argue that he did not receive direct benefits. Like *Bishopsgate* (a case on which Lee relies), where the benefit was one that went to a company owned by the errant director's family, Lee was accorded subtle (but no less significant) benefits by doing Sia's bidding. In the event, he became CDC's executive chairman.

40 Finally, Lee's point that Sia was the driving force behind Dynasty and that Dynasty was Sia's personal investment vehicle is, in our view, neither here nor there. We are also not moved that the absconding of a director should trigger the exercise of the court's discretion to order several liability instead of joint and several liability. Indeed, quite the opposite should follow—why should the burden of pursuing an absconding director be placed on the victim

when the culpable co-director, who had the means of preventing the wrong occurring, went along in participating in the wrongdoing?

41 In the premises, we take the view that the Judge was correct in holding Lee and Sia to be jointly and severally liable for the losses flowing from the Commerzbank pledge.

Issue 2—Causation

42 We note that this issue is moot because Lee accepts that causation is satisfied. As such, we need not say anything more about it.

Issue 3—Equitable compensation to be awarded to Dynasty

Issue 3.1—Valuation of the shares

43 Dynasty argues that the date of valuation should be the date on which the shares would have been sold had there been no breach of fiduciary duty—23 April 1996, the date of the pledge. The Judge's approach of valuing the shares as at April 2001 would be to quantify Dynasty's loss by reference to further hypothetical breaches of fiduciary duty.

44 The applicable authorities seem to be agreed upon; what the parties differ on is the precise principle encapsulated in these authorities and its application to the facts. The test for equitable compensation is set out in *Target Holdings Ltd v Redferns* [1996] 1 AC 421, where Lord Browne-Wilkinson stated at 437D–437E:

> … the fact that there is an accrued cause of action as soon as the breach is committed does not in my judgment mean that the quantum of the compensation payable is ultimately fixed as at the date when the breach occurred. The quantum is fixed at the date of judgment at which date, according to the circumstances then pertaining, the compensation is assessed

> at the figure then necessary to put the trust estate or the beneficiary back into the position it would have been in had there been no breach. **I can see no justification for 'stopping the clock' immediately in some cases but not in others: to do so may, as in this case, lead to compensating the trust estate or the beneficiary for a loss which, on the facts known at trial, it has never suffered**. [emphasis added]

Dynasty also relies on a passage in *Snell's Equity* (Sweet & Maxwell, 33rd Ed, 2015) at para 7-059 which Lee appears to accept:

> The burden of proving that the breach of fiduciary duty caused the loss for which equitable compensation is claimed rests with the principal. **The principal (or beneficiary) bears the primary onus of showing that "but for the breach, the beneficiary would not have acted in the way which has caused his loss". If that onus is met, the court may draw inferences (but cannot merely speculate) as to <u>what would have happened if the fiduciary had performed his duty properly</u>, and in the absence of evidence to justify such inferences the beneficiary is entitled to be placed in the position he was in before the breach occurred, unless the fiduciary (on whom the onus will lie) is able to show what the principal (or beneficiary) would have done if there had been no breach of fiduciary duty.**
>
> …
>
> In English cases, where the onus of proof has fallen on the claimant, **claims have generally failed** not because the claimant *failed* to show that he would have acted differently, but **because it was *clear* from the evidence that he would not have acted differently**.
>
> [emphasis in original in italics; emphasis added in bold and bold underline]

45 The relevant date is that on which the shares *would* have been sold had there been no breach of fiduciary duty. In undertaking this exercise, the court need not "stop the clock" if it has evidence to justify an inference as to what *would* have been done. In coming to such inferences, the court must have in mind the principle that the principal is fundamentally entitled to a fiduciary's performance of his duties. In that sense, the court may disregard what *would*

have been done if it amounts to another breach of fiduciary duty and instead put the principal back in a position before the breach occurred.

46 Dynasty (rightly, in our view) accepts that it *would* have held onto the shares had it not been pledged on 23 April 1996. What it argues is that the shares *should* have been sold on 23 April 1996 to repay the debts owed to the vendors. To hold onto the shares to bolster Sia's bid for control of CDC would, it says, be to disregard the vendor's interests *qua* creditor and, accordingly, amount to a breach of fiduciary duty.

