IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 1

Suit No 875 of 2010

Between

Nordic International Limited

… *Plaintiff*

And

Morten Innhaug

… *Defendant*

JUDGMENT

[Companies] — [Directors] — [Duties]

TABLE OF CONTENTS

Nordic International Ltd
v
Morten Innhaug

[2017] SGHC 1

High Court — Suit No 875 of 2010
Steven Chong J
24–26 August; 1, 26 September 2016

4 January 2017 Judgment reserved.

Steven Chong J:

Introduction

1 The parties to this action have been embroiled in litigation against each other over the last seven years. The dispute can be traced to a joint venture between two shareholders which went really badly, almost from the word "go". This case is a derivative action brought by one shareholder of the company against a director – the other shareholder – alleging that he breached his fiduciary duties to the company by procuring an "assignment" of a charterparty to a company he substantially owned, on terms enabling him to make a profit. Besides seeking to make the director account for the profit he has made, the company seeks to hold him liable for the loss of charter hire to the company.

However, the aggrieved shareholder has itself commenced another derivative action by way of an arbitration on behalf of the company against the original charterer for loss of the charter hire. If the original charterer is found liable to pay the charter hire, then it may be that the director's alleged breach has not caused any loss of charter hire to the company. The present suit was bifurcated and the hearing before me dealt only with the question of the director's liability for breach of duty. One of the issues which hence arises is whether, assuming the director is found to have breached his duties, the court should grant a declaration to that effect if the loss arising from that breach might not have crystallised as yet given the pending status of the arbitration proceedings. Would the loss of the charter hire only crystallise if the company fails to recover the outstanding charter hire in the arbitration against the original charterer, or is breach of director's duties actionable *per se*?

Background

The joint venture

2 The defendant, Mr Morten Innhaug ("Morten"), incorporated the plaintiff, Nordic International Limited ("Nordic International") in the British Virgin Islands on 16 January 2007[1] to purchase a fishing trawler which would be converted and equipped to operate as a seismic survey vessel ("the Vessel").[2] Morten was then Nordic International's sole shareholder and first director.[3]

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1 Statement Of Claim ("SOC") at para 1

2 Affidavit of Evidence-In-Chief ("AEIC") of Morten Innhaug at para 5

3 SOC at para 2

3 Nordic Maritime Pte Ltd ("Nordic Maritime"), of which Morten was a director and shareholder, was appointed to be the manager of the Vessel pursuant to a ship management agreement dated 1 January 2007 between Nordic Maritime and Nordic International.[4]

4 Sinwa Limited, a company incorporated in Singapore, was approached to invest in this venture. This led to a shareholder's agreement dated 4 July 2007 between Sinwa Limited and Morten, pursuant to which each party would own 50 percent of Nordic International's shares.[5] Sinwa Limited's rights were later novated to Sinwa SS (HK) Co Ltd ("Sinwa"), a company incorporated in Hong Kong, by a novation agreement dated 28 August 2007.[6]

5 Sinwa exercised its right under the shareholder's agreement to nominate Mr Sim Yong Teng ("Mike Sim") and Ms Tan Lay Ling ("Lay Ling") as directors of Nordic International ("the Sinwa directors").[7] Morten nominated himself and Mr Kjell Gaukshiem ("Kjell") as directors. The four of them made up the board of Nordic International at all material times.

6 Sinwa was brought in to finance the joint venture, in particular, to procure financing from the banks for the retrofitting of the Vessel.[8] Pursuant to the shareholder's agreement, Sinwa injected US$2m working capital into Nordic International, of which US$25,000 was used to purchase its 50 percent shareholding.[9] In September 2007, it guaranteed a term loan of US$16m that

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4 SOC at para 2

5 SOC at para 3; Agreed Bundle of Documents, Vol 1 ("1 AB") 165–193

6 SOC at para 3(b); 1 AB 215–221

7 SOC at para 3

8 AEIC of Morten Innhaug at para 9

9 AEIC of Sim Yong Teng at para 17

Oversea-Chinese Banking Corporation ("OCBC") had extended to Nordic International.[10] The loan was used to finance the conversion of the Vessel.[11]

7 At the time of the shareholder's agreement, Morten had already secured a charterparty dated 8 June 2007[12] ("the Time Charter") to charter the Vessel to a company, BGP Geoexplorer Pte Ltd ("BGP") for a *minimum* period of three years at a very lucrative rate of US$37,000 per day (which worked out to be about US$1m per month). BGP had in turn contracted, in December 2006, to provide seismic survey services to a US company named TGS-NOPEC Geophysical Company SA ("TGS").[13] BGP intended to use the Vessel to fulfil its obligation in the provision of seismic survey services to TGS under the seismic services agreement.

8 From Sinwa's perspective, given that the Time Charter had already been signed *prior* to its participation and hence, the source of a very attractive stream of income had already been secured, its investment in Nordic International was viewed as a sound business deal[14] and a no-brainer – so it thought.

The purported assignment of the Time Charter and seismic services agreement

9 Shortly after the commencement of the Time Charter, due to problems in the operation of the Vessel and a downturn in the market,[15] BGP indicated

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10 1 AB 222

11 AEIC of Sim Yong Teng at para 19

12 1 AB 154–164

13 SOC at para 1(c); 1 AB 1–82

14 AEIC of Sim Yong Teng at para 15

15 AEIC of Morten Innhaug at para 43

its wish to Morten, in August 2008, to "cancel" the Time Charter. Morten understood BGP to mean that it wanted to "get out" of having to perform the Time Charter.[16]

10 Morten then entered into discussions with BGP and TGS with a view to "assign" BGP's rights and obligations under the Time Charter and the seismic services agreement to Nordic Maritime. This was done *without* the prior knowledge or consent of the board of directors.[17]

11 In an email from Morten to BGP dated 19 August 2008 (copied only to Kjell), Morten noted that BGP had already invested about US$2m to US$2.5m in the project.[18] He continued:

> We think that if we could agree a compensation to BGP in the amount that we have discussed above *we could get acceptance from the board of Nordic International Limited* (Owners of BGP Atlas) to cancel the TC Contract and that we subsequently transfer the operation of the vessel to Nordic Maritime Pte Ltd.
>
> It is also understood that a part of the cancelation agreement will be that: 1) BGP assign the Seismic contract with [TGS] to Nordic …
>
> [emphasis added]

12 Morten clarified during the trial that by "we" he was referring to both Nordic International and Nordic Maritime.[19] Since he was "in all the Nordic companies", he was purportedly "talking on behalf of the group".[20] It was,

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16 AEIC of Morten Innhaug at para 44

17 Notes of Evidence (25 August 2016) at p 56, lines 16–18

18 2 AB 367

19 Notes of Evidence (25 August 2016) at p 28, lines 14–19; p 29, lines 9–14

20 Notes of Evidence (25 August 2016) at p 28, lines 19–20

however, strictly incorrect of Morten to refer to the "group" since Sinwa has no interest in the Nordic companies apart from Nordic International.

13 BGP indicated its in-principle agreement to this proposal on 20 August 2008.[21]

14 BGP thereafter negotiated with TGS and obtained its agreement to assign the seismic services agreement either to Nordic Maritime or to a company to be incorporated by Morten.[22]

15 BGP and TGS then prepared a tripartite Memorandum of Agreement ("MOA")[23] which was eventually signed on 23 August 2008 by BGP, Nordic Maritime and TGS.[24] It is not insignificant that in the original draft MOA, Nordic International was also supposed to be a party.[25] It was obviously sensible to include Nordic International, the very party who had chartered the Vessel to BGP. Morten was not able to explain why Nordic International was eventually excluded as a party but it appears that its eventual exclusion from the MOA was probably a recognition by Morten, BGP and TGS that Nordic International might either disagree or raise objections to it. This is explained at [65] below.

16 The material terms of the MOA were as follows:

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21 2 AB 366

22 AEIC of Morten Innhaug at para 46

23 Notes of Evidence (25 August 2016) at p 41, lines 2–4

24 2 AB 373

25 2 AB 372

(a) BGP would "transfer and assign all rights and obligations" under the Time Charter and the seismic services agreement to Nordic Maritime.

(b) BGP would be "relieved and released of the obligations under the Time Charter" and the seismic services agreement.

(c) The parties to the seismic services agreement would be Nordic Maritime and TGS.

