IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 283

Suit No 911 of 2014

Between

(1) Prima Bulkship Pte Ltd (in creditors' voluntary liquidation)

(2) Star Bulkship Pte Ltd (in creditors' voluntary liquidation)

… *Plaintiffs*

And

(1) Lim Say Wan

(2) Beh Thiam Hock

… *Defendants*

JUDGMENT

[Companies] — [Directors] — [Duties]

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v
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27 December 2016 Judgment reserved.

Kannan Ramesh JC:

Introduction

1 This is an action brought by the liquidators of the two plaintiff companies ("the Liquidators"), Prima Bulkship Pte Ltd ("Prima") and Star Bulkship Pte Ltd ("Star") (collectively, "the Companies"), against the defendants, Lim Say Wan ("Lim") and Beh Thiam Hock ("Beh") (collectively, "the Defendant Directors"), for breach of directors' duties. The Liquidators allege that the Companies had each suffered a loss in the sum of, *inter alia*, US$3.4m by reason of such breach, and seek to recover these sums from Lim and Beh respectively.

Background

The parties

2 Prima is a company incorporated in Singapore on 16 December 2009 with an issued and paid-up share capital of S$2. Star is similarly a company incorporated in Singapore on 13 July 2010 with an issued and paid-up share capital of S$2.

3 Lim and Beh were appointed as directors of Prima and Star respectively on 15 July 2010. At the time of their appointment, Lim and Beh were the sole directors on record for Prima and Star respectively.

Events leading up to the Defendant Directors' appointments

4 Between June 2010 and July 2010, Sonic Finance Inc ("Sonic") and Mirage Finance Inc ("Mirage") (collectively, "the Sellers"), both companies incorporated in the Marshall Islands, entered into negotiations with a group of purchasers ("the Purchasers") for the sale and purchase of two vessels, MV Moonray ("the "Moonray"") and MV Sunray ("the "Sunray"") (collectively, "the Vessels"), owned by Mirage and Sonic respectively. The Purchasers comprised three groups of high net-worth individuals, *viz*, the family of one Haji Mazlan, the royal household of Kelantan, Malaysia, and the family of one Halim Bin Mohammad ("Halim"). I note that Halim is a well-known player in shipping circles and there is nothing to suggest that he was anything other than sufficiently well-heeled to consummate the transactions with the Sellers. The Purchasers were represented by, amongst others, Halim, Halim's son, Hisham Halim ("Hisham") and one Panchacharam Ramasamy ("Panchacharam"). The sale and purchase was brokered by Simpson Spence Young, Singapore ("SSY

Singapore”). The Purchasers were represented by Messrs Joseph Tan Jude Benny LLP (“JTJB”).

5 The Purchasers decided that they would use Prima and Star to purchase the Vessels. Prima and Star were special purpose vehicles incorporated for the sole purpose of purchasing and owning the Vessels. As mentioned above at [2], they each had an issued and paid-up capital of S$2 and had no real assets and/or operations. At the material time, the sole shareholder of Prima was RP Capital Sdn Bhd (“RP Capital”) and the sole shareholder of Star was RP Ventures Sdn Bhd (“RP Ventures”). Both RP Capital and RP Ventures are companies incorporated in Malaysia by Halim. The Purchasers were behind both companies.

6 On 13 July 2010, JTJB approached Lim with a view to appointing two “local nominee directors” for Prima and Star. Lim operates Corporate Managers Pte Ltd, a company involved in the business of providing corporate secretarial services including nominee directorships. Lim and Jude Benny, a partner in JTJB, have known each other for a long time and the latter had in the past approached Lim for the purpose of appointment as a nominee director for other ship-owning companies which were involved in transactions that Jude Benny was acting in. As JTJB required two nominee directors, one for each of the Companies, Lim approached Beh, an employee of Lim’s former associate firm, to ask if he was agreeable to be the local nominee director for one of the Companies. Beh agreed. The rate of S$2,000 per annum per company was discussed and agreed. The following day, JTJB emailed Lim to inform him that their client, *ie*, the Purchasers, had agreed to appoint Lim and Beh as the sole nominee directors for Prima and Star respectively. Lim and Beh were appointed on 15 July 2010.

7 Also, Lim and Beh each received a Nominee Director Indemnity Agreement (collectively, the "NDI Agreements") signed by Halim. Clauses 1.3 and 4.2 of the NDI Agreements provide:

> 1.3 In consideration of the payment of the Basic Annual Fee, the Nominee Director shall provide routine services as a Nominee Director of the Company, which are limited to signature of routine notices, approval of the annual audited accounts, the convening of an annual general meeting and the execution of the annual return (if requested). It does not include making inquiries into the audited accounts, preparation of minutes or documents, attending board meetings and/or signing any other papers.
>
> …
>
> 4.2 Both the Principal and Nominee Director acknowledge and agree that the Services are provided in a purely nominee capacity and the *Nominee Director will not* act in any executive capacity or *undertakes any commercial decisions or assume any commercial responsibility*.
>
> [emphasis added]

Entry into Memorandum of Agreements with the Sellers

8 Upon appointment, Lim and Beh each caused a director's resolution in writing to be passed by their respective companies, resolving, *inter alia*, that:

(a) the Companies be authorised to purchase suitable dry bulk vessels to engage in the international carriage of dry bulk commodities;

(b) the Companies be authorised to enter into any Memorandum of Agreement(s) pertaining to the purchase of the vessels; and

(c) the Companies appoint Halim, Hisham and Panchacharam ("the POA Holders") as their attorneys-in-fact, each of them empowered to act alone, in connection with the above transactions.

The director's resolution further provided that:

> … the [POA Holders] or any [POA Holder] above named of this Company be and each of them hereby is authorized, empowered and directed to execute all such instruments and documents, make all such payments and do all such other acts and things as in the opinion of the [POA Holders] or any [POA Holder] so acting may be necessary or appropriate for the purpose of the transaction contemplated in the foregoing resolutions and in carrying out the responsibility of this Company under the foregoing resolutions and the instruments referred to therein, and further
>
> … that the [POA Holders] or any [POA Holder] above named of the Company may act without any specific power of attorney on the authority of a certified copy of these resolutions.

It bears repeating that RP Capital and RP Ventures, the respective Companies' shareholders, were incorporated by Halim, and that Halim and Hisham were directors of RP Capital and RP Ventures (as at 19 July 2010). Thus for all intents and purposes, Lim and Beh appointed the person behind the Companies and their shareholders, their controlling mind, Halim, to negotiate, execute and close out the transactions.

9 On the day of Lim and Beh's appointment as directors of the Companies and two days after they were approached by Jude Benny, *ie*, 15 July 2010, a Memorandum of Agreement was entered into between Sonic and Prima for the purchase of the "Sunray", and a Memorandum of Agreement was entered into between Mirage and Star for the purchase of the "Moonray" (collectively, "the MOAs"). The MOAs were signed by Halim on behalf of Prima and Star. I note that the Liquidators argue that the MOAs were only entered into on 19 July 2010 (despite the MOAs being dated 15 July 2010) because the parties were still negotiating terms after 15 July 2010, but nothing turns on the exact date the MOAs were entered into. The MOAs were in identical terms save for the parties and the vessel in question.

10 Under the MOAs, the purchase price of each Vessel was US$34m. The Companies were also each required to make payment of a deposit of US$3.4m (collectively, "the Deposits") within 48 hours of entry into certain "Tripartite Agreements", under which the Companies were to take over from the respective Sellers liability for the time charters in relation to the Vessels between Korea Line Corporation (the charterers of the Vessels) and the respective Sellers. The Tripartite Agreements were entered into on 27 July 2010 (despite being dated 20 July 2010) and consequently, the Deposits were due on 29 July 2010. The parties also agreed that the Deposits were to be paid into a joint account opened with DNB Bank and would only be released upon the joint instructions of the Companies and the Sellers.

Breach of the MOAs

11 On 28 July 2010, the Companies each opened a bank account with Credit Suisse AG, Singapore (collectively, "the Bank Accounts"). However, the Bank Accounts were never funded and no transactions were made under them.

12 By 29 July 2010, the Companies had yet to pay any part of the Deposits. Halim informed SSY Singapore that he had given instructions for the Deposits to be remitted to the DNB Bank joint account and that the Deposits would be received by 2 August 2016 at the latest. The Sellers agreed to give an extension of time for payment of the Deposits till then.

13 Things, however, took an unexpected and perhaps unfortunate turn. On 31 July 2010, the POA Holders were informed that the "Moonray" had been arrested in New Orleans, the USA and the "Sunray" was at risk of imminent arrest. This led the POA Holders to harbour grave concerns over the purchase of the Vessels. Between 31 July 2010 and 6 August 2010, multiple emails, of

significant intensity in some instances, were exchanged between the POA Holders (either personally or through JTJB), the Sellers (through their solicitors, Reed Smith LLP) and SSY Singapore in relation to the attachment of the "Moonray". It came to light that the "Moonray" was indeed arrested on 26 July 2010, but was subsequently released on 2 August 2010. Nevertheless, the POA Holders were still apprehensive about proceeding with the MOAs. There was negative publicity in the shipping circle about the financial stability of the Coronis family which were behind the Sellers which coupled with the arrest of the "Moonray" formed the basis of the POA Holders apprehension. The POA Holders therefore sought to negotiate with the Sellers to come to an acceptable arrangement to address their concerns. It appears that the negotiations were unsuccessful, and on 6 August 2010, the Sellers sought confirmation from the POA Holders and JTJB that the Deposits would be paid by 9 August 2010. As no confirmation was received, the Sellers' solicitors informed JTJB that the Sellers had cancelled and/or terminated the MOAs in the light of the Companies' breach of condition or repudiatory breach.

14 On 10 August 2010, the Sellers commenced arbitration proceedings in London against the Companies, each claiming, *inter alia*, a sum of US$3.4m being the Deposit due under each respective MOA, together with all interest earned thereon, and in the alternative, damages, interests and costs ("the Arbitrations"). JTJB represented the Companies in the Arbitrations.