47 In our view, the flaw in Dynasty's argument lies in one of its central premises, namely, that it would have been a breach of fiduciary duty to cause Dynasty to hold onto the shares to support Sia's bid for control of CDC. First, there was no finding by the court that such conduct would have been a breach. In fact, this court's comment in the *Judgment (Liability) (CA)* at [40] that the "position might well have been different if Dynasty had pledged the Shares as security for loans to *itself*" shows that it may not have been a breach of fiduciary duty to retain the shares. Secondly, as a matter of principle, we take the view that it was within the scope of business judgment to have held onto the shares. It could not be said that no reasonable businessman would have held onto the shares in these circumstances.

48 Accordingly, we cannot agree with Dynasty's contention that the shares should be valued as at 23 April 1996.

49 Given our view that the shares should be valued as at April 2001, the issue of valuation does not arise. As we noted above, Dynasty did not put forward any contending valuation through its expert but instead accepted the valuation of Lee's expert as reasonable.

Issue 3.2—Pre-judgment interest

50 Given our view that the shares should be valued as at April 2001, pre-judgment interest (which accrued before 2001) does not arise. Accordingly there is no basis for it being claimable. Indeed, Dynasty's counsel conceded as much in oral arguments before us.

Issue 3.3—Post-judgment pre-liquidation interest

51 The parties concede that post-judgment pre-liquidation interest is claimable at least in part. However, the parties dispute the *duration* for which such interest is claimable, and the *rate* at which it is to be awarded.

Issue 3.3.1—What is the rate to be applied?

52 We reproduce the relevant parts of the BVI Insolvency Act:

> 153. …
>
> (2) If it was agreed between the debtor and a creditor that the debt on which the creditor's claim is based would bear interest, the claim may include interest, at the agreed rate, up to the relevant time.
>
> (3) A claim made by a creditor other than one referred to in subsection (2) may include interest up to the relevant time if
>
> (a) the debt on which the claim is based is due by virtue of a written instrument and was payable at a certain time before the relevant time; or
>
> (b) if, before the relevant time, the creditor made written demand on the debtor and the demand stipulated that interest would be payable on the debt from the date of the demand until payment of the debt.
>
> (4) The amount of interest that may be included in a claim under this section is,
>
> (a) in the case of a debt referred to in subsection (3)(a), interest at the court rate for the period

> from the date that the debt was payable to the relevant time; and
>
> (b) in the case of a debt referred to in subsection (3)(b), interest at the court rate for the period from the date of the written demand to the relevant time.

53 Dynasty argues that the rate should be the HK post-judgment rate (which fluctuated between 8.00% and 12.08% per annum) because s 153(2) of the BVI Insolvency Act applies. In particular, its expert, Mr Folpp, makes the point that an agreement referred to in s 153(2) must be read to include a judgment on a debt by a court of competent jurisdiction and, as a corollary, at the rate prescribed by that court. If it were otherwise, he says that there would be the odd and inequitable result that a lender who commences insolvency proceedings based on a debt is entitled to any rate agreed therein, but a lender who commences insolvency proceedings based on a judgment on that debt is subject to a different rate. However, Lee argues that the Judge applied the correct rate, which was the BVI rate of 5% per annum, because s 153(3)(a) of the BVI Insolvency Act applies by virtue of the fact that the HK Judgment was a "written instrument" in Mr Prudhoe's view.

54 In our view, Dynasty's arguments on this point must fail. First, Mr Folpp's scenario is hypothetical and can be distinguished on the simple basis that the debts here (*ie*, arising from the sale and purchase agreements) do *not* contain any agreed rate of interest. After all, Mr Folpp conceded in cross-examination that the directors would not be liable to pay more interest to Dynasty than Dynasty would be liable to pay its creditors in liquidation. Secondly, we do not think the result is as odd as Mr Folpp made it out to be. Ultimately, a debt and a judgment on a debt are two different instruments with different characteristics and legal consequences. Mr Folpp agrees with Mr Prudhoe's view that any right to interest contained in an underlying document

merges upon the issue of a judgment, but this point works in favour of the position Mr Prudhoe is arguing for, *ie*, that the rate of interest is that applicable to a judgment rather than a debt. In any event, even if there is a deficiency or loophole in BVI law, it is not the function of this court to remedy it. Thirdly, we also agree with the Judge that Dynasty's argument, if accepted, would lead to a strained interpretation of the word "agreed" in s 153(2); this is a point which Dynasty has not addressed.