(d) The daily rate payable by TGS to Nordic Maritime for the provision of seismic services would be US$52,500. This was US$5,000 more than the daily rate paid by TGS to BGP, which was US$47,500[26]

17 Given that the charter hire payable to Nordic International remained fixed at US$37,000, following the assignment, Nordic Maritime stood to make US$15,500 a day, which was US$5,000 per day more than BGP did, from the assignments of both the Time Charter and the seismic services agreement.

18 The purported assignment of the Time Charter was made by way of a "Notice of Assignment of Time Charter Party"[27] dated 22 September 2008 from BGP to Nordic Geo-Services Ltd ("NGS"), a wholly-owned subsidiary of Nordic Maritime,[28] which Morten had incorporated on 10 September 2008[29] to take over the Time Charter and the seismic services agreement from BGP.[30]

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26 AEIC of Sim Yong Teng at para 49

27 2 AB 403

28 SOC at para 10

29 Notes of Evidence (25 August 2016) at p 57, line 21

30 AEIC of Morten Innhaug at para 54

19 The material terms were as follows:

(a) BGP would assign all its "rights, interest and benefit in and under the Time Charter" to NGS.

(b) Pursuant to clause 17(a) of the Time Charter, BGP would "remain liable to [Nordic International] to perform all [its] obligations and liabilities under the Time Charter".

(c) NGS would be "liable to pay to [BGP], any and all charter hires and any other monies payable by [BGP]… to [Nordic International] under the Time Charter".

20 NGS acknowledged the assignment by a letter of the same date signed by Morten in his capacity as its CEO.[31]

The legal nature of the MOA and Notice of Assignment

21 Before going further, it is perhaps useful to first understand the true legal nature of the MOA and the Notice of Assignment.

22 There are two "assignments" in question here – one in relation to the Time Charter, the other in relation to the seismic services agreement. On the face of the two assignments, they appear to contradict each other. Under the MOA, BGP was purportedly "relieved and released of the obligations under the Time Charter" while under the Notice of Assignment, BGP would "remain liable to [Nordic International] to perform all [its] obligations and liabilities under the Time Charter".

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[31] SOC at para 10(a); 2 AB 403–404

23 In my view, it is a misnomer to describe the Notice of Assignment as an "assignment" of the Time Charter. It is incontrovertible that only the benefits of a contract can be assigned, not the burdens. It was Nordic International who, under the Time Charter, had the right to receive payment of the charter hire from BGP. Hence, if there is any assignment of the Time Charter to speak of, it would be by Nordic International and not BGP to begin with. Nordic International was, however, neither a party to the MOA nor the Notice of Assignment.

24 BGP did, however, have the option, under clause 17(a) of the Time Charter, of "subletting, assigning or loaning the *Vessel* to any person or company" not competing with [Nordic International], subject to [Nordic International's] prior approval "which shall not be unreasonably withheld, upon giving notice in writing to [Nordic International]" (emphasis added). This was provided that BGP remained liable "for the performance of the [Time Charter]" to Nordic International. So what BGP had was the right to assign *its use* of the vessel, not the Time Charter itself; the property, not the chose in action. As Morten's email to BGP indicated (see [11]), BGP was transferring the operation of the Vessel to Nordic Maritime.

25 As for the seismic services agreement, BGP did assign to NGS its right to receive the seismic services fees from TGS. That was an assignment of a chose in action. The Notice of Assignment stated that its validity would be governed by the laws of the United Kingdom. Both parties referred me to s 136(1) of the English Law of Property Act 1925 (c 20)[32] which is *in pari materia* with s 4(8) of the Civil Law Act (Cap 43, 1999 Rev Ed). Under these provisions, express notice in writing must be given to the "debtor…from

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[32] Plaintiff's Submissions at para 61, Defendant's Submissions at para 102

whom the assignor would have been entitled to receive or claim [the] debt or chose in action". BGP is the assignor while TGS is the debtor. The Notice of Assignment was, however, addressed from BGP to NGS, not to TGS. The MOA, on the other hand, was signed both by BGP and TGS. It may well be that only the MOA, and not the Notice of Assignment constituted the statutorily required "express notice in writing" to the debtor (TGS). That, however, is not a matter I have to decide. I am not, for the purposes of this case, concerned with the validity of any of these "assignments". Instead, I am only concerned with whether Morten's structuring of these arrangements was in breach of his duties as a director of Nordic International.

26 Since both parties have consistently used the term "assignment" in their pleadings and submissions, this judgment will continue to use "assignment" to refer to the arrangement involving BGP's purported "assignment" of the Time Charter as well as the benefit of the seismic services agreement to NGS, subject to the caveats about the use of this descriptive term as mentioned above.

27 The net effect of the two purported assignments is that BGP was taken out of the equation *vis-à-vis* TGS but remained liable to Nordic International for the charter hire under a rather convoluted arrangement. This arrangement has since become a source of dispute between Nordic International and BGP (see [35(d)]).

The reaction of Nordic International to the purported assignments

28 According to Nordic International, the purported assignment of the Time Charter was made by way of the Notice of Assignment dated 22 September 2008, and Morten did not inform it of the purported assignment *before* it was executed.[33]

29 The Sinwa directors first had an inkling of the assignment on 9 September 2008 when Kjell informed them by email that "Nordic" would be taking over the seismic operation of the Vessel and would be "dealing direct" with TGS "for the overall operation of the vessel".[34] Mike Sim and Lay Ling both sought clarification from him. In reply to Mike Sim's query on whether "Nordic" referred to Nordic International or Nordic Maritime, Kjell answered that it was the latter, but assured Mike Sim that there would be "no financial implications" for Nordic International.[35] Similarly, Kjell told Lay Ling that there would be no changes to the Time Charter.[36]

30 Morten's position is that the MOA only constituted an agreement to assign, and that the actual assignment was effected by the exchange of letters between BGP and NGS on 22 September 2008. Therefore, Morten claims that Kjell's email of 9 September 2008 to Mike Sim and Lay Ling constituted notice of the assignment before it was executed.[37] This submission is of no legal consequence in any event since, as I have observed at [25] above, there was never any valid assignment of the Time Charter to begin with. Therefore strictly speaking, whether the requisite "notice" was given does not arise.

31 Notwithstanding the dispute over the actual date of the assignment, it is undisputed that Morten did not involve the Sinwa directors in the discussions with BGP over the purported assignment. Morten ostensibly justified this approach on the basis that so long as he had taken steps to ensure that Nordic International was not any worse off from the assignment, there was no

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33 SOC at paras 10(a)–(b)

34 AEIC of Sim Yong Teng at para 33; 2 AB 385

35 1 AB 387

36 1 AB 388

37 AEIC of Morten Innhaug at paras 56–57

necessity to involve them in the discussions. His aim was to maintain a good commercial relationship with BGP given that the seismic services industry was a niche market with very few players.[38] He did not think Nordic International had any reason to withhold approval of the assignment since there was to be no change in the terms of the Time Charter.[39] In his mind, he was concerned that if the Sinwa directors were consulted, it might scuttle the whole assignment arrangement.[40]

32 Sinwa wrote to Morten on 23 October 2008 to place on record its objections to the purported assignment.[41] Sinwa alleged that Morten had "allowed" an assignment of the Time Charter and had, in doing so, breached Clause 8.1 of the shareholder's agreement, which provided that decisions on all matters other than those relating to the technical operations and management of the Vessel had to be made with the unanimous agreement of both parties. Sinwa further alleged that Morten compounded the breach of the shareholder's agreement by allowing the assignment of the Time Charter to a "related and interested party which raise[d] a conflict of interest issue".