First liquidation of the Companies

15 On or about 18 April 2011, the Companies were both placed in creditors' voluntary liquidation (collectively, "the Liquidations") by the appointment of Mr Robert Yam Mow Lam ("Mr Yam") as provisional liquidator. Prior to that, Lim and Beh had signed all the necessary documents

for the voluntary liquidation, including (a) the balance sheet and profit and loss account of Prima and Star (as at 31 December 2010), and (b) the Statement of Affairs (and affidavit verifying the same) of Prima and Star. They had done so with the express authority of RP Capital and RP Ventures. On 12 May 2011, Mr Yam was appointed the liquidator of the Companies. The Companies continued to participate in the Arbitrations despite being in liquidation.

16 On 21 October 2011, the Companies were purportedly dissolved by Mr Yam. As a result, JTJB informed the arbitral tribunal that the Companies had been dissolved pursuant to a creditors' voluntary winding up and that JTJB no longer had the authority to act for the Companies in the Arbitrations.

17 The arbitral tribunal nevertheless proceeded to issue an Award on the preliminary issue in each of the Arbitrations on 21 November 2011. Under the Awards, each of the Companies was liable to the respective Sellers for, *inter alia*, the sum of US$3.4m, being the unpaid Deposit under each MOA, together with interest and costs.

Reversal of the purported dissolutions and appointment of current liquidators

18 On 19 December 2011, the Sellers commenced applications in the High Court by way of Companies Winding Up No 164 of 2011 and Companies Winding Up No 165 of 2011 against Mr Yam and the respective Companies for, amongst other things, a declaration that the purported dissolutions by Mr Yam were void. On 4 May 2012, the High Court made the following orders:

(a) Declaring that the purported dissolution of each of the Companies was void;

(b) Restoring each of the Companies into creditors' voluntary liquidation;

(c) Removing Mr Yam as liquidator of each of the Companies; and

(d) Appointing Mr Tam Chee Cheong and Mr Andrew Grimmett ("Mr Grimmett") of Deloitte & Touche LLP as liquidators of each of the Companies, *ie*, the Liquidators.

19 On 13 December 2013 and 10 January 2014, Mr Grimmett and his solicitors held interviews with the Defendant Directors and their then solicitors. On 21 August 2014, the Liquidators brought the present action against the Defendant Directors.

Parties' arguments

The Liquidators' arguments

20 In the round, the Liquidators allege that the Defendant Directors were derelict in their duties having breached four categories of their duties: (1) duties of care, skill and diligence; (2) duties in relation to delegation and supervision; (3) duties owed when the respective Companies were insolvent or of doubtful solvency; and (4) duties to avoid conflicts of interest, act in good faith in the interests of the respective Companies, and act for proper purposes.

21 First, the Liquidators argue that the Defendant Directors have breached their duties of care, skill and diligence because they had failed to read or become aware of the terms of the respective MOA, which was the sole and/or

main transaction undertaken by each Company. Neither were the Defendant Directors involved in decisions relating to it in any way. They were unaware that the respective Deposits were payable, or that they had not been paid and that the MOAs had been breached. They were further unaware of the Arbitrations. Lastly, they signed management accounts and a Statement of Affairs that omitted any reference to the MOAs.

22 Second, in respect of the Defendant Directors' duties in relation to delegation and supervision, the Liquidators argue that these were breached because the Defendant Directors delegated every function relating to the respective MOAs to the POA Holders, without taking any steps to acquaint themselves of the respective MOAs' terms, financial obligations incurred thereunder or subsequent performance (or lack thereof). They also did not take any steps to monitor or supervise the POA Holders. The Defendant Directors were not entitled to rely on the POA Holders in this manner, without more.

23 Third, the Liquidators argue that at the material time, they were insolvent or of doubtful solvency. As a result, the Defendant Directors owed a duty to take into account the best interests of creditors when making decisions for the respective Companies. This duty was breached because the Defendant Directors allowed or caused the Companies to enter into US$34m transactions *ie* the purchase of the Vessels, with a Deposit of US$3.4m falling due shortly, at a time when each Company had no revenue or assets and a paid-up capital of S$2 only. The Defendant Directors further did not obtain (or attempt to obtain) any promise, representation or express indication that there would be funding for the transactions, and put in place no safeguard for funding. They had left it entirely to the respective shareholders of each Company on whether, how, and when to secure funding for the liabilities under the respective MOAs.

24 Fourth, the Defendant Directors had breached their duties to avoid conflicts of interest, act in good faith in the interests of the respective Companies, and act for proper purposes because they had left every substantive decision to the POA Holders without exercising their own independent consideration of the Companies' interests.

25 Lastly, the Liquidators argue that the above breaches of duties caused the Companies to suffer the following loss and damages:

(a) US$3.4m being the unpaid Deposit for the respective MOAs plus interest;

(b) £4,650 being the arbitral tribunal's costs of the respective Awards plus interest; and

(c) S$44,347.91 in the case of Prima and S$36,690.39 in the case of Star, being the initial operational costs and expenses incurred by the respective Companies. These amounts were initially paid for by RP Capital and RP Ventures by way of shareholder's loans, but upon the liquidation of the Companies, RP Capital and RP Ventures filed proofs of debts against the Companies in respect of these sums.

Lim's arguments

26 Lim does not dispute that he owed a duty of care, skill and diligence to Prima. He argues, however, that the extent of that duty and/or the standard of care he owed depends on the circumstances of the case, and on the present facts, Lim had not breached his duty of care and diligence. He further claims that he did not hold himself out to have any special skill in respect of Prima's business and consequently did not breach his duty of skill either.

27 Lim further argues that he had no duty to take into account the interests of creditors because Prima was not insolvent or of doubtful solvency when it entered into the MOA. In any event, the duty a director owes to creditors when a company is insolvent or of doubtful solvency extends only to ensuring that the company's assets are not dissipated or exploited for their own (or others') benefit to the prejudice of the creditors interests. Prima had no assets at the material time and there was nothing to dissipate, and accordingly, any duty owed to creditors was not breached. Furthermore, the Sellers were not existing creditors at the time of the signing of the MOA and their interests should not be taken into account.

28 Lim also submits that the delegation of responsibilities in respect of the sale and purchase of the "Sunray" to the POA Holders was reasonable because the matter should be handled by professionals in the shipping industry. Lim was of the view that it was in the best interests of Prima for the POA Holders to be appointed to deal with the purchase and this could not amount to a breach of his duty to act in the best interests of Prima. Lim further points out that the Liquidators do not take issue with the terms of the MOAs or how the POA Holders had handled the sale and purchase.

29 In any event, Lim submits that none of the alleged breaches caused Prima any loss, much less the loss Prima is presently claiming. He also raises two separate defences in the event the court finds that he did breach any of his director's duties. The first is that the NDI Agreement amounted to an informal shareholder ratification of any of Lim's actions and/or omissions which allegedly constituted breaches of his director's duties. The second is that the court should excuse any alleged breach of duty pursuant to s 391 of the Companies Act (Cap 50, 2006 Rev Ed) as Lim had acted honestly and reasonably at all times.

Beh's arguments

30 Like Lim, Beh argues that Star was not insolvent or of doubtful solvency at the material time and therefore he did not owe any duty to take into account the interests of the creditors. In respect of his duty of care, skill and diligence owed to Star, Beh submits that these duties were attenuated by the sole shareholder of Star, RP Ventures, by virtue of the NDI Agreement. Further, given the circumstances of the case, the only duties of care, skill and diligence Beh owed to Star pertained to ensuring that Star complied with its statutory obligations under the Companies Act. In any event, Beh submits that Star had not proven that it had suffered any losses as a result of any alleged breaches of Beh's duties as a director. Beh also adopts the two defences raised by Lim.

Issues before the court

31 The parties agreed that the following issues were to be decided by the court:

(a) What the duties and/or scope of the duty/duties owed by each of the defendants as director of the respective Companies were, given the circumstances of the case as pleaded.

(b) Whether each of the Defendant Directors breached any of their duties as director to the respective Companies as pleaded.

(c) If each of the Defendant Directors did breach any of their duties as director to the respective Companies, whether such breach(es) caused the respective Companies to suffer the loss and damage alleged by the Companies. Further or alternatively:

(i) Whether each of the Companies are entitled to equitable compensation for the claimed sums for each of the Defendant Directors' alleged breach of fiduciary duties.

(ii) Whether by reason of s 157(3) of the Companies Act, each Defendant Director is liable to the respective Company for any profit made by him or for any damage suffered by the company as a result of the alleged breach of director's duties owed under s 157 of the Companies Act.

(d) If each of the Defendant Directors did breach any of their duties as director to the respective Companies, whether the Defendant Directors have a defence to the present claims:

(i) Whether the sole shareholder of the respective Companies can and/or did prospectively ratify such breach(es).

(ii) Whether such breach(es) should be excused pursuant to s 391 of the Companies Act.

(iii) Whether the POA Holders acted reasonably in the circumstances to further and/or to protect the interest of the Companies and no loss if any was caused by the alleged breach(es).

(e) Whether Lim was a shadow director of Star.

Decision

32 In order for the Liquidators to succeed, it is incumbent upon them to show that the Defendant Directors had breached their respective directors' duties, *and as a result, caused* the loss to the Companies that the Liquidators

are presently claiming for. Before delving into the analysis, I would point out that the Defendant Directors do not dispute the following facts:

(a) In respect of the entry into the MOAs:

(i) Each MOA was the sole and/or main transaction undertaken by Star and Prima;

(ii) The Defendant Directors each did not review a copy of the respective MOA, and were each unaware of the terms of the respective MOA;

(iii) Save that the respective MOA involved the purchase of dry bulk vessels to engage in the international carriage of dry bulk commodities, the Defendant Directors were each not aware of any further details of the respective MOA;

(iv) The Defendant Directors were each unaware that the respective MOA required the payment of a deposit of US$3.4m falling due within 48 hours of entry into the respective Tripartite Agreement;

(v) The Defendant Directors were each not involved at all in the negotiations leading up to the entry into of the respective MOA, but had instead each left the same entirely to the POA Holders without each Defendant Director supervising, monitoring or controlling the said negotiations;

(vi) The Defendant Directors were each not involved at all in the decision to execute the respective MOA; and

(vii) The decision to execute the MOAs had been made entirely by the POA Holders without each Defendant Director supervising, monitoring or controlling the said decision.