55 Accordingly, we take the view that s 153(2) of the BVI Insolvency Act is inapplicable and the Judge rightly applied s 153(3)(a) instead. The rate of interest which follows is therefore the BVI court rate of 5% and not the HK rate.

Issue 3.3.2—How long should interest run for?

56 Dynasty argues that interest should run for six years (*ie*, from 6 April 2001 to 5 April 2007) instead of four because the parties agreed to that. Lee argues that there was no such agreement; the only concession he made was that a maximum of six years' interest was claimable. Instead, Lee says that the Judge was justified in awarding interest for a period of only four years, in the light of the delay of eight years between the Judgment and the commencement of liquidation in the BVI.

57 In our view, Dynasty's appeal on this point has merit and should be allowed.

58 From the documents, it appears to us that the parties had indeed reached an agreement that interest should run for six years. While the agreement is not explicit, it can be inferred from the papers. In our view, such

a limit was obviously based on limitation. . In the agreed list of issues in the Lead Counsel's Statement on Trial Proceedings, one of the issues reads:

> 5. Is the interest rate applicable to the arrears of interest for the period six years from the date of the Hong Kong Judgment dated 6 April 2001 ("**HK Judgment**") (*ie*, from 6 April 2001 to 5 April 2007): (a) the applicable interest rate on judgment debts (per annum) as determined by the Hong Kong Chief Justice from time to time; or (b) the BVI judgment rate of 5% per annum?

We observe that the premise underlying this question is that interest would run for six years from 6 April 2001 to 5 April 2007, and that this question is not phrased conditionally in the sense that there are no "ifs" in the question. Lee should not be allowed to argue otherwise now. He should not be heard to say that he did not agree to the premises of the issue listed there. More pertinently, Lee's closing submissions stated:

> **V. INTEREST**
>
> **A. Pre-liquidation interest capped at 6 years at BVI court rate**
>
> 136. Parties now agree that the period of any pre-liquidation interest upon any equitable compensation which is ordered in Dynasty's favour would be capped at 6 years under section 4 of the BVI Limitation Ordinance 1961.
>
> 137. Where parties differ is as to the rate of interest to be applied.
>
> [emphasis in original]

Our interpretation of this passage is that, in the context in which it was made, Lee was not only agreeing that Dynasty was entitled to claim for interest and that such claim should be limited to, or capped at, six years, but that Dynasty was entitled to claim exactly six years' worth of interest.

59 In this light, the question then becomes whether the Judge was right to have, on her own initiative, overridden the parties' agreement and reduced the pre-liquidation interest claimable by Dynasty against Sia and Lee to less than six years. There is no contrary evidence that the BVI law in this regard is any different from that of Singapore.

60 In our view, the answer is "no". The Judge observed (at [62] of the *Judgment (Assessment)*), on the authority of *D'Oz International Pte Ltd v PSB Corp Pte Ltd and another appeal* [2010] 3 SLR 267 at [25], that the presumption of similarity of laws was subject to one exception, *ie*, that it is unjust or inconvenient to apply the presumption. It would, in our view, be unjust to adjust the duration for which pre-liquidation interest is to run if it is the subject of an agreement freely arrived at by the parties. Moreover, such agreement could be seen as an agreement as to the content of BVI law, *ie*, an agreement as to a fact (as opposed to a statement of law) and the Judge was not at liberty to change what parties had agreed based on her own notion.

61 In these circumstances, the post-judgment pre-liquidation interest should run, as agreed, for six years (*ie*, from 6 April 2001 to 5 April 2007).

Issue 3.4—Post-judgment post-liquidation interest

Issue 3.4.1—Is Dynasty entitled to post-judgment post-liquidation interest?

