IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 139

Originating Summons No 166 of 2019

Between

(1) Poh Fu Tek
(2) Koh Seng Lee

… Plaintiffs

And

(1) Vermont UM Bunkering Pte. Ltd.
(2) Vermont Groups Limited

… Defendants

JUDGMENT

[Companies] — [Statutory derivative action] — [Minority shareholders] — [Whether applicants acting in good faith] — [Whether statutory derivative action for collateral purpose] — [Whether proposed action is prima facie in interests of company] — [Whether winding up of company more appropriate]

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v
Vermont UM Bunkering Pte Ltd and another

[2020] SGHC 139

High Court — Originating Summons No 166 of 2019
Audrey Lim J
25 July, 22 and 23 October 2019, 28 January, 9 and 10 June 2020

6 July 2020 Judgment reserved.

Audrey Lim J:

Introduction

1 Poh Fu Tek ("Poh") and Koh Seng Lee ("Koh") ("the Applicants"), are directors and minority shareholders of the first respondent ("Vermont"). Goldsland Holdings Company Limited ("Goldsland") and Hong Kong Sin Hua Development Co. ("Sin Hua") commenced Suit 260 of 2018 ("Suit 260") and Suit 261 of 2018 ("Suit 261") respectively to recover loans allegedly made to Vermont and obtained default judgments in the Suits ("the Default Judgments").

2 Poh and Koh then commenced this originating summons ("OS 166") to seek leave under s 216A of the Companies Act (Cap 50, 2006 Rev Ed)

("Companies Act") to do the following on Vermont's behalf:[1] (a) apply to set aside the Default Judgments in Suits 260 and 261 and defend the Suits; (b) claim against the other directors of Vermont for breaches of fiduciary duties; (c) claim against Goldsland and Sin Hua for dishonestly assisting the aforesaid directors in the breaches of their fiduciary duties; and (d) claim against Goldsland, Sin Hua, and/or those directors for conspiracy to harm Vermont.

3 For the reasons set out below, I allow the Applicants' proposed derivative actions, subject to certain conditions.

Background

Background of Vermont and related entities

4 The Guangxin group of companies ("Guangxin Group") comprises state-owned enterprises operated by the Guangdong provincial government, and includes: (a) Guangdong Guangxin Holdings Group Ltd ("Guangdong Guangxin"); (b) Goldsland, which is 99.99% owned by Guangdong Guangxin; and (c) Sin Hua, which is 99.99% owned by Goldsland.

5 Sin Hua owned 70% of the second respondent, Vermont Groups Limited ("VGL") until 22 March 2018 when it then owned 100% of VGL. VGL is a private company incorporated in Hong Kong, and in the business of oil trading and bunker supply in Hong Kong. I will refer to Vermont and VGL as "the Respondents".

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[1] Originating Summons (Amendment No. 1); Poh's 1st affidavit dated 4 February 2019 ("Poh's 1st Affidavit") at [76].

6 Vermont was incorporated in Singapore in October 2009, and is owned by VGL (51%), Poh (24.5%) and Koh (24.5%). Its directors then were Lu Chaoying ("Lu"), Zhao Kundian ("Zhao"), Ngai Man, Poh and Koh. Both Lu and Zhao held directorships in Vermont, VGL, Sin Hua, and Goldsland at the time of Vermont's incorporation.[2]

7 Vermont's shareholders are governed by a shareholders agreement ("Shareholders Agreement"),[3] which provides in particular that: (a) there would be five directors of Vermont – three appointed by VGL ("Majority Directors") and two appointed by the Applicants; (b) the chairman of the board of directors is to be nominated by VGL; (c) the board of directors shall appoint two executive directors to manage Vermont's business and the day-to-day operational management and control of Vermont shall be the executive directors' responsibility; and (d) Vermont shall inform its shareholders and obtain their written consent for borrowing (except from Vermont's bankers in the ordinary and proper course of business) in excess of a total sum outstanding at any time of US$1 million.

8 In addition to Poh and Koh, the present Majority Directors are as follows:[4]

(a) Zou Bin (since 3 February 2017). He is also a director of Goldsland, Sin Hua and VGL (all since 1 August 2016).

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2 Joint Bundle of Tables and Charts dated 4 September 2019 ("JBTC") at Tab 1.

3 Poh's 1st Affidavit at p 447.

4 Li's 2nd affidavit dated 23 May 2019 ("Li's 2nd Affidavit) at [64]; JBTC at Tab 2 at s/n 27, 40, 42.

(b) Zhong Xiaolin ("Zhong") (since 1 August 2017). He was also a director of Goldsland, Sin Hua and VGL from 31 March 2017 to 31 May 2018.

(c) Tong Shenghong ("Tong") (since 24 April 2017). He is also a director of Sin Hua (since 11 April 2018) and VGL (since 13 October 2012).

On 9 June 2020, VGL's counsel (Ms Sia), informed me that Tong and Zhong were no longer directors of Vermont, and they had been replaced by Li Bijian ("Li"), who is also a director of VGL, and Wang Qigan.