(b) In respect of the funding for the MOAs:

(i) At all material times, Star and Prima each had no revenue and no assets apart from a paid up capital of S$2. They each had no bank account prior to entry into the respective MOA, and they were only able to operate and cover their operational costs through shareholder support via loans;

(ii) Each Defendant Director had left it entirely to the respective shareholders of each Company on whether, how and when to secure funding for the liabilities under the respective MOA; and

(iii) Each Defendant Director had assumed that such funding would be provided or secured by the shareholders of each Company and they did not take active steps to obtain any promise, representation or express indication that the Companies would be provided with the funds.

(c) At the material time, although each Defendant Director had signed a bank account opening form with Credit Suisse AG, Singapore for each Company, they were unaware that the account was actually opened on 28 July 2010, and of the status of and balance in the account.

(d) In respect of monitoring, controlling or seeking updates on the Companies' business after the MOAs:

(i) The Defendant Directors were each unaware of, and/or did not seek or receive any updates or information on the subsequent discussions with the respective Sellers in relation to the MOAs, after the entry into the respective MOAs;

(ii) At all material times, until at least on or after 9 August 2010, the Defendant Directors were each unaware that the Deposit due under the respective MOA had not been paid, and were each unaware that the respective Company had breached the relevant MOA;

(iii) At all material times, until at least on or after 9 August 2010, the Defendant Directors were each unaware of the reason why the respective Deposit had not been paid;

(iv) At all material times, Lim was unaware that the vessel which had been attached in New Orleans on 26 July 2010 was not the "Sunray" (*ie*, the vessel purchased by Prima), but was instead the "Moonray" (*ie*, the vessel purchased by Star); and

(v) At all material times, Beh was unaware of the matters relating to the attachment of the "Moonray".

(e) The Defendant Directors were both unaware of the Arbitrations.

33 I make an observation in respect of the categories of the directors' duties the Liquidators allege the Defendant Directors have breached. While the Liquidators have identified four categories of duties (see [20] above), I am of the view that the "duties in relation to delegation and supervision" are best analysed under the category of "duties of care, skill and diligence". I say this

because a director, where appropriate, is perfectly entitled to delegate the performance of certain tasks to subordinates, professionals or experts he reasonably believes will competently discharge their duties in the company's interests (see *Vita Health Laboratories Pte Ltd and others v Pang Seng Meng* [2004] 4 SLR(R) 162 ("*Vita Health*") at [20]). Of course the reasonableness of the decision to delegate is a matter which goes to whether the director discharged his duty with skill, care and diligence. Putting that aside, if he does so delegate, he must supervise the discharge of the delegated functions. The extent to which he must supervise depends on the facts of each particular case, including the director's role in the management of the company (see *Vita Health* at [21]). If the director fails to adequately supervise, he would then be in breach of his duty of care and diligence. It would therefore be more appropriate to analyse the issue of delegation and supervision under the umbrella of "duties of care, skill and diligence".

Whether the Defendant Directors were expected to ensure that funding was available

34 At this juncture, it is also appropriate for me to deal with a contention raised by the Liquidators which, as the proceedings unfolded, became apparent was the crux of their complaint. The Liquidators' principal quarrel is that MOAs were entered into and executed without the Defendant Directors ensuring, either pre or post-execution, that there would be funds in place to perform the transactions. Indeed, the Liquidators' claim on behalf of the Companies is for, *inter alia*, the sums owed by them to the Sellers under the Awards (US$3.4m and costs), which in turn is premised upon the failure of the Companies to pay the Deposits due under the MOAs. This failure (or breach of the MOAs) arose because there were no funds in place or no arrangement were made to have funds available to perform the MOAs. In his opening

remarks, counsel for the Liquidators, Mr Andrew Chan Chee Yin ("Mr Chan"), confirmed as much:

> COURT: Your client doesn't have a quarrel with the terms of the MOA per se, do they?
>
> MR CHAN: They do not have a quarrel with the terms of the MOAs per se, other than the fact one needs to be alive to the fact these are the obligations.
>
> COURT: I understand that point. But on the terms itself, the terms in the document which was executed, do your clients have a problem with that?
>
> MR CHAN: As the evidence currently stands, as we understand the case, the answer is no. Unless something else emerges, our position is that we do not take issue with the terms of the MOA per se.
>
> COURT: *Your quarrel really is the fact that there was no money available to perform the transaction?*
>
> MR CHAN: *That is at the heart of the matter, your Honour.* In relation to the point which has just been raised, that there was no monies, this is a company, each company had $2 paid-up capital, no revenue, no assets and no bank account prior to the entry of the MOA. Of course, they opened it subsequently and we will go into that.
>
> *Page 9: they left it entirely to the respective shareholders, or the POA holders, how and when to secure funding. The directors had no promise, no representation or express indication or even tried to obtain any such promise, representation or indication that they would be provided with funds. In fact, very tellingly, that is part of the evidence, the directors assume that such funding will be provided. Further, they left it entirely to the respective shareholders, and each director clearly -- what is clear -- placed no safeguards to ensure that they would receive sufficient funds to meet the liabilities.*
>
> In fact, on some of these matters there are various references, they did on various

> occasions say they will not lead positive evidence on matters such as that. There was no promise, no attempt to seek cover.
>
> [emphasis added]

35 I appreciate that this contention of the Liquidators bleeds into the issues of whether there was a breach of directors duties and whether that breach caused the Companies any loss (to put in another way, whether the Defendant Directors could and were reasonably expected to have done something to prevent the Companies' loss). It behoves me, however, to address this contention right at the outset since it appears to go to "heart" of the Liquidators' case. In my view, this contention fails to get off the ground.

36 As can be observed from my exchange with Mr Chan reproduced above at [34], the Liquidators do not take issue with the terms of the MOAs. Neither do they allege that it was wrong for the Companies to have agreed to purchase the Vessels or that the purchase of the Vessels was not *bona fide*. In fact, Mr Grimmett had acknowledged that the Purchasers were likely serious buyers as they had undertaken costly physical inspection of the Vessels and travelled to meet the time charterers. In terms of ensuring there was sufficient funding before entering into the MOAs, there was a reasonable expectation that the Purchasers and/or the shareholders of the Companies, *viz*, RP Ventures and RP Capital, would eventually come up with the monies when performance was due. There was nothing to suggest in the circumstances that were prevalent at the time of the execution of the MOAs that the Purchasers and/or the shareholders of the Companies did not intend to consummate the MOAs or that they did not have sufficient means to perform the same. Indeed, the POA Holders, who on top of acting on behalf of the Companies, were also the representatives of the Purchasers and RP Ventures and RP Capital and were the ones negotiating and executing the MOAs from the beginning. If they

had decided that the MOAs should be entered into by the Companies, it is a matter of reasonable inference that funding would not be an issue and would be available at the appropriate time. I see no reason why the Defendant Directors should have second-guessed that decision given the prevailing circumstances. Halim's evidence on this point was unequivocal:

> COURT: Mr Halim, assuming these two transactions, the two MOAs involving Prima and Star were performed, how would the funds be made available to the companies to enable payments to be made to the sellers?
>
> A. Yes, your Honour. The two companies are SPV companies. *They are representing the royal household.*
>
> COURT: Meaning RP Ventures and RP Capital?
>
> A. Yes, and the families of Haji Mazlan.
>
> COURT: Yes.
>
> A. And my own families, your Honour. *As and when the funding is due, I am very clear and positive, your Honour, that the funding will be made available to meet, number one, the 10 per cent when it falls due. We are very positive on that, your Honour. Even my families alone would be able to come up to pay the 10 per cent.*
>
> COURT: So how would that happen?
>
> A. If the proceeds were to go through, your Honour, because we are coming through -- the Halim Mazmin Group has got no involvement whatsoever, your Honour, I want to stress that, so the three parties will have, initially, when they met in agreement, that my families would take 30 per cent, and the balance 70 per cent would be shared between the royal family and the families of Haji Mazlan and ultra high net worth. So when capital is called, the parties will come in in pro-ration. At that point in time, my families were thinking we would enter the scheme through preference shares.

COURT: So your participation in the funding would be by way of an equity injection?

A. Preference shares.

COURT: And the others would do what?

A. And the others, of course, would be common shares.

COURT: So RP Capital and RP Ventures would be recapitalised?

A. Indeed, your Honour.

COURT: And what happened after that?

A. And that funding would be used to pay the obligation under the terms of the MOA, if I recall US$3.4 million each for those vessels, if the sale is going to go through.

COURT: How would that payment be channelled to the two companies, Prima and Star?

A. The two RP, the royal family and the families of Haji Mazlan would then inject capital into RP, and my family by way of preference shares can remit funding directly to the bank, and then RP Ventures will follow suit.

COURT: The preference shares are to be issued by which corporation?

A. At that point in time we have not decided one company that will represent the preference shares.

COURT: The flow of funds from RP Ventures and RP Capital to Prima and Star would be by way of shareholders' loan or by way of recapitalisation of these two companies?

A. It could be by recapitalisation or part shareholders' loan, they have not decided on that. *But I can assure your Honour that the funding was ever ready.*

[emphasis added]

I should further add that Halim also gave evidence that he had assured the Defendant Directors that they had no need to be concerned over funding. This was not challenged and is significant. It assists in setting the context for the Defendant Directors not insisting on funds being secured prior to the execution of the MOAs. There was no reason for the Defendant Directors to not accept the representation as true given the circumstances.

37 From the Defendant Directors' perspective, they were approached by JTJB to sit as directors on the Companies. As noted earlier, Lim had on previous occasions been approached by JTJB to perform similar roles and he had a long standing relationship with JTJB based on trust. This would have given further comfort and assurance to the Defendant Directors of the *bona fides* of the deal and that it would eventually be fuelled by funds. Furthermore, by the time the Defendant Directors were appointed, *ie*, 15 July 2010, the parties were on the cusp of entering into the MOAs. By this time, the terms of the MOAs were substantially (if not completely) agreed upon and the parties (*ie*, the Sellers and the POA Holders) were ready to enter into them. There is some dispute over whether the MOAs were in fact entered into on 15 July 2010 or 19 July 2010. While the MOAs are dated 15 July 2010 and were sent over from the Sellers to the POA Holders on that date, there appears to have been some discrepancies in the formatting of the MOAs (such as the Addenda and the Sellers' signature being illegible, blank pages between certain sections, the absence of the official numbers for the Vessels and the absence of the Sellers' company seal). The POA Holders thus did not sign the MOAs until these discrepancies were rectified. After some discussion and upon rectification of the discrepancies, the POA Holders faxed signed copies of the MOAs to the Sellers on 19 July 2010. However, the MOAs remained dated 15 July 2010. In my view, it is unnecessary to determine whether the MOAs are to be taken as entered into on 15 July 2010 or 19 July 2010. It suffices for the

present case to take the parties as having effectively entered into the MOAs on 15 July 2010, and all that remained was to iron out certain administrative and clerical discrepancies, which the parties did by 19 July 2010.