62 Dynasty argues that it should be entitled to claim post-judgment post-liquidation interest from Sia and Lee independent of whether it is payable to the creditors subsequently, and that the Judge missed the point by holding that Lee and Sia's liability to pay such interest depended on whether there would be a surplus after paying claims in liquidation. Lee argues that post-liquidation

interest is precluded by s 153 of the BVI Insolvency Act. The relevant provisions are as follows:

> 153. (1) Subject to sections 215 and 342, a claim in the liquidation of a company or the bankruptcy of an individual shall not include an amount for interest in respect of a period after the relevant time.
>
> …
>
> 215. (1) Interest is payable on any claim in the liquidation of a company in respect of the period after the commencement of the liquidation in accordance with this section.
>
> (2) Any surplus remaining after the payment of all claims in the liquidation of a company shall, before being applied for any other purpose, be applied in paying interest on those claims in respect of the periods during which they have been unpaid since the commencement of the liquidation.

63 This appears to raise a circuitous conundrum. On the one hand (as Lee argues), Dynasty should not be allowed to claim post-liquidation interest from Lee because that is not a loss that it would suffer — it is *ex hypothesi* insolvent and by virtue of ss 153(1) and 215(2) would not need to pay any post-liquidation interest to its creditors. On the other hand (as Dynasty alluded to), whether Dynasty has to pay such interest to creditors may well depend on whether Lee, by paying such interest, creates a surplus of assets in Dynasty in the first place.

64 In our view, the solution lies in how the issue is framed. To us, the issue is whether Dynasty may claim from Lee the interest that would have accrued on its loss. As Lord Denning explained in *Wallersteiner v Moir (No 2)* [1975] QB 373 at 388 (and referred to by Mr Folpp), "in equity interest is awarded whenever a wrongdoer deprives a company of money which it needs for use in its business". As a matter of principle and common sense, any sum of money would presumably be put to use such that either the same sum would

grow in value each year or that sum would prevent a loss from growing in size. Thus, even if Dynasty is not required to pay post-liquidation interest to its creditors, it has suffered a loss in the nature of the *loss of use of money*. Accordingly, we take the view that Dynasty is entitled to claim from Lee post-liquidation interest.

65 Although Mr Folpp accepted that a claim against Dynasty could not include interest as and from the commencement of Dynasty's liquidation (by virtue of s 153(1)), the more critical part of his opinion was that the entitlement *of Dynasty* to post-liquidation interest would arise *independently* of whether the same will eventually be distributed to Dynasty's creditors.

66 On the other hand, Mr Prudhoe is of the view that s 153(1) of the BVI Insolvency Act precludes the admissibility of any claim for post-liquidation interest. Mr Prudhoe's reasoning is simply that Dynasty cannot claim post-liquidation interest against Lee and Sia because the creditors cannot claim the same against Dynasty in liquidation owing to a lack of surplus in Dynasty. He seems to think that "the BVI legal and equitable principles" dictate that any interest payable by Lee to Dynasty should not exceed the quantum of the claim admissible in Dynasty's liquidation. In our opinion he fails to appreciate the rationale implicit in s 153(1) and s 215(1) and (2) quoted at [62] above. When a company goes under liquidation, ordinarily, it is because it is unable to pay its debts. There are therefore good reasons for differentiating between claims in liquidation *against Dynasty*, and claims *by Dynasty* against its debtors. Rules regarding the former are designed for the effective administration of *pari passu* distribution while rules regarding the latter are designed to enlarge the pool of assets available for distribution. There is no reason why the debtors of a company under liquidation should be accorded special treatment and not have to pay interest on their debts owed to the

company up till the date of payment. What is provided in s 215(2) makes absolute sense—post-liquidation interest due on debts owed by the company to its creditors should only be reckoned after it is established that there is a surplus after the debts owed by the company to its creditors have all been paid. It is not that creditors of the company would never be paid post-liquidation interest. It depends on whether there are surplus funds available. If surplus funds are available distribution of those funds to creditors of the company would similarly be on a *pari passu* basis. To say that Dynasty may not claim post-liquidation interest against Sia and Lee because Dynasty might not pay it out as interest to its creditors is to misunderstand the scheme.