Vermont's operations

9 Vermont is involved in bunker trading. Poh claimed that it was incorporated as a joint venture between VGL and the Applicants. He claimed that the Applicants did not know at the material time that the Majority Directors held cross-directorships in VGL, Goldsland and Sin Hua.

10 The Applicants alleged that the shareholders and directors of Vermont agreed on rules to govern Vermont's operations and bunker trading activity to limit the shareholders' risk exposure ("Bunker Trading System"). Poh stated that the key features of the Bunker Trading System are as follows.[5] First, an open position trading limit for Vermont was imposed, at a maximum of 10,000 metric tonnes of bunker fuel ("the Trading Limit"). Second, Vermont's trading operations would be financed solely by trade receivable financing from banks.

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5 Poh's 1st Affidavit at [17].

In this regard, the Guangxin Group would assist Vermont in obtaining the necessary banking facilities to finance its operations.

11 The day-to-day running of Vermont was left to the Majority Directors. Poh claimed that the Applicants were content to leave the daily operations of Vermont to the Majority Directors because Vermont's business risk would be regulated by the Bunker Trading System. Zhao was one of the initial Majority Directors (nominated by the Guangxin Group through VGL) and served as both the executive director and general manager of Vermont, effectively making all its management and trading decisions.[6]

12 In 2010, Zhao informed Koh and Poh that the Guangxin Group had sourced for trade receivable financial facilities from various banks. However, the banks required the Guangxin Group to provide parent company guarantees to secure Vermont's obligations. Poh and Koh then executed counter-guarantees in favour of Goldsland and Sin Hua in 2010 and 2014 ("the Counter-Guarantees"), under which they would each be responsible for a 24.5% share of any call on the parent company guarantees by the banks.[7]

Zhao's wrongful trading and the alleged Guangxin Agreement

13 In 2011, it was discovered that Zhao had traded wrongfully in breach of the agreed Trading Limit, resulting in massive losses to Vermont. Poh claimed that he and Koh were not given much information on the internal investigations on Zhao pertaining to that matter.[8]

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6 Poh's 1st Affidavit at [19] and [23]; Li's 2nd Affidavit at [49].

7 Poh's 1st Affidavit at [24]–[26] and [45]–[46].

8 Poh's 1st Affidavit at [30]–[34].

14 A meeting was held in May 2011 in Hong Kong ("2011 HK Meeting") at which Poh and Koh were informed that the estimated loss suffered by Vermont was more than US$10 million. That meeting was also attended by the Respondents and the Guangxin Group.[9] According to Koh, he emphasised at that meeting that, as Zhao was the Guangxin Group's representative on Vermont's board of directors, the Guangxin Group should bear full responsibility for Zhao's wrongful trading. Further, the breach of the Trading Limit and resulting losses were hidden from Poh and Koh. Hence, they and Vermont should not be held responsible for Zhao's actions. Lu, then a director of Goldsland, Sin Hua and the Respondents, allegedly agreed that the Guangxin Group would be responsible for the consequences of Zhao's trading and not the minority shareholders and Vermont.[10] Some two months later, Poh claimed that he and Koh travelled to Guangzhou for another meeting attended by representatives of the Guangxin Group, and reiterated their position as stated at the 2011 HK Meeting. Poh claimed that, thereafter, an agreement was reached among Vermont, the Guangxin Group, Poh and Koh, that neither Vermont nor its minority shareholders (*ie,* Poh and Koh) would be responsible for the consequences of Zhao's trading, and that these consequences would be the Guangxin Group's sole responsibility ("Guangxin Agreement").[11]

15 On 29 June 2011, Zhao was removed as a director by the Guangxin Group for his wrongful trading, and replaced by Yang Sanhua ("Yang"), who ran the day-to-day operations of Vermont.[12]

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9 Poh's 1st Affidavit at [34]–[35].

10 Poh's 1st Affidavit at [35].

11 Poh's 1st Affidavit at [36]–[39].

12 Poh's 1st Affidavit at [21], [29]–[35], [42] and [93(a)].

The Credit Facility and Loan Agreement

16 Li, a director of VGL, claimed that, around June 2010, Vermont ran into cash flow difficulties and requested for financial assistance from its shareholders, but Poh and Koh were not agreeable to provide further funding.[13] A Request for Instructions on Borrowing Working Capital dated 14 June 2010 ("June 2010 Request to Borrow Capital") was then issued by the board of directors to Goldsland, which stated that:[14] (a) as at 13 June 2010, Vermont had borrowed US$8.19 million (and a standby letter of credit of US$4.5 million) and US$4.6 million (and a credit line of US$11 million granted by the Bank of Communications) from Goldsland and VGL; (b) it was still difficult for the current borrowing to meet the funding needs for Vermont's existing operations and the gap was about US$2.27 million; and (c) Vermont hoped that Goldsland would be able to lend it another US$3.6 million.