38 In these circumstances, it seems to me unreasonable to suggest that the Defendant Directors had a duty to ensure or insist that funds or financing for the purchase be put in place before the MOAs were executed. It must also be remembered that the Defendant Directors had no means independent of the shareholders of raising finances, be it before or after the execution of the MOAs. This is not disputed by the Liquidators. All they could have done pre-execution of the MOAs was to stop the transactions from being executed. Such a step would not have been reasonable in my view given the circumstances and having regard to the fact that the Companies were incorporated for the very purpose of entering into the transactions by the very people who were negotiating the transactions and who were behind them.

39 I would further add that the Sellers did not seem bothered by the financial standing of the Companies or the lack thereof as they entered into the MOAs knowing full well that the Companies were S$2 shell companies. I note Mr Paul Coronis, the representative of the Sellers, has asserted the Sellers were unaware of this, but given his experience in the shipping business, the scale of the transaction, and that information on the share capital of the company being publicly available, I find that hard to believe. Indeed, that the Sellers knew of the Companies' financial situation is evidenced by the fact that the former had requested for a guarantee from the Purchasers. Notwithstanding that this request was denied, the Sellers were content to proceed with the MOAs. It is apparent that the Sellers were heavily reliant on the creditworthiness of the Purchasers, and in particular, Halim (who as noted earlier was well-known in the shipping industry), and the fact that they were

backing the Companies. The Sellers were comfortable that the Purchasers would ensure that the MOAs would be consummated. Indeed, there has been no allegation in these proceedings that the Purchasers did not have the ability to fund the purchase. Neither was there any allegation in the contemporaneous correspondence at the time of entry in the MOAs that the Purchasers could not fund. If this was the understanding that all the relevant parties had at the material time, it serves to underscore my view that it was reasonable for the Defendant Directors to have in similar vein placed the same reliance on the POA Holders and the Purchasers, and therefore had no reason to believe that the Companies would not be armed with the necessary finances when the time for performance of the MOAs came.

40 When I questioned Mr Grimmett on what exactly he expected the Defendant Directors to have done, he appeared to accept that there was *no need* for the Defendant Directors to have ensured that the Companies had a legally binding source of funds; it would suffice if the Defendant Directors saw evidence of funds held somewhere in escrow. I do not see how this is any different from the Defendant Directors reasonably expecting that the Purchasers and/or shareholders of the Companies would step in to fund the purchases when the time for payment came, especially when there was no reason to doubt *both the ability and motivation* of the Purchasers and/or shareholders to fund (see Halim's evidence above at [36]). Mr Grimmett was unable to provide an adequate explanation in this regard:

> COURT: If I understand your evidence correctly, Mr Grimmett, what you're saying is you would expect the defendants to have required confirmed, legally binding obligations to fund from some source --
>
> A. Yes, your Honour.

COURT: -- before authorising the execution of the transactions?

A. Yes, I would expect to see much more detail on the source of funds.

I don't know whether it would have been legally binding, but it would have been I think certainly you would have expected to see facilities, bank facilities, for example, or funds held in escrow if it was cash or equity form that were ready to come in for this transaction.

Again, there are two transactions here, two separate companies, so both collectively $68 million is a lot of money.

COURT: *But if the obligation to fund was not legally binding, for example, if there was evidence of funds being held in escrow but there was no obligation between the company and the funder to put the money into the company, then we are back to square one, are we not?*

A. *It's not as strong evidence, your Honour, yes*, but we are looking at a situation where there was no evidence of funding at all, and a mere promise I don't think would have been sufficient for this level of transaction.

COURT: What if there's reason to believe that the shareholders were of sufficient means?

A. I'm sorry?

COURT: *What if there was reason to believe that the shareholders were of sufficient means to fund the transaction?*

A. Yes -- I think it depends on where the funding was coming from, because again in looking at the chain above, you've got two SPVs, Star being an SPV in Prima, and immediately above that would be another two SPVs in Malaysia. So I think you would want to see that the funding is in place for this particular transaction. Whilst people may be individually or representing a company that's got a large pool of assets, it doesn't mean those assets are

> ready and available to be deployed on a transaction in a short space of time. So I think you're looking for something that is almost like a commitment, like a bank line that had been drawn down for these vessels, or equity that had been set aside ready to be paid for the deposit on these vessels.

[emphasis added]

41 Once the MOAs were entered into, things were already cast in stone as the contractual obligations had already set in. This would include the obligation to pay the Deposits once the "Tripartite Agreement" was entered into. As noted, there were no powers on the part of the Defendant Directors to compel financing from the shareholders and/or Purchasers. Nor did means exist for the Defendant Directors to raise financing independent of the shareholders as the Companies were shell companies. The Liquidators further do not argue that the POA Holders had acted unreasonably or in bad faith in deciding to breach the MOAs. The reasons for non-performance of the MOAs appear *bona fide* given the concerns expressed over the financial standing of the Sellers and the risk of arrest of the vessels, especially given that JTJB had advised the POA Holders that there were grounds for challenging the quantum of the Sellers' claims for the Deposit under the MOAs. Even if there were funds available, the payment of the Deposits would just as likely not have been paid. In my view, there was little the Defendant Directors could have done to have prevented the breach of the MOAs once they had been executed. Mr Grimmett admitted as much under cross examination:

> COURT: Paragraph 18 of the statement of claim, page 24 of the bundle, this pertains to the breaches of the respective MOAs and the defendants' breach of directors' duties with regard to their failure to keep themselves adequately informed, to enquire, supervise, monitor or control all decisions and authority in relation to their respective MOA, so this is after the execution of

the transactions and the non-performance of the same.

A. This is on page 18, your Honour?

COURT: Page 21, paragraph 18 which concerns breaches which pertain to the defendants' failure to keep themselves informed of matters after the execution of the MOA.

A. Yes, your Honour. So I think this is a matter of following up after they -- so you have directors' resolutions being signed on 15 July to authorise entry into an MOA, and the MOA being executed a few days after that period. And, again, there's that kind of following up to make sure everything is on track with the purchase, the deposits will be paid on time, that funding is available for the balance of the 90 per cent consideration.

COURT: *You're not suggesting that the defendants were in a position to procure funding at that stage?*

A. *The defendants being the directors, no.* So it would be more the directors following up with the POA holders who were the parties given the authority to drive the transaction forward.

COURT: *So are you making the case that these alleged breaches on the part of the defendants caused any specific loss to the company?*

A. *Ultimately the breach occurred because the transaction deposits weren't paid and there was no funding available. So this is the chain of events leading up to that breach of the agreements.*

COURT: *But that was already put in motion as a result of the MOA being executed?*

A. *Yes.*

COURT: So these would be events which form part of the factual matrix as regards the defendants' conduct but they wouldn't have directly contributed to the current problems with the plaintiffs, right?

A. No, that's correct, your Honour, yes.

COURT: I'm just going to take you to page 24, paragraph 18(3). The allegation is:

"Further or in the alternative, the Directors each caused, procured, enabled and/or omitted to prevent the breach of the respective MOAs, thereby causing each Company to incur substantial liabilities as described further below."

What is the point that the plaintiffs are making here? What do you say the defendants ought to have done to prevent the breach?

A. Well, the directors should have been in touch with the POA holders to understand how they were going to address the issue and fulfil the contracts.

COURT: *But again you're not suggesting that the defendants themselves could have conducted themselves in a manner that could have prevented the breach of the MOA?*

A. *No, I think it's difficult to conclude that on the action by themselves, your Honour.*

COURT: It's again a failure to keep themselves abreast of what's happening on the ground with regard to the MOA's performance?

A. Yes, the performance, and making sure the transaction is seen through.

[emphasis added]

In the circumstances, it cannot be said that the Defendant Directors had breached their directors' duties and/or caused any loss to the Companies as a result by failing to ensure that sufficient funds were available for the performance of the MOAs either before or after the MOAs were entered into.

42 Having realised that such an argument would be unsustainable, the Liquidators sought to challenge the Defendant Directors on a more

fundamental level. They essentially allege in their closing submissions that the Defendant Directors had breached their duties of care, skill and diligence as they had completely failed to address their minds in any manner to the affairs of the Companies, which at that time comprised only the MOAs. They argue that the Defendant Directors were not sufficiently involved in the MOAs. Not only were they unaware of the terms of the MOAs (save that it pertained to the purchase of dry bulk vessels), they had no participation in any form in the negotiations leading up to the entry into the MOAs and the execution/performance of the MOAs. They were therefore completely uninformed and uninvolved in the affairs of the Companies and breached their duties of care, skill and diligence. I am not clear how these breaches, even if they were established, could be said to be causative of loss. Nonetheless, I turn to these contention now.

Duties of care, skill and diligence

Was there a breach?

43 It is undisputed and indisputable that the Defendant Directors owe a duty of care, skill and diligence to their respective Company. Indeed, s 157(1) of the Companies Act obliges a director to "use reasonable diligence in the discharge of the duties of his office". The law further draws no distinction between the types of duties owed by different categories of directors – nominee directors (as the Defendant Directors describe themselves) owe the same duties to a company as any other director (see *eg*, *W&P Piling Pte Ltd (in liquidation) v Chew Yin What and others* [2007] 4 SLR(R) 218 at [80]).