67 In the circumstances, we take the view that Dynasty is entitled to claim post-judgment post-liquidation interest from Sia and Lee. We turn next to the issue of the applicable rate.

Issue 3.4.2—What is the rate to be applied?

68 The issue of the rate to be applied for post-liquidation interest was not dealt with by the Judge below. The applicable provision is s 215(4) of the BVI Insolvency Act:

> 215. …
>
> (4) The rate of interest [on creditors' claims in liquidation] payable under this section is the greater of
>
> (a) the court rate; and
>
> (b) the rate that would be applicable to the claim if a liquidator of the company had not been appointed.

69 Dynasty argues that the rate should be the HK post-judgment interest rate of 8% per annum. Lee, however, argues that the correct rate was the BVI rate of 5% per annum.

70 We found Mr Prudhoe's expert opinion on this matter to be unhelpful. According to Lee, Mr Prudhoe had stated unequivocally in re-examination that the applicable interest rate is the BVI rate of 5% per annum. However, Mr Prudhoe's opinion pertained to post-judgment interest generally, and not post-judgment post-liquidation interest in particular. Also, s 215(4) of the BVI Insolvency Act did not feature anywhere in his analysis. This is an especially serious flaw given his position that the amount Dynasty can claim against Lee and Sia should be pegged against what creditors can claim against Dynasty in liquidation. In fact, Mr Prudhoe even maintained during cross-examination that post-liquidation interest was not claimable against Lee and Sia.

71 Dynasty's expert, Mr Folpp, wrote that the position as to the rate for post-liquidation interest was not entirely clear. However, he argued that the rate was arguably a matter of HK law on the basis that this was the rate applicable (and not merely recoverable) to the HK Judgment prior to Dynasty being placed into liquidation, thus squarely falls within the ambit of s 215(4)(b) of the BVI Act.

72 We find Mr Folpp's position to be in line with s 215(4)(b). It is reasonable to hold that the judgment which Dynasty obtained from the court in HK would carry interest in accordance with HK law. As the HK rate is greater and applying s 215(4), we hold that post-liquidation interest should be based on the HK post-judgment interest rate.

Conclusion on Issue 3

73 We turn now to the computation. We will accordingly make the following adjustments:

(a) The post-judgment pre-liquidation interest should run for six years (*ie*, from 6 April 2001 to 5 April 2007) instead of four years, with the applicable rate to be 5% per annum.

(b) The post-judgment post-liquidation interest should be awarded at the HK post-judgment rate of 8% per annum from 22 December 2009, the date on which liquidators were appointed.

(c) In addition, the Judge at [49] of the *Judgment (Assessment)* seems to have adjusted the third and fourth pledges for the share split (*ie*, she further multiplied the number of shares which had *already* been adjusted). This appears to be an error and has since been confirmed by counsel to be so. Thus, the correct number of shares pledged to KG Investments Asia Limited and Creditanstaslt Bankverein (after the stock split) should be 48,822,000 and 10,702,625 respectively.

74 Our computation of the base value of the shares (*ie*, before interest) is as follows:

No	Institution to which shares pledged	No of shares (post-split)	Value of loss (at HKD0.1092 per share)
1	Commerzbank	60,161,510	6,569,636.89
2	Société Générale (Labuan branch)	28,000,000	3,057,600.00
3	KG Investments Asia Limited	48,822,000	5,331,362.40
4	Creditanstalt Bankverein	10,702,625	1,168,726.65
		Total	**16,127,325.94**

Issue 4—Equitable allowance

75 Evidence was led that Sia had extended a loan of HKD64,459,317.16 to Dynasty, which Dynasty then used to settle a corresponding part of the purchase price of the shares.