17 Li stated that sometime around late 2011, the Guangxin Group agreed to lend monies to Vermont as follows ("the Loan Agreement"):[15] (a) including the sums that the Guangxin Group had extended to Vermont, the former agreed to extend a credit facility of up to US$37 million to the latter as working capital ("the Credit Facility"); (b) upon Vermont's request, VGL and/or the Guangxin Group would make payments on Vermont's behalf to third parties, with such payments to be regarded as a draw down on the Credit Facility; and (c) Vermont shall pay interest to the Guangxin Group on the sums extended. This Loan

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13 Li's 1st affidavit dated 28 March 2019 ("Li's 1st Affidavit") at [23]–[25].

14 Joint Bundle of Translations ("JBT") at Tab 7; Poh's 1st Affidavit at p 557.

15 Li's 1st Affidavit at [25].

Agreement was apparently recorded in the minutes of a board meeting on 2 December 2011 ("2 Dec 2011 Meeting"), which Poh and Koh attended.[16]

18 Li alleged that pursuant to the Loan Agreement, between 2011 and 2016:[17] (a) Vermont requested for drawdowns of the Credit Facility by requesting VGL and/or the Guangxin Group (through Goldsland and/or Sin Hua) to make payments to third parties on its behalf, or requesting for cash loans from VGL and/or the Guangxin Group; (b) Vermont requested, and the Guangxin Group granted, further increases to the limits on the Credit Facility; and (c) Vermont made partial repayments of the sums due to VGL and/or the Guangxin Group. The drawdowns of the Credit Facility and Loan Agreement are the subject of Suits 260 and 261, as Li claimed that the debts in these Suits are owed by Vermont "pursuant to the Credit Facility and Loan Agreement".[18]

CPIB investigations

19 Around 2016, the Corrupt Practices Investigation Bureau of Singapore ("CPIB") commenced investigations into Vermont's trading activities. At that time, Vermont was managed by Yang. Around November 2017, Vermont, the Applicants, Lee Kok Leong (Vermont's former bunker manager), Yang, and Mac Xing Tao ("Mac") (Vermont's then-financial controller) were charged, *inter alia*, for cheating and criminal breach of trust. The Maritime and Port Authority of Singapore then revoked Vermont's bunker supply licence ("MPA

16 Poh's 3rd affidavit dated 8 July 2019 ("Poh's 3rd Affidavit") at [33].

17 Li's 1st Affidavit at [32].

18 Li's 2nd Affidavit at [11].

Licence") with effect from 27 April 2016.[19] The licence allowed Vermont to trade directly with ship-owners.

20 Despite the revocation of the MPA Licence, Poh claimed that Vermont could still operate as it had vessels it could charter.[20] However, Yang apparently decided to unilaterally close all of Vermont's open trade positions at a significant loss, and Poh and Koh only found out about this on 29 June 2016 at a meeting in Hong Kong. Poh claimed that Yang's actions were a breach of his duties to act in Vermont's best interest and prevented Vermont from using its revenue stream to sustain its operations and reduce any debt owed to third parties. In early July 2016, Yang and Mac disappeared. Around September or October 2016, Yang was removed as a director of Vermont and replaced by Zou Bin, who was the director and chief executive of Goldsland. Poh claimed that Zou Bin refused to engage the Applicants on continuing Vermont's business.[21]

Suits 260 and 261, the HK Proceedings, and application to wind up Vermont

21 On 12 March 2018, Goldsland commenced Suit 260 against Vermont to recover a loan of US$22,443,995.61, and Sin Hua commenced Suit 261 against Vermont to recover a loan of US$18,360,759.33, on the basis that they had provided financial assistance to Vermont for bunkering transactions between 2010 and 2016. They alleged that Vermont requested them to transfer the monies directly to Vermont's suppliers, which they did. Goldsland and Sin Hua obtained the Default Judgments against Vermont on 23 March 2018.

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19 Poh's 1st Affidavit at [6(g)] and [47]–[50] and p 599; Li's 2nd Affidavit at [68].

20 Poh's 1st Affidavit at [50]–[51].

21 Poh's 1st Affidavit at [54]–[58].

22 Poh claimed that the Majority Directors did not reach out to the Applicants to discuss how Vermont should deal with Suits 260 and 261, and did not engage external legal counsel to provide advice on the appropriate course of action.[22] In fact, Vermont did not enter an appearance or contest the Suits.

23 Separately, on 22 January 2018, Goldsland commenced proceedings in Hong Kong against the Applicants for US$9,433,013.27 each ("HK Proceedings").[23] Goldsland claimed that, from 21 April 2010 to 10 December 2013, it made payments of US$34,002,094.98 on Vermont's behalf to suppliers; and, on 20 June 2016, it made payments of US$4,500,000 on Vermont's behalf to the Bank of China. The Applicants signed the Counter-Guarantees in respect of these loans and were thus personally liable for 24.5% of the loan amounts each. On 27 April 2018, Goldsland obtained the leave of the Hong Kong High Court to serve the writ and statement of claim on the Applicants in Singapore. Li stated that Goldsland served the writ and statement of claim on Koh on or around 4 July 2018, and Poh was served sometime thereafter. On 21 September 2018, Goldsland began efforts to enforce the Default Judgments by obtaining an order for the examination of judgment debtor against the Applicants.[24]

24 On 29 April 2019, the Applicants commenced OS 166. On 19 July 2019, Vermont applied (through Zou Bin, a Majority Director) to wind itself up.