44 The standard of care and diligence owed by a director, however, is not fixed and is a continuum depending on various factors such as the individual's role in the company, the type of decision being made, and the size and the

business of the company. The standard will not be lowered to accommodate any inadequacies in the individual's knowledge or experience, and will instead be raised if he held himself out to possess or in fact possesses some special knowledge or experience (see *Lim Weng Kee v Public Prosecutor* [2002] 2 SLR(R) 848 at [28]; and *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd* [2014] 3 SLR 329 at [42]). Given the disparate nature of companies and the varying degrees of complexity of their operations, the law does not expect homogeneity in the extent of knowledge and skill of every director.

45 I turn to the circumstances of the present case that are relevant in determining the standard of care and diligence owed by the Defendant Directors. It must be remembered that the Companies are special purpose vehicles, each incorporated for the *specific purpose* of purchasing and owning two Vessels, the "Sunray" and the "Moonray". In fact, Star was only incorporated on 13 July 2010, a few days before the MOAs were entered into. At the material time, the Companies had no assets and no real business or operations, and their *sole* function was to purchase and own, and thereafter, manage the Vessels. As the Companies were incorporated in Singapore, they are statutorily required to appoint a director ordinarily resident in Singapore (the Purchasers were non-Singaporeans and RP Capital and RP Ventures were Malaysian companies). Thus, the Defendant Directors were approached to take up this role at a rate of S$2,000 per annum. This is a common practice in the industry. Such directors typically do not play an active or executive role in the company, and their main function is to ensure that the company complies with the statutory requirements of local resident director. They also do not engage in or shoulder responsibility for commercial decision making, discharging the role of a director more in form than in substance. Hence, the use of the term "nominee" director to describe them.

46 Indeed, it is clear from the NDI Agreements that the role the Defendant Directors were expected to play was a non-executive one and excluded any commercial decision-making and responsibilities (see above at [7]). Each of the Defendant Director was not obliged to undertake "*any commercial decisions or assume any commercial responsibility*". In other words, the Defendant Directors were neither obliged to examine the commerciality of a decision or be responsible for the consequences that might result from the commercial assumptions of the decision even if they were subsequently proven to be wrong. The Liquidators, relying on the Federal Court of Australia decision of *Australian Securities and Investments Commission v Macro Realty Developments Pty Ltd (ACN 159 678 930) and Others* [2016] 111 ACSR 638 ("*Macro Realty*"), argue that this constitutes an impermissible fetter on the Defendant Directors' powers and discretion. In *Macro Realty*, proceedings were brought by the Australian Securities and Investments Commission against the defendants ("Macro") for developing a scheme under which the defendants would procure potential investors to enter into a memorandum of understanding. Under the memorandum of understanding, the investor agreed to become a sole director and shareholder of a company which would be used to acquire property. The investor (as director), however, had no real or effective control, with control residing exclusively with Macro. In return, the investor would be paid a certain sum each week, and upon termination of the agreement, the investor had an option to "effectively own the company and any property it had acquired". The Federal Court of Australia held that the agreement amounted to an impermissible fetter on the director's (investor's) discretion (at [13]–[16]):

> [13] The Investment Proposal required an investor to become a director of a company in respect of which *Macro: (a) was the sole decision maker for all activities of the company; (b) retained control of the company; and (c) remained the sole decision maker for all business associated with the company in*

circumstances where the investor agreed to do all things that Macro required to run the business of the company "as [Macro saw] fit".

[14] The general rule is that directors "must not fetter their powers by contract with or promises to other persons" (*Davidson v Smith* (1989) 15 ACLR 732 at 734 (*Davidson*) per Ipp J). In *Boulting v Association of Cinematograph Television and Allied Technicians* [1963] 2 QB 606; [1963] 1 All ER 716 (cited with approval in *Davidson*), Lord Denning MR (dissenting, but not on this point) explained the rule in the following terms (at QB 626 and 627; All ER 723 and 724):

> It seems to me that no one, who has duties of a fiduciary nature to discharge, can be allowed to enter into an engagement by which he binds himself to disregard those duties or to act inconsistently with them. No stipulation is lawful by which he agrees to carry out his duties in accordance with the instructions of another rather than on his own conscientious judgment … [I]f a director of a company becomes a member of a trade union on the terms that he is to act in the company's affairs on the instructions of the trade union … (rather than according to what he thinks best in the interests of the company), such an agreement of membership is unlawful. It is contrary to public policy that any director should be made to deny his trust and throw over the interests of those whom he is bound to protect … In each one of these cases the reason is simple: it is wrong to induce another to act inconsistently with the duty of fidelity which he has undertaken by contract or trust to perform.

[15] Because the discretionary powers of directors are fiduciary, in the sense that their exercise is required to be in good faith for the benefit of the company as a whole, an agreement may be void if the directors of a company have purported to fetter wholesale their discretions in advance in relation to the general control and management of the company. Moreover, for directors to purport to so fetter themselves would be a breach of their fiduciary duties and their analogous statutory embodiment in s 181(1).

[16] *The terms of the MOU required each investor to establish a company of which he or she was the sole director and to carry out his or her duties as director of the company in accordance with the instructions of Macro.* The investor's general and specific powers and discretions as a director were to be

> fettered in an absolute way upon establishment of the company. …
>
> [emphasis added]

47 *Macro Realty*, however, is readily distinguishable. The director (investor) in *Macro Realty* had agreed to *completely* subordinate his or her duties as a director to the instructions of Macro. In particular, the director was completely denuded of all decision making powers. This was antithetical to the role of a director as a member of the organ of the company, *ie*, the board, that has decision making authority and which exercised governance over its activities. In contrast, the Defendant Directors have merely agreed not to participate in the commercial decisions of the Companies. This does not, in and of itself, amount to an impermissible fetter of the Defendant Directors' discretion. It could well be the case that the Defendant Directors were of the view that it was in the best interests of the Companies that they do not participate in commercial decisions, with that being left to the persons who owned the Companies and who had the relevant industry knowledge, experience and expertise. Although the Defendant Directors were exempted from examining commercial decisions, they were not required to under or directed by any contractual obligation to slavishly follow the instructions of any other person. In fact, cl 4.3 of the NDI Agreement provided that the Defendant Directors "may at any time refrain from doing any act if it is necessary in order to comply with the law". Regardless of the legal effect of the limitation in the NDI Agreements, what is important is that they reflect the nature of the role the Defendant Directors were expected to play, and this in turn has an impact on the standard of care, skill and diligence that is required of them. The NDI Agreements are a reflection of the purpose for which the Defendant Directors were appointed as directors.

48 It is true that generally, a director is expected to acquire and maintain a sufficient knowledge and understanding of the company's business (see *Vita Health* at [21]). He or she is expected to keep himself or herself informed about the activities and business affairs of the company, and maintain familiarity with the financial status of the company (see *Daniels (formerly practising as Deloitte Haskins & Sells) v Anderson* [1995] 37 NSWLR 438 at 500-501). The Defendant Directors do not dispute that they were completely uninvolved in the matters pertaining to the MOAs (see above at [32]). In my view, however, the Defendant Directors have not breached their duties of care, skill and diligence.

49 First, it is important to emphasise the role of the Defendant Directors in the Companies. They were appointed merely to fulfil the statutory requirement that the Companies appoint a local resident director. As mentioned above at [45], this is a practice that is prevalent. Such directors often do not have the relevant skills and/or expertise in the subject matter the company's business pertained to. Their main role is to ensure that the company complies with its statutory obligations and are rarely expected to participate in the commercial decisions of the company. These decisions and the management of the company are typically left to other more qualified persons (usually the parties who incorporated the company and intend to do business through the company). While this does not mean that the Defendant Directors are relieved of their duties of care, skill and diligence, it does impact the extent to which they are expected to be informed of the Companies' affairs.

50 Second, the Defendant Directors had appointed the POA Holders, *viz*, Halim, his son, Hisham, and Panchacharam, to act on behalf of the Companies in respect of the MOAs. As pointed out at [33] above, the Defendant Directors

were perfectly entitled to so delegate. Furthermore, the identities of the POA Holders are not insignificant: (i) Halim and his family are part of the Purchasers of the Vessels; and (ii) Halim, Hisham and Panchacharam were the persons tasked to represent the Purchasers. They were the ones sourcing and negotiating for the purchase of the Vessels long before the Defendant Directors were even appointed as directors, and before they were in turn appointed as attorneys-in-fact of the Companies.

51 Third, Halim and Hisham were the authorised representatives of RP Capital and RP Ventures, which were in turn the sole shareholder of Prima and Star respectively, to give instructions on behalf of the former companies to the latter companies. Halim's oral evidence was as follows:

> COURT: I think the question is were you authorised by RP Capital and RP Ventures, by these two companies to give instructions on their behalf to the two companies in question, Star and Prima?
>
> A: Yes, your Honour, yes.
>
> COURT: You were?
>
> A: Yes.

Indeed, a company search on RP Ventures done on 5 August 2010 reflect Halim and Hisham as directors (along with two others who appear to be related to Halim) and Halim as a shareholder (along with one Mariana Binti Halim). A Form 49 filed by RP Capital (a requirement under the Malaysian Companies Act, 1965) on 19 July 2010 also reflect Halim and Hisham as directors. Halim's evidence in his Affidavit of Evidence in Chief ("AEIC") was that RP Capital and RP Ventures were "two existing shelf companies which [he] had incorporated much earlier in Malaysia … of which [he] was the first director and subscriber/shareholder".

52 In substance, the POA Holders were the representatives of the Purchasers and were the sole shareholders of the Companies (RP Ventures and RP Capital were controlled by Halim). The Companies were specifically incorporated by them to carry out the purchase of the Vessels and enter into the MOAs. In the circumstances, the interests of the Companies and the POA Holders were really one and the same. Furthermore, the POA Holders were veterans in the shipping industry and have significant experience in the business of ship purchasing and owning. Having regard to the role the Defendant Directors were expected to play in the Companies as delineated in the NDI Agreements (*ie*, they were not obliged to undertake commercial decisions), it was entirely reasonable for the Defendant Directors to have left all matters pertaining to the MOAs to the POA Holders. The POA Holders were in the best position to decide these matters, *eg*, what the terms of the MOAs should be, whether the MOAs should be entered into, how funding should be arranged, whether the MOAs should be performed or whether to breach the MOAs. Furthermore, the Companies and the POA Holders were legally advised by JTJB in respect of the MOAs.