The termination of the Seismic Services Agreement

33 Unfortunately, subsequent events were contrary to Morten's expectations.

34 TGS was dissatisfied with the physical condition of the Vessel and alleged that the Vessel was unfit for seismic operations.[42] On 19 December

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38 AEIC of Morten Innhaug at para 47

39 AEIC of Morten Innhaug at paras 50 and 52

40 Notes of Evidence (25 August 2016) at p 52, lines 16–19

41 2 AB 433

2008, TGS sent Nordic Maritime a notice of termination of the seismic services agreement.[43] The termination was with effect from 30 December 2008. Nordic International found itself in a very unsatisfactory situation where its projected flow of monthly charter hire in excess of US$1m came to an abrupt halt. The Vessel was laid up from 19 December 2008 until sometime in December 2009 when it was employed in some *ad hoc* projects.[44] Apart from those *ad hoc* projects, the Vessel has not been gainfully employed ever since.[45] Morten testified that Nordic Maritime continued to pay the operating costs of the Vessel even after it was laid up – this amounted to some $50,000 every month.[46]

The outstanding charter hire

35 Following the purported assignment of the Time Charter, NGS paid Nordic International the charter hire for the months of August 2008 to December 2008. It was Nordic Maritime who prepared all the invoices on behalf of Nordic International.[47]

(a) On 2 September 2008, Nordic International invoiced NGS for charter hire in the sum of US$1,266,399 for the period 27 August to 30 September 2008.[48] Nordic International issued a credit note for US$530,302.50[49] for charter hire downtime.[50] On

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42 2 AB 583

43 2 AB 559

44 AEIC of Mike Sim at para 110; AEIC of Morten Innhaug at para 86

45 Minute Sheet (25 July 2016) at p 1

46 Notes of Evidence (25 August 2016) at p 125, line 8–18

47 Notes of Evidence (25 August 2016) at p 69, lines 10–12

48 2 AB 384

49 2 AB 405

17 October 2008, NGS paid Nordic International the balance sum of US$736,096.50.[51]

(b) On 1 October 2008, Nordic International invoiced NGS for charter hire in the sum of US$1,147,000 for the period 1 to 31 October 2008.[52] Nordic International issued a credit note for US$43,706.25 for charter hire downtime.[53] On 12 November 2008, NGS paid Nordic International the balance sum of US$1,103,293.75.[54]

(c) On 10 November 2008, Nordic International invoiced NGS for charter hire in the sum of US$1,110,000 for the period 1 to 30 November 2008.[55] Nordic International issued a credit note for US$271,539.92 for charter hire downtime.[56] On 19 December 2008, NGS paid Nordic International the balance sum of US$838,460.08.[57]

(d) On 15 December 2008, Nordic International invoiced NGS for US$1,147,000 for the period 1 to 31 December 2008.[58] Nordic International issued a credit note for US$434,743.83 for charter hire downtime.[59] On 3 February 2009, NGS paid Nordic International the balance sum of US$712,256.17.[60]

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50 Notes of Evidence (25 August 2016) at p 73, lines 14–17

51 AEIC of Morten Innhaug at para 76(a); 2 AB 406

52 AEIC of Morten Innhaug at para 76(b); 2 AB 407

53 2 AB 441

54 2 AB 442

55 2 AB 551

56 2 AB 481

57 AEIC of Morten Innhaug at para 76(c); 2 AB 482

58 2 AB 537

36 By a letter dated 31 December 2008, Morten, in his capacity as CEO of Nordic Maritime informed BGP that following TGS's termination of the seismic services agreement with effect from 30 December 2008, the Time Charter between BGP and Nordic International was "reinstated effective 31 December 2008", with the result that BGP would henceforth be liable for the charter hire.[61] By a letter dated 2 February 2009, BGP objected to the purported "reinstatement" of the Time Charter. It took the view that following the signing of the MOA, it did not have any obligations under the Time Charter or the seismic services agreement.[62]

37 By two letters dated 25 March 2009 and 7 April 2009, Nordic International informed BGP that it had yet to pay the charter hire for January and February 2009.[63] On 22 April 2009, BGP replied through its solicitors that the Time Charter had been novated to Nordic Maritime pursuant to the MOA "executed by Nordic [Maritime] for and on behalf of itself and [TGS], and [BGP]". Consequently, BGP no longer owed any obligations under the Time Charter to Nordic International.[64]

38 Nordic International thereafter commenced arbitration against BGP by way of a notice of arbitration dated 2 September 2009, claiming the unpaid charter hire as at 31 August 2009 (which amounted to US$10,098,868.97).[65] But even before Nordic International did so, Morten's counsel had written to

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59 2 AB 566

60 3 AB 581

61 2 AB 572

62 3 AB 614

63 3 AB 599

64 3 AB 607–608

65 3 AB 711

Nordic International's counsel on 25 June 2009[66] informing them they had no authority to commence the arbitration against BGP on Nordic International's behalf without Morten's consent, since, according to the shareholder's agreement, the commencement of legal proceedings against BGP was a matter to be decided solely by the directors appointed by Morten.

Procedural history

Originating Summons No 960 of 2009

39 On 25 August 2009, Sinwa filed Originating Summons No 960 of 2009 to commence this derivative action on behalf of Nordic International against Morten for breach of fiduciary duties. Before the High Court, Sinwa alleged that Morten had breached his duties in twelve distinct aspects (see *Sinwa SS (HK) Co Ltd v Morten Innhaug* [2010] 4 SLR 1 ("*Sinwa (OS 960)*") at [11]). The High Court dismissed its application.

40 The Court of Appeal allowed Sinwa's appeal (in Civil Appeal No 5 of 2010) but only to a limited extent. Its order of court dated 27 September 2010 only granted leave to Sinwa to commence a derivative action against Morten's alleged breaches of his directors' duties in:[67]

> a. Procuring a purported assignment of a lucrative time-charter party entered into between [Nordic International] and [BGP] to a company owned and controlled by [Morten], namely [NGS], in which at all material times, [Morten] was the controlling mind and alter ego and failing and/or refusing to give notice of such intentions and/or the purported assignment to fellow shareholders/directors;
>
> b. Withholding payment or causing the withholding of charter hire to [Nordic International] by reason of the

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66 3 AB 635

67 4 AB 949–952

> purported assignment to [NGS] for the total sum of USD6,697,000 being charter hire under the time charter party for the periods from January 2009 to June 2009 thereby exposing [Nordic International] to serious cash flow problems;
>
> c. Profiting or intending to profit from the sale of the vessel after the completion of the 3 year charter period at the discounted amount of US$5,000,000 being the price [Morten] would pay for the Vessel in the event the purchase option in clause 40 of the Time Charter was exercised by [NGS].

Clause 40 of the Time Charter, which was referred to in relation to the third alleged breach, granted the charterer the option to purchase the Vessel with equipment at US$5m after completion of the three-year charter period.

41 It is clear that the leave granted by the Court of Appeal is limited to breaches of Morten's duties as a director in relation to the procurement of the purported assignment of the Time Charter. Some six years later, the trial of the derivative action finally came before me for hearing. In the interim period between the leave application and the eventual hearing of this trial, the parties were immersed in numerous related legal proceedings between them. It is only necessary to mention three such proceedings as they each have a bearing on the issues in this case.

Originating Summons No 22 of 2010

42 First, on 7 January 2010, Morten applied to court, in Originating Summons No 22 of 2010 ("OS 22"), for a determination of the meaning of cl 8.1 of the shareholders' agreement. He argued that the assignment of the Time Charter and the commencement of arbitration against BGP were matters relating to the operations and management of the vessel (cl 8.1.1) and thus that the directors he had appointed (himself or Kjell) could decide on matters without consulting the Sinwa directors. The court dismissed his application, holding that pursuant to cl 8.1, all the directors had to come to a unanimous

decision both on the assignment and on the appointment of lawyers to pursue Nordic International's claim against BGP (see *Morten Innhaug v Sinwa SS (HK) Co Ltd and others* [2011] SGHC 20 ("*Innhaug (OS 22)*") at [44]).

43 Following this court's decision in OS 22 on 24 January 2011, BGP filed a court application in August 2011 (Originating Summons 650 of 2011) for a declaration that the arbitrator had no jurisdiction to hear the claim brought by Nordic International against it. BGP relied on the fact that Morten did not agree to the arbitration commenced by Nordic International. BGP's application was successful and the arbitration was discontinued.[68]

44 When the matter was eventually raised at a board meeting on 24 October 2011, Morten and Kjell voted against the commencement of arbitration against BGP.[69] Morten explained on the stand that he did so because "the purpose of the meeting was to create a deadlock".[70] The shareholder's agreement contained a deadlock clause (cl 11) which provides that if there is no agreement by the board of Nordic International on a matter requiring unanimous approval, and if no resolution can be reached even after referring the matter to the shareholders, then Morten may serve a notice on Sinwa requiring it to sell its shares to him.