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22 Poh's 1st Affidavit at [6(h)], [59]–[60].

23 Poh's 1st Affidavit at [65] and p 662.

24 Poh's 1st Affidavit at [142] and pp 660 and 984; Li's 1st Affidavit at [51].

Requirements under s 216A of the Companies Act

25 The court may only grant leave to an applicant under s 216A of the Companies Act if: (a) the applicant has given 14 days' notice to the company's directors of his intended application if the directors do not bring, diligently prosecute or defend the action; (b) the applicant is acting in good faith; and (c) it appears to be *prima facie* in the interests of the company for the action to be brought, prosecuted, defended or discontinued.

26 The applicant has to establish that he is acting in good faith. Essentially, there are two interrelated factors in determining good faith: *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 ("*Ang Thiam Swee*") at [23] and [27] to [30]. First, the applicant must honestly or reasonably believe that a good cause of action exists for the company to prosecute. He may be found to lack good faith if it is shown that no reasonable person in his position, and knowing what he knows, could believe that the company had a good cause of action to prosecute. The second is whether the applicant is seeking to bring the derivative action for a collateral purpose as to amount to an abuse of process. The best way to demonstrate good faith is to show that the company has a legitimate claim which its directors are unreasonably reluctant to pursue with the appropriate rigour or at all: *Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 ("*Pang Yong Hock*") at [20].

27 However, the legal merits of a proposed derivative action alone should not be used to determine good faith. An applicant may seek to bring a statutory derivative action in good faith "*even where there is no arguable or legitimate case* to be advanced" [emphasis added]: *Ang Thiam Swee* at [29]. Conversely, an applicant with a legitimate case may be found to lack good faith if the applicant "is so motivated by vendetta, perceived or real, that his judgment will

be clouded by purely personal considerations": *Pang Yong Hock* at [20]. He has to demonstrate that he is or may be "genuinely aggrieved" and that his collateral purpose is sufficiently consistent with the purpose of "doing justice to a company": *Ang Thiam Swee* at [29] and [31].

28 As to whether the proposed derivative action is *prima facie* in the company's interest, the applicant must show that the claim is "legitimate and arguable". The claim must be such that the company will stand to gain substantially in money or money's worth if proved. At the leave stage, the threshold is low and only the most obviously unmeritorious claims will be excluded. Additionally, the court may examine "whether it would be in the practical and commercial interests of the company for the action to be brought": *Ang Thiam Swee* at [53]–[56].

29 The Applicants submitted as follows. First, it is *prima facie* in Vermont's interests for leave to be granted because the alleged debts are not genuine. Even if they were genuine, they were procured by the Majority Directors in breach of their fiduciary duties by failing to disclose their conflicts of interest, and with the dishonest assistance of, and/or in conspiracy with, Goldsland and/or Sin Hua. The Majority Directors had caused Vermont to allow Default Judgments to be entered into in Suits 260 and 261 without the approval of its board of directors or shareholders, or engaging external counsel to advise Vermont. Goldsland and Sin Hua are also estopped from recovering the loans due to the Guangxin Agreement. Second, the Applicants are acting in good faith because they have an honest belief that Vermont has legitimate defences and cogent claims against Goldsland, Sin Hua and the Majority Directors.

30 Li, for VGL, submitted that it is not *prima facie* in Vermont's interests for leave to be granted. Vermont has no defence to Suits 260 and 261 as the

debts which form the subject matter of the Suits ("the Alleged Debts") are *bona fide*. The Credit Facility was approved by Vermont's directors and all parties were well aware of the relationship between Goldsland, Sin Hua and Vermont. Even if the Majority Directors did breach their fiduciary duties, some of them, such as Yang, have seemingly absconded, so any judgment obtained by Vermont against them would be a paper judgment. In addition, the Guangxin Agreement did not exist. Furthermore, Vermont has ceased operations since April 2016 and has no funds to support the Applicants' litigation. The Applicants are also not acting in good faith,[25] as they brought OS 166 to create a false front that they were not involved in Vermont's day-to-day operations and thus not complicit in the criminal activity that they and Vermont have been charged with, and to delay and buttress their defence in the HK Proceedings. The Applicants should not be granted charge and control over Suits 260 and 261 because they are "the subject of criminal charges in relation to their management of [Vermont]".

Prima facie interest of Vermont to defend Suits 260 and 261 and pursue actions

31 I first deal with whether the Applicants' claims on behalf of Vermont are "legitimate and arguable" and *prima facie* in Vermont's interest, as this is also relevant to the issue of whether the Applicants are acting in good faith.

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25 Li's 2nd Affidavit at [8(h)] and [8(i)].