53 The Liquidators argue that the Defendant Directors were obliged to supervise and/or monitor the POA Holders. They cite the English High Court decision of *Re London Citylink Ltd and another; Secretary of State for Trade and Industry v London Citylink Ltd and another* [2005] EWHC 2875 (Ch) ("*London Citylink*") as analogous to the present situation. In *London Citylink*, an application to wind up a company known as London Citylink Ltd ("Citylink") was brought by the Secretary of State for Trade and Industry. Citylink was a company operated by one Mr Weigt that provided company incorporation services which cloaked the identity of its beneficial owners. Citylink would incorporate a company at the request of the "beneficial owner", and would issue two shares to another company associated with Mr

Weigt. Mr Weigt would then be appointed as the sole director of the incorporated company and the company would execute a general power of attorney in favour of the "beneficial owner". The Secretary of State for Trade and Industry was of the view that the services provided by Citylink were objectionable as they completely concealed the identity of the persons running the client companies, there is no effective management by the director over the client company, and no proper records in relation to the companies are maintained. Pumfrey J agreed with the Secretary of State. In coming to his decision, he observed as follows (at [37] and [39]):

> 37. It is clear to me that Mr Weigt was, in respect of each of the companies to which I have referred above, in breach of his fundamental duty as a sole director of the companies to know what was going on. Mr Weigt is a director of many hundreds of companies of the kind I have discussed, and it seems to me that their purpose and effect is not in the public interest. Practically speaking, I find it difficult to see how anyone could discharge the duties of a sole director of so many companies where the management has been effectively delegated to someone who must be supervised. ….
>
> …
>
> 39. … The appointment of a new director in place of Mr Weigt does not, it seems to me, in any way cure the objectionable fact that the sole director of the company is not concerned in its day-to-day business and cannot be relied upon to know how that day-to-day business is being conducted. …

54 However, the present case is not one where the beneficial owners of the Companies were concealed. It was known to all the relevant parties that the Purchasers were the parties purchasing the Vessels, and that the Companies were the vehicles that were being employed to perform the transaction. The Companies were not vehicles set up by Lim and Beh to facilitate the concealment of the identity of the Purchasers. In fact, it was the evidence of Lim, Beh and Halim that after the purchase of the Vessels were complete, other directors with experience would be appointed to manage and

operate the Companies and its Vessels. This is crucial. Further, it is incorrect to analogise the Defendant Directors' conduct with Mr Weigt's. In *London Citylink*, Pumfrey J had examined some of the companies which Mr Weigt was sole director. Those companies had real operations and actual revenues and liabilities which Pumfrey J found that Mr Weigt simply had no understanding of (at [27]–[32]). In contrast, at the material time, the Companies had no real operations and/or business. Neither did they have any assets and/or real liabilities (all expenses were paid for by RP Capital and RP Ventures). Apart from the MOAs, there was nothing for the Defendant Directors to "understand" and/or "supervise". Furthermore, Mr Weigt's indemnity under a "Nominee Director Agreement" in respect of his acting as a director of the company was subject to him complying with any "lawful direction or instruction given by the beneficial owner" (at [12] and [17]). Mr Weigt had thus completely subordinated his duties as a director, which as I have found above at [47], the Defendant Directors did not.

55 It is true that the MOAs were the main (and only) transactions undertaken by the Companies, and that the Defendant Directors had left these matters completely at the discretion of the POA Holders without any form of supervision. But as explained above at [52], the POA Holders were in a special position vis-à-vis the Companies and were best positioned to make decisions pertaining to the MOAs. In my view, a reasonable director in the Defendant Directors' position would have similarly relied on the POA Holders, and accordingly, the Defendant Directors' have not breached their duties of care, skill and diligence.

56 It is for the above reasons that the present case is also unlike the Supreme Court of South Australia decision of *Sheahan (as liquidator of SA Service Stations (In Liq)) and another v Verco and another* (2001) 37 ACSR

117 ("*Sheahan*"), another case relied upon by the Liquidators. *Sheahan* involved a company which owned and operated service stations in South Australia. The business did not operate successfully and the company incurred losses. It was owned and operated by its Managing Director, Mr Linke. He sought and obtained finance from two of his acquaintances, Mr Verco and Mr Hodge, in return for shareholdings in the company. Mr Verco and Mr Hodge became non-executive directors of the company because they did not want an active role in management. They did not ask to see the company's financial records, which would have shown the poor financial position of the company and the bank debts. Mr Linke had also misleadingly represented that the company was profitable and trading successfully. Subsequently, the company went into receivership and the liquidators sued Mr Verco and Mr Hodge for losses sustained by the company during the term of their directorships, alleging that they were in breach of their duties of care to the company. The Supreme Court of South Australia agreed with the liquidators because Mr Verco and Mr Hodge took no steps to inform themselves about the affairs of the company and were content to leave the management of it entirely to Mr Linke without having made any relevant enquiries about the company. While the company was not a public company and the only shareholders were the three gentlemen or entities which they controlled, it had large debt, and those lenders were entitled to expect that the company would be managed appropriately and the directors were obliged to do so (at [121]). The situation here is quite different. First, it was reasonable for the Defendant Directors to have left all matters pertaining to the MOAs to the POA Holders. Second, while it is true that the Companies were shelf companies with no revenue or assets, these were not companies that were in financial straits as there was every reason to believe that there was shareholder commitment and ability to fund. These were shelf companies used as special purpose vehicles by

shareholders of means to enter into the acquisition of vessels in an open and transparent manner. Even if the Defendant Directors had kept a watchful eye on the Companies' affairs, they would have found nothing amiss. This is unlike the situation in *Sheahan* where Mr Verco and Mr Hodges' lack of vigilance had made them unaware of the financial woes of the company in question.

Did the breach cause the Companies loss?

57 Even if the Defendant Directors' failure to keep themselves adequately informed of and involved in the matters pertaining to the MOA did amount to a breach of their duties of care, skill and diligence, I am of the view that this did not cause the Companies any loss. I had alluded to this point earlier. Whether a loss may be recovered due to a director's breach of his duties of skill and care is subject to the common law rules of causation, *ie*, the "but for" test, remoteness of damages and foreseeability (see *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 at [105] and [108(a)]).

58 The loss the Liquidators are presently claiming are, amongst others, the sums they owe to the Sellers under the arbitral Awards. This loss arose because the POA Holders (on behalf of the Companies *and* the Purchasers) decided not to follow through with the MOAs due to the concerns they had over the arrest of the "Moonray", thereby breaching the MOAs. While this exposed the Companies to potential liability of US$3.4m (being the Deposits due under the MOAs), the POA Holders were of the view that this was the better *commercial* decision to take, especially given that JTJB had advised them there were grounds for challenging the quantum of the Sellers' claims. I stress again that the Liquidators are not taking issue with the terms of the MOAs or how they were entered into. They are also not alleging that the

purchase of the Vessels was not *bona fide*. Neither are they alleging that the POA Holders had acted unreasonably in deciding to breach the MOAs.

59 There is nothing to suggest that had the Defendant Directors been more involved in the matters pertaining to the MOAs (or even addressed their minds to it), the MOAs would not have been entered into and/or breached. Lim and Beh both gave evidence to the effect that had they supervised every decision taken by the POA Holders, they would not have done anything differently. Indeed, the POA Holders were in substance the Purchasers and the shareholders of the Companies. Even if the Defendant Directors had kept abreast of the situation and opposed entering into the MOAs and/or breaching it, this would likely have been inconsequential. The POA Holders would have likely gone ahead with non-performance of the MOAs, especially given the advice they had received from JTJB that they could contest the quantum the Sellers could claim. The Defendant Directors would then have been removed as directors and replaced with others who would not oppose the decisions of the POA Holders. In the circumstances, it is difficult to see what the Defendant Directors could have said or done that would have prevented the "loss" incurred by the Companies.

60 I further emphasise that the Liquidators do not take issue with how the Arbitrations were conducted. Mr Grimmett testified as follows:

> COURT: Paragraph 26, Mr Grimmett, page 29, the statement of claim, page 32 of the bundle. The allegation is that:
>
> "The [defendants] breached the Directors' duties in that they each failed to adequately or at all, keep informed about enquire into, supervise, monitor and/or control the respective Company's participation in the relevant arbitration."

	Again, what does the case that the liquidators make, and I've looked at the statement of claim. I don't see a specific loss asserted with regard to this particular breach. What is the loss that the liquidators assert the company suffered as a result?
A.	Well, I believe it's connected to the arbitration award for the amount of 3.4 million dollars ultimately, that the particular parties related to the conduct of the arbitration proceedings on behalf of the company. There was a lack of awareness of those proceedings. The directors weren't seeking regular reports from the company on the status of the business the company had tried to enter into, so they were completely unaware of the arbitration proceedings and all of the conduct of those proceedings which is being done on the company's behalf by the power of attorney holders.
COURT:	*But the liquidators are not suggesting that the conduct of the arbitration was improper?*
A.	*Not the conduct of the arbitration, no, your Honour, not the actual conduct itself*, although there is an issue about whether the POA holders had the powers to do this because it wasn't in the specific resolution.
COURT:	*But that aside, the actual conduct of the arbitration itself, is that an issue that the liquidators raised?*
A.	*I don't think the conduct in terms of the way it proceeded.* It was just really the lack of knowledge of the directors on this issue.
COURT:	*So you're not suggesting that the outcome of the arbitration would have been any different if the defendant had discharged their responsibilities in the right way with regard to the arbitration?*
A.	*In regard to the arbitration, no, your Honour, no.*

[emphasis added]

61 The Liquidators therefore have not established that the losses presently claimed were caused by the Defendant Directors' alleged breaches of their duties of care, skill and diligence. I now turn to the next category of duties the Liquidators allege have been breached.