SIAC No 4 of 2012

45 Second, on 9 January 2012, Morten commenced arbitration against Sinwa under the rules of the Singapore International Arbitration Centre. He invoked the "deadlock" clause and sought to buy out Sinwa's shares in Nordic

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68 AEIC of Sim Yong Teng at paras 94–95

69 4 AB 1038

70 Notes of Evidence (25 August 2016) at p 114, lines 12–17

International. On 1 October 2013, the arbitrator issued a partial award ordering Sinwa to sell its shares to Morten at a price to be assessed.[71] The parties have been unable to agree on the appropriate valuation methodology. Notwithstanding this lack of agreement, no application was filed to stay the present suit.

Suit No 1166 of 2013

46 Third, Sinwa sought leave of court in Suit No 1166 of 2013 to commence arbitration proceedings on behalf of Nordic International against BGP for the outstanding charter hire due under the Time Charter. That also took a somewhat tortuous route. Leave was eventually granted by consent on 18 December 2014. Morten was agreeable to Sinwa pursuing the claim against BGP in the name of Nordic International so long as Sinwa bore the costs of doing so (subject to its right to be indemnified for those costs out of any sums it could recover from BGP on behalf of Nordic International).

47 However, the arbitration has not progressed beyond service of the notice of arbitration due to disagreement over the composition of the arbitral tribunal.[72] As a result, the arbitration against BGP for the outstanding charter hire is still pending.

Issues

48 The issues for determination are, broadly speaking, as follows:

(a) Did Morten breach his fiduciary duties to Nordic International?

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71 4 AB 1088–1089

72 AEIC of Morten Innhaug at para 98

(b) If Morten breached his fiduciary duties, should he be relieved from liability for having acted "honestly and reasonably" within the meaning of s 391 of the Companies Act (Cap 50, 2006 Rev Ed)?

(c) Did Nordic International consent to or ratify the breach of duty?

(d) What relief should the court grant?

Did Morten breach his fiduciary duties to Nordic International?

49 It is not disputed that Morten owes fiduciary duties to Nordic International in his capacity as director. It is equally not in dispute that those duties, insofar as they are relevant in this case, are:

(a) the duty to act bona fide in the best interests of Nordic International;

(b) the duty not to place himself in a position of conflict;

(c) the duty not to make a profit out of his position without Nordic International's consent;

(d) the duty not to enter into any self-dealing transaction.

50 Although, the above duties are discretely pleaded, in reality, there is considerable overlap. The parties are however poles apart as to whether Morten was in breach of any of the above duties.

Applicable legal principles

51 A director has the duty to act *bona fide* – which means to act honestly – in the best interests of the company (see *Walter Woon on Company Law*

(Tan Cheng Han gen ed) (Sweet & Maxwell, Revised 3rd Ed, 2009) ("*Walter Woon on Company Law*") at para 8.10).[73] A court would be slow to interfere with commercial decisions of directors which have been honestly made even if they turned out to be financially detrimental, but this does not mean the court would stop short of interfering as long as the directors claim to be genuinely acting to promote the company's interests (see *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 ("*Scintronix*") at [37]–[38]).

52 The no-conflict rule obliges a director, as a fiduciary, to avoid any situation where his personal interest conflicts with or may conflict with that of the company whose interest he is bound to protect, such that there is a risk he may prefer his interest over that of the company's. The rule is strict: where a director is found to have placed himself in a position of conflict of interest, he will not be permitted to assert that his action was *bona fide* or thought to be in the interests of the company (*Walter Woon on Company Law* at para 8.44, citing *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 834). A director can be in breach of the rule even though his or her own conduct has caused no loss to the company (*Company Directors: Duties, Liabilities, and Remedies* (Simon Mortimore ed) (Oxford University Press, 2009) at para 14.11, citing *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 ("*Regal (Hastings)*") at 134, 153)

53 The no-profit rule obliges a director not to retain any profit which he has made through the use of the company's property, information or opportunities to which he has access by virtue of being a director, without the fully informed consent of the company. The rule is again a strict one and

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[73] Plaintiff's Submissions at para 14

liability to account arises simply because profits are made (see *Regal (Hastings)* at 144).

54 The rule against self-dealing prohibits a director from entering, on behalf of the company, into an arrangement or transaction with himself or with a company or firm in which he is interested (see *Tan Hup Thye v Refco (Singapore) Pte Ltd (in members' voluntary liquidation)* [2010] 3 SLR 1069 at [29]). There is "self-dealing" because the director essentially acts on behalf of both parties in such a transaction.

55 It can be seen that there is indeed overlap between the no-conflict rule, no-profit rule, and rule against self-dealing. A director who enters into a self-dealing transaction would inevitably be in a position of conflict and, if a profit is made, would be in breach of the duty not to make a profit out of his position. For that reason, the no-profit rule and rule against self-dealing have been described as particular instances of the broader duty of a director not to place himself in a position of conflict (see *Walter Woon on Company Law* at para 8.45).[74] In turn, there is overlap between the no-conflict rule and a director's duty to act in the best interests of the company, "for when a director makes his interests paramount, invariably he will not be acting in the best interests of his company" (*Walter Woon on Company Law* at para 8.39).

Application to the facts

56 To recap, the Court of Appeal granted Sinwa leave to pursue a derivative action against Morten in respect of only three purported breaches of fiduciary duties: (a) procuring the purported assignment of the Time Charter; (b) withholding payment or causing the withholding of charter hire to Nordic

[74] Defendant's Submissions at para 73

International; and (c) profiting or intending to profit from the sale of the Vessel after the completion of the 3-year charter period.

57 In my judgment, Morten breached his fiduciary duties to Nordic International on all three counts.

Procuring the purported assignment of the Time Charter

(1) Did Morten "procure" the purported assignment?

58 There is first a preliminary issue to consider. Morten argues that because it was BGP, and not he, who initiated the purported assignment, it cannot be said that he procured it.[75] Nordic's response is that the identity of the party who initiated the negotiations is irrelevant; to "procure" is to "bring about" and Morten clearly brought about the purported assignment.[76] In support of this, Counsel for Nordic International, Mr Anthony Soh, relies on the dicta in *Tan Hock Keng v L & M Group Investments Ltd* [2002] 1 SLR(R) 672 at [28]. In that case, the Court of Appeal was concerned with the *contractual* interpretation of the obligation "to procure". It held that the correct meaning depended on the context of the entire document and went on to adopt the dictionary meaning as ascribed in the Shorter Oxford English Dictionary (3rd Ed) vol II.

59 Here, the issue is not with the interpretation of a contractual provision. Instead, it concerns the interpretation of the Court of Appeal's order dated 27 September 2010. In my view, there is no reason to ascribe any meaning to the words "to procure" other than its ordinary meaning, *ie*, "to bring about". It

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[75] Defendant's Submissions at para 38

[76] Plaintiff's Submissions at paras 6–7

is strictly irrelevant which party initiated the discussion which led to the assignment.

60 The evidence clearly shows that Morten did "bring about" or "procure" the assignment of the Time Charter:

(a) Essentially, BGP did not want to continue the Time Charter and wanted an early termination. BGP wanted to "cancel" the Time Charter but recognised that it could not be done without the approval of Nordic International's board. Morten agreed that to do so under the terms of the Time Charter, BGP would have to pay compensation for early termination.[77] It should be noted that while cl 17(a) of the Time Charter permitted BGP to sublet or assign the Vessel, BGP would "remain responsible for due performance" of the Time Charter. Similarly, while BGP may terminate the Time Charter prematurely under cl 26, it could only do so on condition that it settles all "Hire and other payments due" under the Time Charter.

(b) Morten also accepted that in his discussions with BGP, there was no mention of any compensation to be paid by BGP.[78] He explained that it was because "in the end this was an assignment".[79] Since BGP was to remain liable to Nordic International under the terms of the Time Charter, they "did not discuss about the amount of compensation".[80] Counsel for

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77 Notes of Evidence (25 August 2016) at p 37, lines 16–20

78 Notes of Evidence (25 August 2016) at p 34, line 25 to p 35, line 4

79 Notes of Evidence (25 August 2016) at p 37, line 23

80 Notes of Evidence (25 August 2016) at p 37, lines 24–25

Morten, Mr Joseph Tan, accepted during the closing submissions that based on the objective evidence, it was unlikely that BGP had any right to terminate the Time Charter. Further, BGP did not at any material time indicate in writing its intention to *terminate* the Time Charter. That being the case, the only option for early termination without paying any compensation *upfront*, as required by the Time Charter, would have to be consensual, *ie*, the consent of Nordic International would be necessary. This was, however, never given.