Setting aside the Default Judgments and defending Suits 260 and 261

Parties' submissions

32 First, I consider the Applicants' proposed derivative action to set aside the Default Judgments and to defend Suits 260 and 261. It is not disputed that the Default Judgments were regular. To set aside a regular default judgment, the defendant has to show a *prima facie* defence, *ie*, that there are triable or arguable issues. The merits of the defence do not constitute the sole consideration, but it is a "certainly highly significant" factor to be weighed against other relevant considerations such as the applicant's explanation both for the default and any delay, as well as any prejudice to the other party: *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 at [60], [65] and [98]. Thus, the central question is whether the Applicants have a legitimate and arguable claim to set aside the Default Judgments and, subsequently, mount a defence for Vermont to the Alleged Debts.

33 The Applicants claimed that the Loan Agreement is not genuine or accurate.[26] First, Goldsland and Sin Hua have taken inconsistent positions in Suits 260 and 261 vis-à-vis the HK Proceedings. The total debt allegedly owed by Vermont for payments made to its suppliers is pleaded differently in the HK Proceedings and the Singapore proceedings. Second, Poh claimed that Goldsland made only a short-term bridging loan of about US$3.6 million around 14 June 2010 to Vermont ("2010 STBL"). Third, the 1st Goldsland Breakdown of Debts filed by Goldsland in the HK Proceedings (which purportedly showed that Goldsland had advanced at least US$60 million to Vermont) is inaccurate because only the 2010 STBL was recorded but not subsequent repayments.

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[26] Poh's 1st Affidavit at [33], [82]–[86] and pp 676, 712–713.

Fourth, while Goldsland's pleadings in Suit 260 and in the HK Proceedings state that it made the payments directly to third parties on Vermont's behalf, the 1st Goldsland Breakdown of Debts showed payments made directly to Vermont. Fifth, the extracts derived from the "Kingdee system" ("Kingdee Documents") – the alleged common accounting system used by Goldsland, Sin Hua and the Respondents and which is supposedly a contemporaneous record – further cast doubt on the legitimacy of the Alleged Debts in Suits 260 and 261.

34 Further, Poh claimed to have no knowledge of the Alleged Debts and of Suits 260 and 261 until it was too late. The Applicants were initially unaware that Vermont was served with court papers, and the Suits were only brought to their attention later on 20 March 2018.[27]

35 Li claimed that the loans were genuine as the Applicants were aware of the Loan Agreement and the outstanding sums due from Vermont to Goldsland and Sin Hua under the Loan Agreement were reflected in Vermont's audited financial statements.[28] Further, an audit confirmation issued by Vermont to Goldsland dated 1 February 2011, and signed by Poh, confirmed that, as at 31 December 2010, US$17,766,149.75 was due from Vermont to Goldsland. Poh also signed various documents evidencing the Loan Agreement. The Applicants also had possession of Vermont's accounting records which recorded the loans from Goldsland and Sin Hua to Vermont.[29] As for the HK Proceedings, Goldsland is seeking to enforce the Counter-Guarantees against the Applicants

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27 Poh's 1st Affidavit at [42]–[44] and [64]; Poh's 3rd Affidavit at [21].

28 Li's 2nd Affidavit at [13]–[14]; Li's 1st Affidavit at [25] and pp 261 and 265.

29 Li's 2nd Affidavit at [15] and [20].

which is different from Suits 260 and 261 where Goldsland and Sin Hua are claiming for all sums due and owing from Vermont.[30]

Whether there is a legitimate and arguable case to defend Suits 260 and 261

36 The key question is whether the *specific* Alleged Debts claimed in Suits 260 and 261 are legitimate and defensible. I find there is basis to doubt the veracity of the Alleged Debts and that the Applicants have a legitimate and arguable claim to set aside the Default Judgments and defend the Suits.

37 First, Li's affidavits highlighted some inherent contradictions in the claims in Suits 260 and 261. The first inconsistency concerns *when* the debts were incurred. Goldsland and Sin Hua pleaded in Suits 260 and 261 that Vermont's debts were incurred from *2010*. However, Li attested that Goldsland's and Sin Hua's claims in the Suits are based on the Credit Facility and Loan Agreement which arose only in *2011* (see [17] and [18] above).[31] If so, the Alleged Debts (the subject of the Suits) must have been incurred *from 2011*. At the same time, Li relied on Vermont's audit confirmation dated 1 February 2011 to show that Vermont owed about US$17 million to Goldsland *as at 31 December 2010*, and referred to Vermont's accounting records to support that it owed these debts *in 2010*.[32] Thus, while Li adduced evidence to show that Vermont owed debts to Goldsland and Sin Hua *in 2010*, his own case was that the Alleged Debts claimed by them are based on the Credit Facility and Loan Agreement entered *in 2011*.

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30 Li's 2nd Affidavit at [39]–[42]; Poh's 1st Affidavit at [26], [45] and [65].

31 Li's 2nd Affidavit at [11]–[14] and [26].

32 Li's 2nd Affidavit at [15] and [25] and pp 57–172.

38 The second inconsistency concerns *what* debts are being claimed.

(a) While Li stated that the Alleged Debts in the Suits were incurred "pursuant to the Credit Facility and Loan Agreement",[33] which must have been from 2011 onwards, he *also* claimed that other debts that Vermont incurred in 2010 were the subject of the Suits.