Duties when the Companies are insolvent or of doubtful solvency

62 It is well-established that when a company is insolvent, or even in a parlous financial position, directors have a fiduciary duty to take into account the interests of the company's creditors when making decisions for the company. This fiduciary duty is not an open-ended duty. It principally obliges directors to ensure that the company's assets are not dissipated or exploited to the prejudice of creditors' interests given that an insolvent company is effectively conducting business with creditors' money. In *Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd* [2010] 4 SLR 1089 ("*Progen*"), the Singapore Court of Appeal held (at [48] and [52]):

> 48 … *it is now also settled law that when a company is insolvent, or even in a parlous financial position, directors have a fiduciary duty to take into account the interests of the company's creditors when making decisions for the company. This fiduciary duty requires directors to ensure that the company's assets are not dissipated or exploited for their own benefit to the prejudice of creditors' interests.* In this regard, the purpose of this duty mirrors that of the avoidance provisions in seeking to preserve the company's assets for distribution to the company's creditors through the mechanism of insolvency. The House of Lords in *Winkworth v Edward Baron Development Co Ltd* [1987] 1 All ER 114 (per Lord Templeman) declared at 118:
>
> > [A] company owes a duty to its creditors, present and future. The company is not bound to pay off every debt as soon as it is incurred, and the company is not obliged to avoid all ventures which involve an element of risk, but the company owes a duty to its creditors to keep its property inviolate and available for the repayment of its debts. The conscience of the company,

> as well as its management, is confided to its directors. A duty is owed by the directors to the company and to the creditors of the company to ensure that the affairs of the company are properly administered and that its property is not dissipated or exploited for the benefit of the directors themselves to the prejudice of the creditors. …
>
> …
>
> 52 … the rationale for such a duty is that, when a company is insolvent, the creditors' interests come to the fore as the company is effectively trading and running the company's business with the creditors' money. Because of the limited liability principle, the risks (of trading when the company is insolvent) on shareholders would be minimal as they would at worst lose only what they have already invested in the company in their capacity as shareholders. Unsecured or partially secured creditors on the other hand may never recover any monies due to them. Unlike shareholders who have the most to gain from risky ventures, unsecured creditors, in particular, have everything to lose when illegitimate risks are taken. As such, it is only right that directors ought to be accountable to creditors for the decisions they make when the company is, or perilously close to being, insolvent. …
>
> [emphasis added]

63 The Liquidators argue that the Defendant Directors have breached this duty in two ways:

(a) They allowed or caused the entry of the Companies into the MOAs, with a Deposit of US$3.4m falling due shortly, at a time when each Company had no revenue or assets apart from a paid-up capital of only S$2.

(b) They further did not obtain (or attempt to obtain) any promise, representation or express indication that there would be funding for the transactions, and put in place no safeguard of funding.

This requires first an examination of whether the Companies were insolvent or of doubtful solvency at the material time.

Were the Companies insolvent or of doubtful solvency?

64 When assessing a company's solvency for the purpose of determining whether its directors have breached their fiduciary duties, the Singapore Court of Appeal in *Dynasty Line Ltd (in liquidation) v Sukamto Sia and another and another appeal* [2014] 3 SLR 277 observed that the inquiry requires a broader assessment of the surrounding circumstances of the case. The Court of Appeal held (at [33]–[35]):

> 33 *It is important to approach this inquiry from the perspective that the purpose of determining Dynasty's solvency at the time of the Security Transactions is to establish whether Sia and Lee had breached their fiduciary duties. We are not concerned here with the question of whether Dynasty was technically insolvent or whether it would have been appropriate to liquidate the company.* Therefore, a strict and technical application of the "going concern" test and the "balance sheet" test which are used in the context of a winding up action would be of limited utility in the present circumstances.
>
> 34 *Rather, the key issue before us calls for a broader assessment of the surrounding circumstances of the case.* Under BVI law – and indeed, in Singapore law too – a director of a company is affixed with fiduciary duties. This calls for the consideration of the company's best interests having regard to the position of its shareholders as well as of its creditors. The weight to be accorded to these interests will vary according to the financial health of the company. Where the company is in robust financial health with little, if any, risk to the interests of its creditors a director would be entitled to pay greater heed to what is best for the shareholders. *But where there are mounting concerns over its financial health*, the pendulum will swing towards the creditors. … *this assessment would include a consideration of all claims, debts, liabilities and obligations of a company. The general financial health and solvency of the company is considered in this context in order to ascertain if there was reason to doubt or to be concerned over the financial*

> *viability of the company, especially at the time of the Security Transactions.*
>
> 35 This broader inquiry reflects the shift in focus that we have alluded to. Both BVI law experts were agreed that the interests of creditors would come to the fore when the company is insolvent or likely to be insolvent. In such circumstances, focussing solely on the interests of shareholders would be incorrect. *Moreover, the interests of the creditors are not to be considered in an arid and technical way as if all such considerations are irrelevant or capable of being ignored until and unless the company is found to be technically insolvent. … On the contrary, as long as there are reasons to be concerned that the creditors' interests are or will be at risk because of difficult financial circumstances, the directors ignore those interests at their peril.*
>
> [emphasis added]

65 The Liquidators submit that in the light of the above observations, the Companies were insolvent and/or of doubtful solvency from the date the Defendant Directors were appointed, *ie*, 15 July 2010. Alternatively, the Companies became insolvent or of doubtful solvency from the date the MOAs were entered into, or became so as a result of entering into the MOAs.

66 It is not in dispute that at all material times, the Companies had a total paid up share capital of S$2. Further, the companies had no revenue and no assets apart from the paid up capital. The only source of funds available to the Companies were its shareholders, RP Capital and RP Ventures. Indeed, most of the expenses incurred by the Companies such as the legal fees to JTJB, the vessel inspection fees and the Defendant Directors' fees, were all paid by RP Capital and RP Ventures. I note there were two other expenses, *viz*, the professional fees for a feasibility study on the purchase of the Vessels done by a company known as Ad Value Sdn Bhd and the fees of Mr Yam's company, ACA Management Services Pte Ltd ("ACA Management"), which had yet to be paid by RP Capital and RP Ventures. These companies have filed proofs of

debts against the Companies. RP Capital and RP Ventures have also both filed proofs of debts for the expenses they had paid on behalf of the Companies. The Companies had no ability to pay the Deposits let alone perform the transactions contemplated under the MOAs.

67 For the purposes of determining whether the Defendant Directors have breached their fiduciary duties, I am prepared to find that the Companies were of doubtful solvency at the time the Defendant Directors were appointed. The Companies had no means of meeting any potential liabilities other than the shareholders, *ie*, RP Capital and RP Ventures, intervening to satisfy those liabilities. However, the shareholders had no legal obligation to satisfy the liabilities of the Companies. As alluded to in [59], the expenses of Ad Value Sdn Bhd and ACA Management were never paid. In *Living the Link Pte Ltd (in creditors' voluntary liquidation) and others v Tan Lay Tin Tina and others* [2016] 3 SLR 621, Steven Chong J in considering whether a company which was entirely dependent on the cash flow made available by its shareholder was "cash flow" insolvent, refused to consider the past financial support extended by the shareholder, especially as the shareholder was never obliged to provide this support (at [30]).

68 Thus, it seems fairly evident, that using the conventional tests for insolvency of companies, "cash flow" and "balance sheet", the Companies would be regarded as insolvent in the technical sense. However, as the Court of Appeal warned in *Progen*, that in and of itself does not mean that directors have breached fiduciary duties. The surrounding circumstances are absolutely critical and must be taken into account when examining if fiduciary duties were breached. A milieu of factors become relevant as a result. I turn to these now.

Was there a breach?

69 The real question is whether the Defendant Directors have breached the abovementioned duty by permitting the Companies to enter into the MOAs *given the surrounding circumstances* notwithstanding their doubtful solvency. Doubtful solvency does not impose a straitjacket on business activities; business activity is permissible provided it is not improper. In turn, the duties owed by a director of an insolvent (or nearly insolvent) company to take into account the interests of creditors must be put in perspective. The purpose of this duty mirrors that of the avoidance provisions in seeking to preserve the company's assets for distribution to the company's creditors through the mechanism of insolvency (see *Progen* at [48]). As noted earlier, it is to ensure that the company's assets are not dissipated or exploited to the prejudice of creditors' interests. In my view, the duty does not extend to the form argued by the Liquidators, *viz*, to prevent the entering into a *bona fide* transaction which it is believed, based on reasonable commercial grounds, would benefit the company. To find otherwise would effectively allow personal liability to be visited on directors under the guise of breach of director's duties for trading in an insolvent situation, when such liability is only available for wrongful and/or fraudulent trading under ss 339(3) and 340 of the Companies Act (which the Liquidators have confirmed they are not proceeding on). This would result in the circumvention of the statutory provisions which impose, *inter alia*, a much higher bar of fraud. On this basis alone, this contention of the Liquidators can be dismissed.

70 In any event, when one looks at the surrounding circumstances, there is no basis for the Liquidators to argue that the Defendant Directors had breached their duties to take into account the interests of creditors by allowing the Companies to enter into the MOAs despite their doubtful solvency at the

material time. First, entering into the MOAs to purchase the Vessels was the very purpose the Companies were incorporated for. While this would cause the Companies to incur liability of up to US$34m, inclusive of the US$3.4m Deposit, it is important to be cognisant of the fact that such liability was incurred in the reasonable expectation that the funds would be available to complete the acquisitions. In return, the Companies would receive income generating assets, the Vessels, of significant commercial value. There was absolutely no reason to believe that the execution of the MOAs would place either the Companies or their creditors in any jeopardy. There was every reason to conclude that these transactions would arm the Companies with a positive balance sheet and healthy cash flow. It would be incorrect to examine the Defendant Directors' conduct by focusing only on the impact of the MOAs on the Companies' financial situation at the point of their execution and disregard the benefits that the transaction would accrue to the Companies in the future. This would be a myopic assessment of the transactions in disregard of the surrounding circumstances.

71 Second, the only creditors at the time of the entry into the MOAs were RP Capital and RP Ventures (the liabilities to Ad Value Sdn Bhd and ACA Management were only incurred subsequently). It was clearly in the interests of RP Capital and RP Ventures that the Companies enter into the MOAs. In fact, the POA Holders, who were authorised to give instructions on behalf of RP Capital and RP Ventures, were the ones who procured the Companies' entry into the MOAs. The Sellers' interests *cannot* be taken as a creditor's interest which the Defendant Directors were obliged to take into account at the time of entry into the MOAs. It would be circuitous if the creditor whose interests the Defendant Directors ought to have had regard to is the Sellers' because at the material time, the Sellers were not yet creditors of the

Companies; it was only *by virtue* of entering into the MOAs with the Companies that the Sellers subsequently became creditors.