(c) Morten was keen to accommodate BGP's request for early termination. He was however not clear how he could do so "contractually".[81] He negotiated with BGP without informing the Sinwa directors of his intention.[82] Eventually, BGP, TGS and Nordic Maritime agreed pursuant to the MOA, *inter alia*, to the assignment of the Time Charter to Nordic Maritime. Morten was involved in all the discussions. He also signed the MOA and the acknowledgement of the Notice of Assignment on behalf of Nordic Maritime and NGS respectively. It is therefore clear that the assignment would not and could not have taken place without the concurrence and agreement of Morten.

(2) Did Morten breach his fiduciary duties in procuring the assignment?

61 In deciding whether Morten was in breach of his director's duties in the procurement of the assignment of the Time Charter, it is crucial to view the assignments of both the Time Charter and the seismic services agreement

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81 Notes of Evidence (25 August 2016) at p 30, lines 15, 18

82 Notes of Evidence (25 August 2016) at p 30 lines 19–22

as one transaction. It is also necessary to understand Morten's real reasons for adopting the route which he eventually did. The assignment of the Time Charter was never intended to be an end in itself. Morten's interest was not in the assignment of the Time Charter *per se*. The seismic services agreement was the true prize to him. In his words, the novation of the seismic services agreement "was the most critical in this deal".[83] This was after all the lucrative source of revenue. Once the revenue from the seismic services agreement was secured with the MOA, Morten then took steps for the assignment of the Time Charter from BGP to NGS in order to secure the use of the Vessel to perform the seismic services agreement with TGS.[84]

62 In order to fully appreciate Nordic International's case, it is also imperative to recognise that the *only* asset of Nordic International was the Vessel. Hence, its *only* source of revenue was to earn charter hire from the Vessel. It follows that all directors including Morten owed a duty to ensure the preservation of Nordic International's contractual rights to earn the charter hire due and payable under the Time Charter. It should be recalled that the Time Charter with BGP had already been secured for three years, with monthly charter hire in excess of $1m, by the time Sinwa was invited to invest in Nordic International. That must have an important consideration in Sinwa's decision to invest as well as its decision to act as the guarantor for the bank loan to Nordic International. After all, the charter hire was to be used by Nordic International to pay off the monthly loan repayments to OCBC.

63 Yet, when BGP expressed its desire for premature termination of the Time Charter in August 2008, its negotiations with Morten proceeded without

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[83] Notes of Evidence (25 August 2016) at p 89, lines 18–19

[84] Notes of Evidence (25 August 2016) at p 91, line 4– 10

any discussion of *any* compensation payable by BGP to Nordic International. Morten agreed that, as at 19 August, his discussion, with BGP did not contemplate BGP making any compensation for its premature termination.[85] But according to the Time Charter, BGP would have to pay compensation for early termination.[86] The stance Morten took was therefore quite unusual given that the Time Charter still had just under two years to run and especially since Morten's own counsel acknowledged that it was unlikely that BGP had any right of early termination without paying compensation.

64 It is clear that Morten was not exactly sure how the existing Time Charter could be rearranged "contractually" to allow BGP to exit without immediate financial consequences to BGP. In the words of Mr Tan, Morten sought a "win-win" situation. Morten believed this could be achieved by way of the MOA and the Notice of Assignment. Through the MOA and the Notice of Assignment, Morten *via* NGS would effectively take over the Time Charter as well as the seismic services agreement from BGP. The intention was for BGP to exit both the Time Charter as well as the seismic services agreement with the important qualification that BGP was to remain responsible to Nordic International "to perform all [its] obligations and liabilities" under the Time Charter. This proviso was separately set out in the Notice of Assignment and not in the MOA.

65 It appears to me that this somewhat convoluted arrangement was conceived to enable Morten to avoid having to involve Nordic International (and, in particular, the Sinwa directors) directly in the negotiations with BGP and/or TGS. To do otherwise would risk Sinwa finding out about it and

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85 Notes of Evidence (25 August 2016) at p 34, line 25 to p 35, line 4

86 1 AB 159; Notes of Evidence (25 August 2016) at p 36, line 19

Morten candidly acknowledged during the trial that he was concerned that Sinwa would object, which would in turn scuttle the new arrangements with BGP and TGS. For this reason, Nordic International was neither a party to the MOA nor the Notice of Assignment. This is extremely odd, to say the least, given that Nordic International was a party to the Time Charter.

66 What was Morten's reason for restructuring the existing contractual arrangements in this rather unconventional manner? It seems to me that he was primarily driven by three key considerations, each of which reveals that he prioritised his personal interest over Nordic International's.

67 First, he was keen to preserve the goodwill of BGP. He described BGP as a "big government company in China" who "promised to give us work so that we can resume their payment" to Nordic International.[87] However, when he was asked to clarify who he was referring to when he used the word "we", he said he was referring to himself "personally".[88]

68 Second, he was also keen to take over the lucrative seismic services agreement with TGS – the end user of the Vessel. This led him first to conclude the MOA with BGP and TGS. However, that alone would not have been sufficient for BGP to exit the Time Charter since Nordic International was conspicuously not a party to the MOA. Morten sought legal advice on the purported assignment after the MOA was negotiated.[89] The Notice of Assignment was crafted in such a way that BGP was to remain liable to Nordic International under the Time Charter but NGS was to indemnify BGP for all sums payable by BGP to Nordic International. Through this method,

87 Notes of Evidence (25 August 2016) at p 108, lines 22–24

88 Notes of Evidence (25 August 2016) at p 109, lines 5–9

89 Notes of Evidence (25 August 2016) at p 89, lines 6–8

Morten was hoping to achieve his objective of *notionally* allowing BGP to exit the Time Charter and the seismic services agreement without directly engaging Nordic International.

69 Finally, upon completion of the three-year charter period, BGP has the option to purchase the Vessel at a discounted price of US$5m. With the assignment, Morten through NGS would have the right to exercise the option. At the material time, the Vessel was valued at about US$30m, according to a valuation report dated 16 April 2010 which Nordic Maritime commissioned Altech Maritime Consultants Pte Ltd to produce.[90] The upside from the exercise of the option to purchase was therefore very significant. Although Morten has confirmed under cross-examination that he no longer has any intention to exercise the option, that was because of the deteriorated condition of the Vessel due to the lengthy ongoing dispute between the parties. But Morten did in fact indicate his intention to exercise the option to purchase the Vessel in a letter from NGS to Nordic International one month before the expiry of the Time Charter in September 2010 (although he did not eventually give formal notice of the exercise of the option).[91] In any case, that Morten did not eventually exercise the option does not change the fact that the valuable option to purchase played an important part in his decision to proceed as he did in keeping Nordic International out of the loop. Acquiring the option to buy the Vessel at a discounted price of US$5m was one of two benefits that he gained from the assignment of the Time Charter and seismic services agreement to NGS – the other being the increased seismic services fees due from TGS.[92] In my view, in acting in this manner, he was focused only in advancing his own interest.

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90 4 AB 879; Notes of Evidence (26 August 2016) at p 7, lines 22–24

91 4 AB 939

70 Morten made three arguments to deny the alleged breaches of fiduciary duty, namely, that:

(a) the purported assignment was in fact in the best interests of Nordic International;

(b) there could be no possibility of conflict between Morten's personal interest and Nordic International's interests;

(c) the purported assignment was not a self-dealing transaction.

(3) Best interests of Nordic International

71 Morten claimed that there was no need to involve Nordic International or Sinwa in the negotiations as long as Nordic International was not any worse off under the MOA and/or the Notice of Assignment. He asserts that Nordic International was not any worse off since the terms of the Time Charter remained unchanged and, in particular, BGP remained liable under the Time Charter.[93] Furthermore, the additional revenue arising from the assignment of the seismic services agreement would not have been earned by Nordic International in any event. In short, Morten assumed that Nordic International's interests were unlikely to be prejudiced by the MOA and/or the Notice of Assignment. Accordingly, Morten submits that the assignment was in the best interests of Nordic International.[94]

72 I disagree that the purported assignment was in the best interests of Nordic International. Morten had no right to unilaterally make the decision as regards the MOA and the Notice of Assignment without referring the matter to

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92 Notes of Evidence (25 August 2016) at p 56, line 24 to p 57, line 4

93 Defendant's Submissions at para 59

94 Defendant's Submissions at para 63

Nordic International. In *Innhaug (OS 22)* the court found that, contrary to Morten's position, all directors were obliged to come to a "*unanimous decision*" both on the Notice of Assignment and the MOA. In choosing to do so without Sinwa's concurrence, Morten subjected Nordic International's rights against BGP under the Time Charter to risks of challenge on grounds extraneous to the terms of the Time Charter. Indeed, this has now come to pass. BGP is claiming that the Time Charter has been novated pursuant to the MOA which was allegedly executed by Nordic Maritime "for and on behalf of itself and [Nordic International], [TGS], and [BGP]". On that basis, BGP has claimed that it is no longer liable to Nordic International for the outstanding charter hire.