(b) The statement of claim in Suit 260 unequivocally states that the US$22,443,995.61 is claimed on the basis of the "financial assistance in respect of [Vermont's] bunkering transactions with its suppliers" that Vermont requested from Goldsland, and that Vermont "would request [Goldsland] to make payment directly to [Vermont's] bunkering suppliers, for bunkers which were supplied to [Vermont]". Sin Hua pleads the same basis in Suit 261 for its claim for US$18,360,759.33.

(c) However, when the Applicants raised the discrepancy between the quantum claimed in Suits 260 and 261 and in the HK Proceedings (despite the similarity in the subject matter of the claims),[34] Li asserted that the sums claimed in Suits 260 and 261 were actually for "all sums due and owing from [Vermont]", including, additionally: (a) outstanding payments arising from trades or business transactions between [Vermont] and Goldsland or Sin Hua; (b) "sums extended directly to [Vermont]"; and (c) "the cost of pension insurance and housing allowance for … employees sent to [Vermont] as expatriates" which Goldsland had paid for on Vermont's behalf.[35] Some of these were

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33 Li's 2nd Affidavit at [11].

34 Poh's 1st Affidavit at [82].

35 Li's 2nd Affidavit at [40].

> clearly *not* payments made "directly" to Vermont's "bunkering suppliers, for bunkers which were supplied to" Vermont, as pleaded in the Suits. Li then attempted to explain the discrepancies by asserting that "the Statement of Claim [for Suits 260 and 261] did not state that Goldsland and Sin Hua's claims were **limited** to such payments" [emphasis in original].[36] This is clearly unconvincing. By Li's own assertion, the sums Goldsland and Sin Hua claimed in the Suits included those that went *beyond* what was pleaded.

39 Li's explanations of the basis of Suits 260 and 261 in his affidavit contradict not only the pleadings in the Suits but also his own evidence in other parts of *the same affidavit*. These inconsistencies cast doubt on what exactly Goldsland and Sin Hua had sued Vermont for – is it for debts incurred under the Credit Facility and Loan Agreement, for debts incurred even prior to the Loan Agreement, or for "all sums due and owing" from Vermont? Li's inconsistent evidence casts doubt on the basis of the Suits and the legitimacy of the Alleged Debts and suggests that Vermont did not, contrary to Zou Bin's (see [50] below) and Li's claims, properly scrutinise the viability of Goldsland's and Sin Hua's claims in the Suits.

40 I next turn to the documents that Li alleged support the claims in the Suits. I find that the paucity of underlying documents to support the Alleged Debts in Suits 260 and 261 and the multiple inconsistencies within the existing documents, support that the Applicants have a legitimate and arguable case in relation to the Alleged Debts. I raise a few examples.

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[36] Li's 3rd affidavit dated 18 July 2019 ("Li's 3rd Affidavit") at [8].

41 First, Vermont's audited financial statement (for the year ended 31 December 2011) ("2011 Financial Statement") showed that, as of the end of 2011, Vermont had borrowed from a "related company/party" US$37,335,038, comprising US$15,296,233 (from 2011) and an outstanding US$22,038,805 (from 2010).[37] Li claimed – based on a "Breakdown of the Company's Trade and Other Payables" as at 31 December 2011 annexed to the 2011 Financial Statement[38] – that the US$37,335,038 comprised US$18,980,804 owed to Goldsland and US$18,354,234 owed to Sin Hua. I make some observations.

(a) This item and figure of US$22,038,805 (at 2010) was completely missing from Vermont's 2010 audited financial statement.[39] Although this raised serious doubts on the veracity of this debt and thus the overall amount owing at 2011 and the subsequent "carried forward" amount owing by Vermont to Goldsland or Sin Hua in later years, the auditor was unable to provide any explanation for it.[40] In any event, the 2011 Financial Statement *does not* provide any supporting basis for Suits 260 and 261 as they do not show that Goldsland or Sin Hua is the "related company/party" to which Vermont owed money to, and Ms Sia agreed that Vermont's financial statements do not show how much is owing to Goldsland and Sin Hua respectively.[41]

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37 Poh's 1st Affidavit at p 840 ("Proceeds from amount borrowed from related cos/parties") and p 852 ("Trade and other payables – related companies"); Li's 1st Affidavit at [34(a)].

38 Li's 1st Affidavit at [34(a)] and footnote to that paragraph, and p 72.

39 Poh's 3rd Affidavit at p 261.

40 Li's 3rd Affidavit at pp 112–113 and 119.

41 23/10/19 Notes of Evidence ("NE") at p 8.

(b) Even if Goldsland or Sin Hua was the "related company/party" in the 2011 Financial Statement, it is doubtful whether any amount purportedly owed by Vermont to either of them in 2010 would form part of the Alleged Debts. Li's own case is that the claims in the Suits were premised on the Credit Facility and Loan Agreement, hence the debts would have been incurred on or after 2011 (see [37] above).

(c) Next, Li did not disclose that the "Breakdown of the Company's Trade and Other Payables", which he attached to the 2011 Financial Statement, did *not* form part of the 2011 Financial Statement. This was revealed by Poh.[42] Li's conduct gave me the impression that he was attempting to mislead the court as to the quantum of debt owed by Vermont to Goldsland and Sin Hua. In any event, that document is doubtful and the underlying basis for relying on the quantum carried forward from 2010 is suspect (see [41(a)] and [41(b)] above).