76 The fourth issue is whether Lee was entitled to an equitable allowance on a *pari passu* basis in respect of the alleged loan made by Sia to Dynasty. Lee does not dispute that the Judge had the discretion as to whether to apply the rule in *Re VGM Holdings*. The question is therefore whether the Judge had exercised her discretion wrongly. Lee argues that the Judge erred in over-emphasising the uncertainty and impracticality involved in ascribing a *pari passu* value to Lee in respect of the alleged loan. In particular, he says that:

(a) the nature of the advancement of monies (*ie*, whether it was a loan or it was part of Sia's equity in Dynasty) is irrelevant;

(b) the value of the loan was not disputed at the assessment hearing;

(c) the Judge over-emphasised the fact that the debt owed by Dynasty to Sia had not been proved in liquidation since some uncertainty could be tolerated; and

(d) the Judge over-emphasised the impracticality of calculating the costs of liquidation, since Mr Folpp had conceded in cross-examination that it would not be an impossible exercise, and Mr Prudhoe stated in cross-examination that it was unnecessary for the costs of liquidation to be paid off before the rule in *Re VGM Holdings* could apply.

77 In our view, on the facts before us, the rule in *Re VGM Holdings* is not even engaged because Sia never made a claim in the liquidation. We are also inclined to agree with Dynasty that Sia, for whatever reason, will probably never make a claim in the liquidation given his absence in these proceedings. Moreover, there is uncertainty in the payments which are entitled to receive the highest priority, *ie*, costs of liquidation and legal proceedings. More importantly too, as the damages that Dynasty is entitled to claim from Sia and Lee are to be based on the values of the shares in 2001 (as held above at [43]–[48]), and bearing in mind that the values of the CDC shares had drastically fallen since the date of the purchase, there is no way that the liquidation estate will ever have any surplus after paying off its creditors who have filed claims in liquidation. We observe also that even if we were entitled to treat Sia as a creditor of Dynasty (on account of the alleged loan), distributions should not be done to prefer one beneficiary to another's prejudice or cause or risk causing additional costs and expenses falling on some beneficiaries in exoneration of others (*Selangor United Rubber Estates Ltd v Cradock and others (No 4)* [1969] 1 WLR 1773 at 1779). Indeed, Mr Folpp too stated that the rule in *Re VGM Holdings* could be applied only if there was mathematical certainty on the figures.

78 In the circumstances, we take the view that the Judge was correct in not applying the rule in *Re VGM Holdings*.

Issue 5—Costs below

79 This issue essentially concerns the costs of the assessment hearing, given that Lee had on 16 July 2015 made an OTS in the sum of HKD20,514,575.35.

Issue 5.1—Whether Lee's OTS was in compliance with O 22A r 10 of the ROC

80 The first sub-issue that arises is whether the costs consequences under O 22A r 9 of the ROC are triggered. In the present case, this depends on whether there was compliance with O 22A r 10, which provides for additional requirements where joint and several liability is alleged:

> **Joint and several liability (O. 22A, r. 10)**
>
> **10.** Where there are 2 or more defendants, the plaintiff may offer to settle with any defendant and any defendant may offer to settle with the plaintiff, but **where the defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a claim and rights of contribution or indemnity may exist between the defendants**, the cost consequences prescribed by Rule 9 do not apply to an offer to settle unless —
>
> (*a*) in the case of an offer made by the plaintiff, the offer is made to all the defendants, and is an offer to settle the claim against all the defendants; or
>
> (*b*) in the case of an **offer made to the plaintiff** —
>
> (i) the offer is an **offer to settle the plaintiff's claim against all the defendants and to pay the costs of any defendant who does not join in making the offer**; or
>
> (ii) the offer is made by all the defendants and is an offer to settle the claim against all the defendants, and, by the terms of the offer, they are made jointly and severally liable to the plaintiff for the whole of the offer.
>
> [emphasis added]

81 Lee says that his OTS complied in substance with O 22A r 10, in that the settlement sum clearly took into account all outstanding issues, including any costs incurred by Dynasty against Sia, in respect of the Commerzbank pledge. However, we agree with Dynasty that neither requirement in O 22A r 10(*b*)(i) was satisfied—Lee's OTS was only an offer to settle Dynasty's

claim against him (instead of against both him and Sia), and he did not offer to pay Sia's costs. The full contents of the OTS are reproduced below:

> The 2nd Defendant offers to settle Suit No. 256 of 2010/Y (the **"Suit"**) on the following terms:
>
> 1. ***In full and final settlement of all claims, counterclaims and disputes that the Plaintiff and the 2nd Defendant have against each other*** in connection with and/or arising out of the Suit, the 2nd Defendant shall pay to the Plaintiff the sum of HK$20,514,575.35 (**"Settlement Sum"**) within thirty (30) days from the date of acceptance of this offer; and
>
> 2. Should this offer be accepted by the Plaintiff within 14 days from the date of this offer, ***each party shall bear their own costs relating to the Suit***.
>
> 3. Should this offer be accepted by the Plaintiff any time after 14 days from the date of this offer, the Plaintiff shall bear the 2nd Defendant's costs on a standard basis relating to the Suit from the date of this offer to the date of acceptance.
>
> 4. Within five (5) days from the acceptance of this offer, the Plaintiff shall file a Notice of Discontinuance of the Suit against the 2nd Defendant with no order as to costs, and the 2nd Defendant shall consent to the Plaintiff's Notice of Discontinuance.
>
> [emphasis in original in bold; emphasis added in bold italics]

82 In *Denis Matthew Harte v Tan Hun Hoe and Another* [2001] SGHC 19, Chan Seng Onn JC (as he then was) explained the rationale of O 22A r 10 and why compliance had to be strict, and he stated that the costs consequences under O 22A r 9 cannot apply and the court should be slow to mimic the costs consequences when exercising its general discretion:

> 21. The rationale behind Rule 10 (b) is to ensure that a defendant alleged to be jointly or jointly and severally liable with any other defendant does not offer to settle only his part. This is to avoid putting the plaintiff in an embarrassing position having to deal with the balance of his claim against the other defendants jointly or jointly and severally liable, and having at the same time to face the risk of a cost penalty

should he decide not to accept the offer coming from only one of the defendants.

…

28. Since Dr Tan did not offer to settle Mr Hartes claim both against himself and the hospital and neither had he offered to pay the costs of the hospital, Rule 10 b(i) was plainly not satisfied. Neither was b(ii) since the hospital refused to join in making any offer to settle Mr Hartes claim against them. Hence, the punitive cost consequences spelt out in Rule 9 could not visit the plaintiff although the plaintiff had rejected Dr Tans generous offer of $300,000, which far exceeded the damages I had assessed at the conclusion of the trial. Rule 10 **expressly provides** that the cost consequences prescribed by Rule 9 are not to apply to any offer to settle unless the conditions stipulated in b(i) or b(ii) are satisfied. ***Accordingly, the plaintiff was not running the risk of any adverse cost consequences prescribed under Rule 9 when he ignored the offer because there was no offer to settle falling within b(i) or b(ii) which he could properly consider. By extension, the court should similarly be very slow to impose the adverse cost consequences (of a nature similar to Rule 9) under a separate exercise of discretion in the case of the 1st defendants offer to settle, which was not in an acceptable form as prescribed by the Rules because the plaintiff would legitimately be labouring under an expectation that those cost consequences in Rule 9 would not apply as stated by the Rules themselves when he chose to reject the non-conforming offer.***

…

33. I concluded that the terms of the partial offer did not accord with the ***strict requirements*** of Rule 10 (b). Since the Rules stipulate that the usual adverse cost consequences prescribed by Rule 9 are not to apply unless either Rule 10 b(i) or b(ii) is satisfied, it follows then that those serious cost consequences flowing from Rule 9 cannot be imposed as a matter of course under Order 22A. ***An offer that clearly does not conform to the scheme under Rule 9 read with Rule 10 cannot simply be treated as a conforming offer, or equated to one in terms of its consequences.***

[emphasis in original in bold; emphasis added in bold italics]

83 Lee's reliance on *CCM Industrial Pte Ltd v Uniquetech Pte Ltd* [2009] 2 SLR(R) 20 for the proposition that the court retains the jurisdiction to award indemnity costs under O 22A r 9(5) even if O 22A r 9(3) was inapplicable brings it nowhere. This is because r 9(5) is expressed to operate without prejudice to r 9(3). In contrast, O 22A r 10 simply states that the entire r 9 does not operate if no conforming OTS was made.