73 Additionally, it is erroneous for Morten to claim that Nordic International was not any worse off on the basis that the terms of the Time Charter had remained unchanged despite the Notice of Assignment. It is a fact that Nordic International had ceased receiving charter hire for the Vessel since December 2008. BGP has purported to justify its cessation of charter hire by reason of the MOA. Nordic International has brought a claim against Morten for "causing the withholding of charter hire". As the Time Charter was for three years commencing in June 2007, monthly charter hire of about US$1m would have been payable by BGP to Nordic International till June 2010, a further period of 16 months. Further, the fact that there is a pending arbitration against BGP for the outstanding charter hire where the outcome remains unknown does not alter the fact that Nordic International had stopped receiving its monthly charter hire since December 2008. Looking at the events which have taken place following the MOA and the Notice of Assignment, it is plainly incorrect for Morten to claim that Nordic International has not been any worse off by reason of the Notice of Assignment. It was starved of its monthly source of income. Yet it remained liable for the monthly ship

management fees due to Nordic Maritime in addition to the monthly loan repayments to OCBC.

74 In any event, the fact that Nordic International may subsequently recover against BGP is strictly irrelevant in determining whether Morten was in breach of his duties given that it is common ground between the parties that breach of director's duties is actionable without proof of damage. Morten's breach was simply in entering into this commercial rearrangement involving the purported assignments in spite of his personal interest conflicting with that of Nordic International's. Any recovery from BGP would at best affect the *quantum* of the damages that Morten's breach has caused Nordic International. However, as far as *liability* is concerned, "a director's liability for disloyalty in office does not depend on proof of fault or proof that a conflict of interest has in fact caused the company loss" (*Premier Waste Management Ltd v Towers* [2012] 1 BCLC 67 ("*Premier Waste Management*") at [10]).

75 In addition, where the fiduciary has made a profit and thereby breached the no-conflict rule, his liability to account does not depend on whether the company has suffered any loss. As stated in *Mona Computer Systems (S) Pte Ltd v Singaravelu Murugan* [2014] 1 SLR 847 at [13], making the fiduciary account for an unauthorised profit is a gains-based remedy for the fiduciary's breach of duty. That remedy is "unrelated to whether the fiduciary's conduct has *caused any loss* to the principal" (emphasis added). The remedy ensures that a fiduciary is not allowed to retain any profit made from or attributed to his breach of duty (at [17] and [18]).

76 The proper thing for Morten to have done was to involve Nordic International and, consequently, the Sinwa directors in the exit negotiations with BGP in order to negotiate and/or secure compensation for early

termination. At the minimum, as Mike Sim suggested, there should have been board meetings to discuss the purported assignment and resolutions passed in this regard.[95] Morten should have consulted the other directors on whether they wished to consider other options in dealing with BGP's request to exit the tripartite arrangement between Nordic International, BGP and TGS. This would have been in the best interests of Nordic International. Morten did not pursue this course of action because he had a direct interest in securing the novation of the seismic services agreement from BGP and TGS. Claiming compensation from BGP under the Time Charter would have undermined and in all likelihood ruined Morten's plan to secure the novation of the seismic services agreement.

(4) No possibility of conflict

77 Morten argues that Nordic International and NGS are involved in two different businesses – Nordic International was a ship owner while NGS was a charterer. Therefore, there could be no real possibility of conflict of interest, nor could Nordic International make the profit that NGS stood to make as a result of the assignment of the seismic services agreement.

78 Under the MOA, Morten through NGS stood to earn US$15,500 per day. The fact that Nordic International "could not, or would not, take advantage of the opportunity" to earn the additional revenue arising from novation of the seismic services agreement with TGS does not render it any less a breach of his duty not to place himself in a position of conflict (see *Premier Waste Management* at [10]). *In Re Allied Business and Financial Consultants Ltd* [2009] 2 BCLC 666, Rimer LJ added that it was not only irrelevant that the company could not take up the corporate opportunity, it was

[95] AEIC of Sim Yong Teng at para 47

equally irrelevant that the opportunity was not within the company's "scope of business" (at [70]). Hence, I reject Morten's submission that there could be no possibility of conflict of interest because Nordic International's business was different from that of NGS'.[96] In any event, back in September 2007 when there seemed to be a possibility that BGP might not be involved in the commercial arrangement, Mike Sim in fact floated the idea of "doing [the] deal direct with [TGS], and removing BGP altogether".[97] So it was not entirely the case that Nordic International and NGS had completely separate businesses such that any opportunity that came to Morten in his capacity as owner of NGS was not an opportunity that Nordic International could be interested in. Morten also relies on Mike Sim's acknowledgment under cross-examination that there was no conflict between the *business* of NGS and that of Nordic International.[98] Again, this is irrelevant to the question of whether Morten's *conduct* in procuring the purported assignment placed himself in a position where his personal interest conflicted with his duty as a director of Nordic International to act in its best interests.

(5) Self-dealing rule

79 Morten argues that the rule is not engaged here because neither Morten nor NGS (being a company he is interested in) is a party to any transaction with Nordic International under the commercial arrangements being impugned.[99] I do not accept this submission. Morten effectively substituted NGS for BGP, the original charterer of the Vessel. NGS used the Vessel and

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96 Defendant's Submissions at para 76

97 1 AB 224

98 Defendant's Submissions at para 77; Notes of Evidence (24 August 2016) at p 59, line 23 to p 60, line 1

99 Defendant's Submissions at para 93

in return, NGS paid the charter hire to Nordic International. In this way, Morten was representing the interests of both parties in this transaction. The rule against self-dealing is hence engaged.

Causing the withholding of charter hire

80 In addition to the above, the assignment clearly caused Morten to continue to act against the best interests of Nordic International. This is exemplified in his inexplicable conduct in initially stopping Sinwa from commencing arbitration proceedings on behalf of Nordic International against BGP for the outstanding charter hire payable under the Time Charter even though he is a director and a 50 percent shareholder of Nordic International. Such conduct is entirely inconsistent with his duty to act in the best interests of Nordic International to pursue a legitimate claim against BGP for the charter hire due under the Time Charter. He explained under cross-examination that to sue BGP for the outstanding charter hire would effectively "end" *his* hopes for "long-term" business with BGP.[100] Further, under the Notice of Assignment, while BGP is intended to remain liable to Nordic International, NGS is in turn liable to BGP for all charter hire and other monies payable by BGP to Nordic International under the Time Charter. This was effectively an arrangement for NGS to indemnify BGP in respect of the charter hire which would render it unattractive for NGS and hence Morten to allow Nordic International to sue BGP. In fact, a separate version of the minutes of the shareholders' meeting of Nordic International on 24 October 2011 proposed by Sinwa recorded that Morten had opposed the arbitration because "BGP would [then] go after Nordic Maritime/NGS". Morten confirmed that this had been his concern.[101] This also explains Morten's motivation in initially stopping Sinwa from

100 Notes of Evidence (25 August 2016) at p 110, lines 6–9

101 Notes of Evidence (25 August 2016) at p 120, line 4

pursuing arbitration against BGP. It is therefore disingenuous for Morten to argue that he was not in breach in attempting to stop Nordic International from pursuing its legitimate claim against BGP for the outstanding charter hire.

81 This unsatisfactory position also caused Morten to call a shareholders' meeting of Nordic International in order to create a "deadlock" with the specific object of triggering the deadlock clause in the shareholders' agreement in order to buy back Sinwa's shares. This culminated in the partial award in his favour (see [24] above). Morten was hoping to bring an end to all the litigation between the parties including this action by buying Sinwa out of Nordic International so that he could go after BGP himself and be the sole beneficiary of the arbitration against BGP.[102]

Profiting or intending to profit from the option to purchase the Vessel

82 I have already found that, by procuring the assignment of the seismic services agreement to NGS, Morten did *intend* to profit by gaining the option to purchase the Vessel (at [69]). That was a breach of the no-profit rule.