42 Second, I examine the audit confirmations. Ms Sia claimed that Goldsland and Sin Hua had relied on the audit confirmations in pursuing Suits 260 and 261, and that Vermont had decided not to defend the Suits because the audit confirmations were accurate.[43] While the audit confirmation for 2017 recorded that Vermont owed US$22,443,955.61 to Goldsland and US$18,360,754.33 to Sin Hua, the audit confirmations (dating from 2012 to 2017) were signed by either Yang or Tang Ke (Vermont's then General Manager).[44] Again, if the audit confirmation for 2012 showed that, as of 31

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42 Poh's 3rd Affidavit at [45]–[46]; 23/10/19 NE at p 9.

43 22/10/19 NE at p 10.

44 Li's 1st Affidavit at pp 254–266.

December 2011, the amount owing by Vermont to Goldsland and Sin Hua are US$18,980,804.08 and US$18,354,233.65 respectively, these figures would have been based on a running account carried forward from 2010 and before (see the audit confirmation of 1 February 2011) and subsequently carried forward to 2017. However, as earlier stated, it is doubtful if any amount owing in 2010 were the subject of Suits 260 and 261. Thus, the audit confirmations do not show how the sums in the Suits are supported, and there are no other documents to show the breakdown of the Alleged Debts.[45] As the Default Judgments were entered purely on the audit confirmations when there were *no underlying supporting documents* to support the claims, I find that the Applicants have a legitimate and arguable basis to set aside the Default Judgments and defend Vermont's claim on the basis that the quantum of the Alleged Debts may be suspect or inaccurate.

43 Third, the total debt allegedly owed by Vermont to Goldsland for payments made by the latter on the former's behalf is pleaded differently in the HK Proceedings (US$34,002,094.98) and in Suit 260 (US$22,443,995.61). The timeframe for the alleged debts arising is also pleaded in the HK Proceedings as being from 2010 to 2013 only, unlike in Suit 260.[46] Li's explanation for why Goldsland claimed more in Suit 260 – that Goldsland is claiming "for <u>all</u> sums due and owing from [Vermont]"[47] [emphasis in original] – is, as aforementioned, unconvincing and contradicted by Goldsland's own pleadings

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45 23/10/2019 NE at p 9; 10/6/20 NE at p 3.

46 Poh's 1st Affidavit at [82]–[83] and pp 675–676 (Statement of Claim by Goldsland in HK proceedings at [16]).

47 Li's 2nd Affidavit at [40].

(see [38(c)] above). Thus, this casts further doubts on the veracity of its claim pertaining to the Alleged Debts in Suit 260.

44 Fourth, I find that the Kingdee Documents, when read with the 1st and 2nd Goldsland Breakdown of Debts,[48] cast doubt on the legitimacy or accuracy of the Alleged Debts. Counsel for the Applicants, Mr Seah, prepared a table to show that were only eight out of 96 transactions that were consistently reflected across both the Kingdee Documents and the 1st and 2nd Goldsland Breakdown of Debts, and these eight transactions showed monies flowing *from Vermont to Goldsland*.[49] The Kingdee Documents also did not show any transactions of Vermont owing money to Goldsland or Sin Hua in 2010, and at 1 January 2011, it showed a balance of $755 owing from Goldsland to Vermont with no further transactions until 30 December 2011 where the $755 was reclassified leaving a nil balance.[50] This would seem to be contrary to Li's claim that Vermont had "from time to time between 2011 and 2016" requested for drawdowns of the Credit Facility which Goldsland or Sin Hua made for Vermont.[51] The Kingdee Documents also contradict the 1st and 2nd Goldsland's Breakdown of Debts, which set out various transactions between Vermont and Goldsland in 2010 and another debt of about US$37 million in 2011.[52] Thus, these documents undermined the veracity of the Alleged Debts.

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48 JBT at Tab 71.

49 Applicants' Supplementary Written Submissions (dated 10 March 2020) ("AFWS") at [15].

50 AFWS at [19]; Li Bijian's CWU affidavit dated 3 Jan 2020 ("Li's CWU Affidavit") at pp 49–50; 9/6/20 NE at p 2.

51 Li's 1st Affidavit at [32]–[34].

52 JBT at Tabs 19 and 71.

45 Whilst VGL had introduced the Kingdee Documents and the 1st and 2nd Goldsland Breakdown of Debts in OS 166 to support the veracity of the Alleged Debts, Ms Sia confirmed that Goldsland and Sin Hua had relied only on the audit confirmations in Suits 260 and 261.[53] If so, it is unclear how the 1st and 2nd Goldsland Breakdown of Debts (particularly the 2nd Goldsland Breakdown of Debts which was prepared *after* the commencement of OS 166, as an amended and a complete copy of the 1st Goldsland's Breakdown of Debts[54]) or the Kingdee Documents could be relied on for the veracity of the Alleged Debts. In any event, the reliability of Vermont's financial statements for the accuracy of the Alleged Debts is doubtful (see [41] above). When Mr Seah pointed out various inconsistencies among Vermont's accounts read with the 1st and 2nd Goldsland Breakdown of Debts and Kingdee Documents, Ms Sia accepted that the accounts were extremely messy and the figures were inconsistent; that a re-examination of the accounts may be necessitated; and that there may be some doubt as to the claims in Suits 260 and 261.[55]

Documents that Poh signed

46 For completeness, I am cognisant that Poh did sign documents, such as the following, that seemingly document the Loan Agreement:[56]

(a) The June 2010 Request to Borrow Capital which stated that, as at 13 June 2010, Vermont had borrowed US$8.19 million and US$4.6 million from Goldsland and VGL.