72 Third, there was a reasonable expectation that funding for the MOAs would be provided by the shareholders and/or Purchasers. While it is true that there was no legal obligation on the part of the shareholders and/or Purchasers to fund the Companies for the purposes of the MOAs, I am of the view that it was not unreasonable for the Defendant Directors to have presumed that such funding would be made available to the Companies if the MOAs were performed. I have already dealt with these points in some detail above at [34]–[41] and will not repeat them here.

73 There is a further inherent fallacy in the Liquidators' argument. In terms of the form of funding, the Liquidators appear to concede that it could have taken the form of loans from shareholders or financial institution loans. It seems strange that the Liquidators would advocate this as permissible conduct notwithstanding the Companies' doubtful solvency and at the same time decry the execution of the MOAs on the same ground. On a proper analysis, notwithstanding the doubtful insolvency of the Companies, the Defendant Directors would have been wholly justified in allowing such loans to be incurred as they were for the purpose of a legitimate commercial transaction entered into in the interest of the companies. This is because the surrounding circumstances would have suggested that it would be proper to do so. For the same reason, the Defendant Directors were wholly justified in permitting the execution of the MOAs notwithstanding the Companies doubtful solvency. The key is the surrounding circumstances that undergirded the *bona fides* and the reasonableness of the conduct.

74 The Liquidators rely on three cases to argue that the Defendant Directors' duty to take into account the interests of the creditors obliged them to either arrange for financing, make inquiries on financing or not proceed without financing. None of these cases, however, assist them. The first is *Re Wait Investment Ltd (In Liquidation*) [1997] 3 NZLR 96 ("*Wait Investment*"), a decision of the High Court of Auckland. In *Wait Investments*, the defendants operated a property development company with a share capital of NZ$100 and no capital and assets. The second defendant, who essentially drove the company, was the subject of other legal proceedings for the recovery of money relating to a previous failed company in the sum of NZ$17m. The company entered into an unconditional sale and purchase agreement for property priced at NZ$1.635m without arranged financing. The company borrowed the deposit of NZ$60,000 from the second defendant's friend. The company was subsequently unable to raise the finance to purchase the property and was eventually placed in liquidation. The liquidators issued proceedings under the wrongful trading provisions of the New Zealand Companies Act 1955 that sought to make the defendants personally liable for the company's debts resulting from its breach of contract. Barker J found the second defendant liable and held (at 103):

> Having seen and heard the witnesses, *I consider that … [the second defendant] expected the company would be able to raise the finance and thus pay this debt when it fell due for payment. However, that finding is not sufficient. I consider they were unduly optimistic and without proper foundation.* I have to consider whether that belief was reasonable on objective grounds. …
>
> In my view, *no reasonable director or manager of this company would have entered into such a large transaction unconditionally without having finance organised.* The prudent director or manager would have entered into the agreement "subject to finance". The company had no assets and no capital; even the deposit was borrowed; there was no firm arrangement for a joint venture. The fact that numerous

> lenders had turned down the loan application shows that finance was not something that could just be assumed as following inexorably. One can imagine that any financier asked to lend $1.5m would inquire about the driving force of the company. *That financier would discover that the de facto borrower was a person operating under an insolvency proposal with massive debts and that the $100 company was required to pay him a salary of $90,000 pa plus bonus.*
>
> [emphasis added]

75 It must first be pointed out that *Wait Investments* did not pertain to a claim for breach of fiduciary duties. It was brought under the statutory wrongful trading provisions which made directors personally liable if he contracted a debt for the company that he did not honestly believe on reasonable grounds that the company would be able to pay. In any event, the case is distinguishable on its facts. At the time of entering into the sale and purchase agreement, the company was in a particularly difficult financial situation. Not only did the company not have any funds, its driver, the second defendant, was himself laden with debt. There was therefore no way the second defendant could have reasonably believed that the company would be able to raise the finances for the purposes of the transaction and it was on that basis that the court found that the second defendant ought not to have entered into the transaction. In contrast, the Defendant Directors believed, and as I have found reasonably, that the Purchasers and/or shareholders of the Companies would fund the purchases of the Vessels under the MOAs when the time for payment came.

76 The next case is the English Court of Appeal decision of *Stocznia Gdanska SA v Latvian Shipping Co and others (No 3)* [2002] All ER (Comm) 768 ("*Stocznia (No 3)*"). The Liquidators allege that this decision is significant because it similarly involved a one-ship company. The passage the Liquidators rely on is at [53], where Rix LJ held:

> … I can well imagine that a stage might come in the life of a company such as Latreefers when its directors might determine that it could not proceed and did not wish to proceed with a project in circumstances where it would have to undertake financial commitments (eg to a parent company, or to a bank with the support of a parent company) which it could not see its way to meeting. …

This passage is, however, completely cited out of context. *Stocznia (No 3)* involved a company, Latreefers, which refused to make payments on certain ship building contracts. Latreefers was funded by its parent company, Latco. An action was brought against Latreefers and Latco by the shipbuilders for breach of contract and under the tort of inducing breach of contract. It is not a case that deals with the duties owed by a director in a one-ship company. The passage quoted above was made in the context of the claimant-shipbuilder's argument that there was an express provision between Latco and a service company, Capco, that the former will fund Latreefers. Rix LJ, however, considered that Latreefers may legitimately decide that it did not want to continue with the project anymore (because it would impose financial commitments to its parent company, Latco) and if so, it would unlikely be a breach of that provision for Latco to stop its funding of Latreefers. Although Rix LJ ultimately upheld the trial judge's finding that Latco had induced Latreefer's breach of contract, he did so on other grounds (at [129]). *Stocznia (No 3)* does not stand for the proposition that the directors owe a duty not to proceed without financing.

77 The last case is the English High Court decision of *Colin Gwyer & Associates Ltd and another v London Wharf (Limehouse) Ltd and others* [2002] EWHC 2748 (Ch) ("*Colin Gwyer*"). *Colin Gwyer* involved a company whose purpose was to hold the head lease of a property which was divided into three flats, held by Colin Gwyer & Associates Ltd ("CGA"), one Mr

Palmer and Eaton Bray Ltd respectively. Each of them held a share in the company. Due to certain breaches of covenants by CGA, the company had brought proceedings against CGA. By a board resolution compromising Mr Palmer and one Mr Howells (the director nominated by CGA), the company resolved to release all legal claims against CGA on the basis that the company would pay its own costs. A derivative action was brought by, *inter alia*, Eaton Bray Ltd on the basis that Mr Palmer and Mr Howells had breached their fiduciary duty by failing to consider the interests of the creditors when passing the resolution to release the claims against CGA. The court found that the company was insolvent at the time the resolution was passed and that Mr Palmer and Mr Howells knew this. The directors were thus in breach of their fiduciary duties. At [84], the court held:

> The test of what is a fiduciary duty … can be seen to apply without difficulty to the present case, at least in so far as Mr Howells is concerned. However well-meaning, he did not show single-minded loyalty to the company, nor did he have regard to the interests of the creditors. Mr Palmer, on the other hand, although motivated by what he considered to be the interests of the company in the sense of the shareholders also failed the latter test in that he had no regard to the interests of the creditors. *He was unable to explain in the witness box how the company would pay the creditors, except that he assumed that the shareholders would eventually have to raise the necessary funds.*
>
> [emphasis added]

78 *Colin Gwyer* is, however, not applicable to the present case. In that case, the directors in question had dissipated an asset of the company, *ie*, the claim against CGA, when the company was insolvent and had many creditors. In that context, it was not sufficient for the director to simply assume that the shareholders would raise the funds to pay off the creditors. In the present case, there was no dissipation of any asset; in fact, the Companies had no assets to dissipate. Furthermore, there were no creditors other than RP Capital and RP

Ventures; the Sellers had yet to become creditors prior to the entry into the MOAs. While the Companies did enter into the MOAs thereby incurring liability, this was in the interests of RP Capital and RP Ventures (see above at [71]).

79 In the circumstances, I find that the Defendant Directors' conduct do not amount to a breach of their duties to take into account the interests of the creditors. Accordingly, there is no need for me to determine if any loss was suffered as a result of the breach of this duty.

Duties to avoid conflicts of interest, act in good faith in the interests of the respective companies and act for proper purposes

80 The last category of duties alleged to have been breached may be disposed of fairly briefly. It is undisputed that a director owes a duty to act in the best interests of the company, and this includes not placing himself in a position where the interests of the company comes into conflict with the interests of another and an obligation to act for the proper purposes of the company. The Liquidators' argument is that the Defendant Directors could not have acted in the best interests of the Companies as they had simply not addressed their minds to what those interests are; they had left every substantive decision to the POA Holders without exercising their own independent consideration for the Companies' interests. In my view, this contention fails.

81 First, the Defendant Directors had not left *every* substantive decision in respect of the Companies to the POA Holders; it was only those in respect of the purchase of the Vessels and the MOAs. Second, while it is true that the purchase of the Vessels was the sole transaction of the Companies, for the reasons stated above (especially at [52]), there were good reasons for the

Defendant Directors to have left those matters entirely to the POA Holders. The Defendant Directors gave evidence that they were of the view that doing so was in the best interests of the Companies. There is further no allegation that the Defendant Directors had acted dishonestly. Accordingly, the Defendant Directors have not breached their duties under this category.

Remaining issues

82 Given my findings above, there is no need for me to deal with the remaining issues, *viz*, whether the Defendant Directors were entitled to raise any of the defences identified at [31(d)] above and whether Lim was a shadow director of Star.

Conclusion

83 In the circumstances, I dismiss the Liquidators' suit. Costs are to be paid by Prima to Lim and by Star to Beh, to be agreed if not taxed.

Kannan Ramesh
Judicial Commissioner

Andrew Chan Chee Yin, Alexander Lawrence Yeo Han Tiong and Ang Ann Liang (Allen & Gledhill LLP) for the Plaintiffs;
Sarbjit Singh and Ho May Kim (Selvam LLC) for the 1st Defendant;
Tan Teng Muan and Loh Li Qin (Mallal & Namazie) for the 2nd Defendant.