Conclusion on breach of duty

83 For all the above reasons, each of these acts constituted breaches of Morten's fiduciary duties to Nordic International. My findings can be summarised in this way:

(a) Morten procured the purported assignment of the Time Charter between Nordic International and BGP to NGS. He substituted NGS for BGP such that NGS effectively became the charterer of the Vessel from Nordic International, so that NGS (and he)

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[102] Notes of Evidence (25 August 2016) at p 121, lines 9–16

could earn the seismic services fees due from TGS. By entering into this self-dealing transaction in which he placed his own interests above that of Nordic International's, he was in breach of the no-conflict rule. The making of the profit from the seismic services agreement would be in breach of the no-profit rule. The way he allowed BGP to exit the commercial arrangement between Nordic International, BGP and TGS without any payment of compensation could not be said to be in the best interests of Nordic International. It was evidently in his own best interest.

(b) As a result of the purported assignment, BGP has denied any liability to pay the charter hire from December 2008 in reliance on the MOA. Morten further obstructed Nordic International's attempt to recover the outstanding charter hire from BGP. Hence, Morten "[caused] the withholding of charter hire" to Nordic International. This was not in the best interests of Nordic International. He did not act in the best interests of Nordic International since he had multiple contradictory reasons for stopping it from going after BGP. First, he was concerned that it would end any possibility of his own future dealings with BGP. Second, BGP would then go after NGS for the same loss under the Notice of Assignment. Third, he was hoping to go after BGP for the unpaid charter hire himself after buying out Sinwa's shares. It is apparent that as a result of his personal motivation to benefit from the seismic services agreement with TGS, Morten found himself in an entirely unsatisfactory position of being unable to discharge his duty as a director to act in the best interests of Nordic International.

(c) By procuring the purported assignment, Morten also stood to profit by gaining the option to purchase the Vessel at a discounted price after the completion of the charter period. Once again, he placed his own financial interest above that of Nordic International's and was in breach of the no-profit rule and the broader no-conflict rule.

Should Morten be relieved from liability under s 391 Companies Act?

84 Section 391 of the Companies Act provides:

> **Power to grant relief**
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> **391**.—(1) If in any proceedings for negligence, default, breach of duty or breach of trust against a person to whom this section applies it appears to the court before which the proceedings are taken that he is or may be liable in respect thereof but that *he has acted honestly and reasonably and that, having regard to all the circumstances of the case* including those connected with his appointment, he *ought fairly to be excused* for the negligence, default or breach the court may relieve him either wholly or partly from his liability on such terms as the court thinks fit.
>
> (1A) For the avoidance of doubt and without prejudice to the generality of subsection (1), "liability" includes the liability of a person to whom this section applies to account for profits made or received.
>
> [emphasis added]

85 There are three cumulative requirements which must be fulfilled: that the director has acted honestly, acted reasonably, and that it is fair to excuse him for his default (see *W&P Piling Pte Ltd (in liquidation) v Chew Yin What and others* [2007] 4 SLR(R) 218 at [77]).

86 It has been held that a director would be regarded as having acted honestly if his conduct was "without deceit or conscious impropriety",

"without intent to gain an improper benefit or advantage" or "without carelessness or imprudence that negates the performance of the duty in question" (see *Long Say Ting Daniel v Merukh Nunik Elizabeth (personal representative of the estate of Merukh Jusuf, deceased)* [2013] 1 SLR 1428 ("*Long Say Ting*") at [60]. Conduct which is "characterised by a degree of surreptitiousness" can hardly be said to be honest (see *Hytech Builders Pte Ltd v Tan Eng Leong and another* [1995] 1 SLR(R) 576 at [63]).

87 There was clearly a degree of surreptitiousness in the way Morten unilaterally negotiated BGP's exit from the Time Charter and seismic services agreement. He deliberately chose to exclude the Sinwa directors of Nordic International from the discussions so as to ensure that they would not object to the purported assignments of the Time Charter and seismic services agreement. That he subjectively believed that the other directors would not withhold their consent to the purported assignments cannot assist his case, since the assessment of whether a director has acted "honestly" for the purposes of s 391 is an objective one (see *Long Say Ting* at [61]). An objective observer would conclude, in my view, that Morten did not act honestly. There was clearly an intent on Morten's part to gain an "improper benefit or advantage" in unilaterally undertaking the negotiation of the purported assignments with BGP. He did so to secure the substitution of NGS for BGP in the commercial arrangement between Nordic International, BGP and TGS, with a view to advancing his own self-interest, as I have found at [67]–[69].

88 Furthermore, I do not think he acted reasonably in the way he tried to stop Nordic International from pursuing its legitimate claim against BGP for the outstanding charter hire. I am satisfied that this is not an appropriate case to grant relief under s 391.

Did Nordic International consent to or ratify the breach of duty?

89 Morten claims that Nordic International had in any event consented and/or ratified the assignment.[103]

90 It is important to distinguish between ratification of the transaction which was brought about by a breach of fiduciary duty and "ratification" of the director's breach of duty. The latter instance of "ratification" is more appropriately understood as a "release" from liability. As to that, the general principle is that, as noted by the Court of Appeal in *Scintronix* at [59], "directors may be released from their obligations to the company by unanimous, or at the very least majority agreement of the *shareholders*" (emphasis in original). But just because a company ratifies or adopts the transaction in question does not mean it has released the errant director from liability for breach of duty (see Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at para 9.116; Paul L. Davies and Sarah Worthington, *Gower and Davies: Principles of Modern Company Law* (Sweet & Maxwell, 9th Ed, 2012) at para 16-188). This is a specific application, in the context of companies and their directors, of a rule pertaining to principals and agents: a principal may choose to ratify an unauthorised transaction that the agent entered into with a third party without exonerating that agent of any breach of duty (see *Goh Kim Hai Edward v Pacific Can Investment Holdings Ltd* [1996] 1 SLR(R) 540 at [80]).[104]

91 While the ratification of the unauthorised transaction may be implied from "the mere acquiescence or inactivity of the principal" (see *Eng Gee Seng v Quek Choon Teck and others* [2010] 1 SLR 241 at [35]), care must be taken

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[103] Defence at para 22

[104] Plaintiff's Submissions at para 66

not to equate that with ratification of the breach. It has been suggested that the director should go about obtaining ratification "by making a full and frank disclosure and calling together the general body of the shareholders" to ask that the breach be ratified (see *Bamford v Bamford* [1970] Ch 212 at 237, cited in *Scintronix* at [59]). In other words, the informed consent of the shareholders is required. It appears that such consent of the shareholders need not always be given formally, by way of a resolution, although the shareholders must at minimum know of and consent to the breach. In *Chin Siew Seng v Quah Hun Kok Francis and another appeal* [2010] SGCA 44, the director was allegedly in breach of his fiduciary duties in diverting commissions due to the company as well as its ship-brokering business to a company he incorporated. The Court of Appeal found that the director did not breach his fiduciary duty as all the directors and shareholders "knew and consented" to the latter company's receipt of the ship-brokering commissions (at [29]). However, the Court reached this conclusion having found that (a) the other shareholders did not at any time object to the diversion of commissions; and (b) there was an agreement that the businesses of the company would be split up and that the director would be free to pursue his own ship-brokering business (at [27]–[28]).

92 Many of the arguments raised by both sides address the question of whether Nordic International had by its conduct ratified the assignment, but it is important to bear in mind that ratification of the assignment is not necessarily ratification of Morten's breach of duty in procuring it. Morten places emphasis on the fact that Sinwa (a) did not inform OCBC that it objected to the assignment; (b) made no protest when Nordic International continued to receive charter hire for the months of October 2008 to December 2008; and (c) did not write to BGP to object to the assignment.[105] I do not think

these instances of Sinwa's conduct raised by Morten necessarily constitute ratification of the assignment, much less of the breach. There are plausible alternative explanations for Sinwa having acted in the way it did: it did not inform OCBC that it objected to the assignment because, in Mike Sim's testimony, it was concerned that OCBC would withdraw the loan;[106] it did not protest when Nordic International continued to receive the charter hire from NGS because the charter hire was required for the loan repayments to OCBC;[107] it may not have written to BGP to object to the assignment but its conduct in pursuing BGP for the outstanding charter hire shows that at all material times, it did not recognise the assignment in any event.