84 In the circumstances, we take the view that the costs consequences under O 22A r 9 cannot apply.

Issue 5.2—Whether the Judge exercised her general discretion wrongly as to the costs of the assessment hearing

85 The question now becomes whether the Judge exercised her general discretion wrongly in ordering that Lee and Sia were jointly and severally liable to Dynasty for its full disbursements and 50% of Dynasty's costs for the assessment hearing on a standard basis.

86 Lee's main argument is that the main issue was the valuation issue and it was decided in Lee's favour. On the other hand, Dynasty says that the Judge found for Dynasty on the other main issues and, having regard to the litigation as a whole, costs should follow the event.

87 In our view, the principle that "costs follow the event" should apply such that Dynasty is entitled to its costs. It is true that Dynasty succeeded only on a small portion of its original claim against Lee of HKD198,200,732.71 (or, alternatively, HKD157,780,547.51), even considering that Dynasty's appeal is successful on the terms discussed above. However, in the assessment hearing, it prevailed *conceptually* on all issues that had been decided save for the following sub-issues concerning valuation and quantum:

(a) the shares should be valued as in April 2001, rather than 23 April 1996;

(b) pre-judgment interest should not be awarded (and this followed as a natural consequence of the Judge's holding that the shares should be valued as in April 2001); and

(c) the rate of pre-liquidation interest should be the BVI court rate.

88 Even though a large part of the three-day hearing was dedicated to the valuation issue (1.5 days were spent on the valuation experts, and virtually all the remaining time was spent on the foreign law experts who spent half their time addressing the valuation issue), there were other sub-issues concerning valuation (*ie*, post-judgment interest) and other main issues that had to be addressed.

89 In these circumstances, we are unable to say that the Judge was wrong in the way she exercised her discretion in awarding costs for the hearing below.

Conclusion

90 For the above reasons, we dismiss Lee's appeal in CA 223 and allow Dynasty's appeal in CA 208 in part. For convenience, our conclusions are summarised as follows:

(a) The Judge was not precluded from deciding on joint and several liability. She was right in holding Lee and Sia jointly and severally liable for losses flowing from the Commerzbank pledge.

(b) As regards the equitable compensation to be paid:

(i) The Judge correctly valued the shares as at April 2001.

(ii) The Judge was correct in not awarding pre-judgment interest.

(iii) The Judge was correct to hold that the interest rate for post-judgment pre-liquidation interest was 5% per annum. However, she should have awarded six years' worth of interest instead of four.

(iv) The Judge was wrong to hold that Dynasty was entitled to post-judgment post-liquidation interest only if there was a surplus; she should have held that Dynasty was entitled to such interest unconditionally. The interest rate should be the HK post-judgment interest rate of 8% per annum.

(c) The Judge correctly exercised her discretion *not* to apply the rule in *Re VGM Holdings*; accordingly, Lee was not entitled to an equitable allowance on a *pari passu* basis in relation to the alleged loan by Sia to Dynasty.

(d) The Judge was not wrong in exercising her discretion in ordering that Lee and Sia be jointly and severally liable to Dynasty for all the disbursements it had incurred in relation to the assessment and for 50% of Dynasty's costs for the assessment on a standard basis.

91 Based on the table at [73(c)] above, Lee and Sia should be jointly and severally liable for the sum of HKD6,569,636.89 plus post-judgment pre-liquidation *and* post-liquidation interest in respect of the Commerzbank pledge. In addition, Sia should be liable for the sum of HKD9,557,689.05 plus

post-judgment pre-liquidation *and* post-liquidation interest in respect of the other pledges.

92 Parties are requested to make written submissions on costs of the appeal within two weeks from the date of this judgment.

Chao Hick Tin
Judge of Appeal

Steven Chong
Judge

Philip Jeyaretnam SC and Andrea Gan (Rodyk & Davidson LLP) (instructed) and Siraj Omar and Alexander Lee (Premier Law LLC) for the appellant in CA 208/2015 and respondent in CA 223/2015;
Alvin Yeo SC, Joy Tan and Ashvin Thevar (WongPartnership LLP) for the second respondent in CA 208/2015 and appellant in CA 223/2015.