93 More importantly, these acts or omissions at best show that there was ratification of the assignment of the Time Charter. However, there was never any intention to excuse Morten from his breach of fiduciary duty since Sinwa wrote to Morten on 23 October 2008 to formally place him on notice that the assignment raised "a conflict of interest issue".[108] It maintained this stance when it informed all the directors of Nordic International in July 2009 of its intention to commence legal action in its name against Morten for breach of fiduciary duties.[109] I do not think the consent of a shareholder to releasing a director for breach of his fiduciary duties should be lightly implied, all the more so when, in this case, the shareholder in question has expressly made its disapproval clear by commencing a derivative action on behalf of the company.

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105 Defendant's Submissions at paras 138–140

106 Notes of Evidence (24 August), p 55, lines 9–10

107 Notes of Evidence (24 August), p 52, at lines 1–13

108 2 AB 433

109 3 AB 639–640

94 In the circumstances, I reject Morten's case on ratification of his breach(es) of fiduciary duties.

What relief should the court grant?

95 I approach this with respect to the three breaches of duty. The third breach – profiting or intending to profit from the exercise of the option to purchase the Vessel – clearly has led to no damage or profit given that it is common ground that Morten never exercised and does not intend to exercise the option. That leaves the first two breaches.

Procuring the purported assignment of the Time Charter

96 Nordic International is ostensibly seeking to claim the profit that Morten in fact made from the seismic services agreement. As explained above, the novation of the seismic services agreement must be viewed in tandem with the Time Charter. It is clear that Morten ceased to make further profit from the seismic services agreement after it was terminated by TGS in December 2008. But there is still the period from August to December 2008. As mentioned earlier, Morten through NGS stood to make an additional sum of US$15,500 per day from the assignment of both the Time Charter and the seismic services agreement. Morten explained that the additional daily charter hire rate of US$5000 was meant to cover the cost of an extra compressor that TGS wanted, as well as the extra cost of hiring Nordic Maritime's crew.[110] He did however accept that he still expected to make an estimated profit of US$5000 to US$7000 a day by reducing the operation costs as much as possible.[111] It is true that Mike Sim did acknowledge that Morten did not profit because the

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110 Notes of Evidence (26 August 2016) at p 4 lines 10–22

111 Notes of Evidence (26 August 2016) at p 6, lines 11–22

seismic services agreement was eventually terminated by TGS.[112] However, from its context, it appears to me that Mike Sim was acknowledging that Morten did not make as much profit as he would have hoped to because he "did not have the benefit of the full run of the charter".[113] Ultimately, the true extent of the profits earned by Morten would depend on the additional operational costs incurred by NGS to provide the seismic services directly to TGS. As things stand, there is enough evidence that Morten has earned *some* profit from the assignments of the Time Charter and the seismic services agreement. This is sufficient basis on which to order an account of profits.

Causing the withholding of charter hire

97 I now come to the crucial question of the loss occasioned by Morten's breach in causing the withholding of charter hire.

98 The loss which flows from that is the loss of charter hire owed by BGP. Nordic International seeks equitable compensation from Morten for those losses caused by Morten's breaches of fiduciary duties. Morten's primary defence is that the loss has not crystallised since the arbitration between Nordic International and BGP has not concluded.[114] His alternative argument is that even if there had been no assignment of the Time Charter, BGP would have terminated the Time Charter and Nordic International would nonetheless have to recover the charter hire from BGP.[115] In other words, his breaches did not cause the withholding of the charter hire. The second argument can be immediately rejected – it is a completely speculative

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112 Notes of Evidence (24 August) at p 72, lines 8–9

113 Notes of Evidence (24 August 2016) at p 71, lines 12–13

114 Defendant's Submissions at para 170

115 Defendant's Submissions at para 172

assertion. There is no evidence that BGP would have terminated the Time Charter in any event. In fact, the evidence is to the contrary: Mr Tan accepted that BGP had no right of termination of the Time Charter.

99 That leaves the first argument on whether the loss has crystallised. I find this argument both ironic and somewhat facetious. One of the reasons why the loss has yet to crystallise is because the arbitration against BGP is still pending. The principal reason for this state of affairs is because Morten had initially opposed the arbitration. It is therefore incongruous for Morten to rely on the precise fact constituting the breach of duty – *ie*, his delaying of the pursuit of the claim against BGP – to ground his argument that the loss flowing from that breach has not crystallised.

100 To be clear, the issue here is not one of causation. Had Morten not brought about the purported assignment, BGP would not have been able to rely on the MOA to deny its liability under the Time Charter. The loss has already occurred because Nordic International has not been paid the charter hire it was entitled to for the months of January to June 2009, the period of the outstanding charter hire for which leave of the Court of Appeal was granted to pursue in this action. Rather, the issue is about what the remedy of equitable compensation, which Nordic International seeks, is meant to achieve. In *Target Holdings Ltd v Redferns (a firm) and another* [1996] 1 AC 421 Lord Browne-Wilkinson said at 439:

> Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach.

101 In this case, Nordic International has commenced an arbitration against BGP for the loss of the charter hire. Until the conclusion of that arbitration,

one cannot know for certain whether, "using hindsight and common sense", Morten's breach in causing the withholding of charter hire led to any loss. It must be borne in mind that even if Nordic International prevails in the arbitration, it may not be entitled to claim, as against Morten, the full sum of outstanding charter hire for the months of January to June 2009. This is because the charterer would have been entitled to a reduction of the charter hire once the Vessel was laid up, pursuant to cl 5(d) of the Time Charter, as noted by Andrew Ang J in his judgment for OS 960 (see *Sinwa (OS 960)* at [40]). Thus, proof of Nordic International's precise loss can only be determined after the conclusion of the arbitration. Even then, to arrive at the proper quantum representing the loss of charter hire to Nordic International as a result of Morten's breach, it would be necessary to deduct the expenses which Nordic International would have incurred in earning that charter hire.

102 In response to my invitation to submit additional authorities to address the question of the appropriate relief, Mr Soh brought several additional cases to my attention in support of his submission that the assessment of the loss in this case can be reserved with liberty to apply for directions. Three of them are broadly relevant (*Deeny and others v Gooda Walker Ltd (in liquidation) (No 3)* [1995] 1 WLR 1206; *China Resources Purchasing Co Ltd v Yue Xiu Enterprises (S) Pte Ltd and another* [1996] 1 SLR(R) 397; and *Freight Connect (S) Pte Ltd v Paragon Shipping Pte Ltd* [2015] 5 SLR 178)). In each of these cases, the defendant had to indemnify the plaintiff in respect for losses flowing from claims made against the plaintiff by third parties. With respect to claims by third parties which have yet to be made, the courts have held that the assessment of damages should be reserved until after those claims have been finally determined. Here, the situation is slightly different. Unlike the other cases which dealt with a pending *loss* to third parties, Nordic International has a pending *claim* against BGP. Nonetheless, what these cases demonstrate is

that a court has the power to defer the assessment of damages when the liability of a defendant to a plaintiff is contingent on an action between a plaintiff and a third party.

103 Here, as I have found, Morten did indeed breach his fiduciary duties. Given that the claim against BGP is still pending, the sensible solution seems to be to order an assessment of the appropriate amount of compensation in respect of loss of charter hire caused by Morten's breach of fiduciary duty but to direct that such assessment take place only after the conclusion of the arbitration between Nordic International and BGP.

Conclusion

104 In conclusion, I allow Nordic International's claim and order that an account be taken of the profits which Morten has made in procuring the purported assignment. The quantum of compensation that Morten is liable to Nordic International for causing the withholding of charter hire is to be reserved for assessment until the conclusion of the arbitration between Nordic International and BGP. Nordic International shall have liberty to apply for that assessment to be restored following the outcome of the arbitration.

105 Nordic International will have the costs of this action which I fix at $110,000 inclusive of disbursements. Costs of Summons No 2567 of 2012 which related to an injunction hearing before Quentin Loh J was reserved. Taking into account the subsequent events which have transpired following Loh J's Order of Court dated 14 March 2013, I order each party to bear their own costs in respect of the injunction.

Steven Chong
Judge

Anthony Soh Leong Kiat (Via Law Corporation), Andrew Ho Yew Cheng and June Lim Pei Ling (instructed) for the plaintiff;
Joseph Tan Wee Kong and Joanna Poh Ying Ying (Legal Solutions LLC) for the defendant.