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53 22/10/19 NE at p 6.

54 Li's 3rd Affidavit at [42(d)].

55 9/6/20 NE at pp 6–7.

56 Poh's 1st Affidavit at p 557 (exhibit PFT-8); Li's 1st Affidavit at p 253; Li's 2nd Affidavit at [26] and [36], and pp 114, 184, 224 and 393–398; JBT at Tab 38.

(b) A letter from Vermont to Goldsland dated 23 March 2010 requesting Goldsland to make an instalment payment of US$2,522,100, on Vermont's behalf.

(c) A Citibank application for funds transfer dated 4 January 2011 authorising the transfer of US$7,577,060 from Vermont's account to Goldsland to repay a loan of the same amount.

(d) A Citibank application for funds transfer dated 4 May 2011, authorising the transfer of US$8,556,081.82 from Vermont's account to Goldsland, with the handwritten note stating "These bills from [Sin Hua]".

(e) An audit confirmation dated 1 February 2011 which stated that, as at 31 December 2010, Vermont owed Goldsland US$17,766,149.75.

(f) The 2011 Financial Statement.

(g) The board resolution dated 18 August 2014, which states that Vermont accepted credit facilities to be granted by Sinopec Hong Kong (Singapore) Pte Ltd to Vermont from time to time against a deed of guarantee to be provided by Goldsland for up to US$4 million.

47 In addition, the 2 Dec 2011 Meeting minutes recorded that the board of directors had agreed and authorised management on various matters, including that Goldsland "maintains cash support of US$37 million" (being the nub of the Loan Agreement) and that Vermont had applied to the Guangxin Group for an increase of credit line to US$110 million.[57]

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[57] JBT at Tab 27, p 212 at [2(1)]–[2(5)].

48 Poh's explanation to the above is briefly as follows.

(a) The Applicants left the day-to-day running of Vermont to the Majority Directors, since the Bunker Trading System limited the risk exposure to them as shareholders.[58] Poh signed the documents, which were usually prepared by Mac, Vermont's then-financial controller, after a "cursory review" as he relied on Mac to prepare the documents correctly. Poh would have "firmly objected" if he had known that Vermont was receiving significant and unauthorised financing from Goldsland and for Zhao's unauthorised trading that went in excess of the Trading Limit and incurred significant losses for Vermont.[59]

(b) The 2011 Financial Statement did not prove that the Applicants were aware of Vermont's stated debts to "related companies/parties" therein, as they were not involved in preparing the audited financial statements.[60]

(c) As for the 1 February 2011 audit confirmation which stated that Vermont owed Goldsland US$17,766,149.75, this did not mean that the advances made to Vermont were genuine or accurate. Poh could not recall if the figures on the audit confirmation were filled in before he signed the document and he did not pay close attention to it.[61]

(d) The 2 Dec 2011 Meeting was a request to the shareholders and the Guangxin Group for a US$37 million credit line facility to be

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58 Poh's 1st Affidavit at [6] and [42]–[44]; Poh's 3rd Affidavit at [21].

59 Poh's 1st Affidavit at [43(c)]; Poh's 3rd Affidavit at [25].

60 Poh's 3rd Affidavit at [36]–[37].

61 Li's 1st Affidavit at p 253; Poh's 3rd Affidavit at [49].

provided to support Vermont's operations moving forward, and was not meant to retrospectively endorse any transactions or loans incurred by Vermont prior to that meeting.[62]

49 It is unnecessary to decide if the Applicants took part in the day-to-day running of Vermont and whether they closely scrutinised each document that they signed. The question is whether the content of the aforesaid signed documents erase the doubts regarding the legitimacy and veracity of the Alleged Debts. I find that this is not the case. Whilst they showed that a Loan Agreement was reached, they do not provide the *underlying supporting documents* that prove *the specific debts* claimed in Suits 260 and 261.

(a) The 2011 Financial Statement does not provide any supporting basis for Suits 260 and 261 because it does not show that Goldsland or Sin Hua is the "related company/party" to which Vermont owed money to, much less how much Vermont owed to each of them. I had earlier explained that the figures in the 2011 Financial Statement were doubtful.

(b) The 1 February 2011 audit confirmation records that Vermont owed Goldsland US$17,766,149.75 as at 31 December *2010*. But Goldsland and Sin Hua's claims in Suits 260 and 261, according to Li's own evidence, pertained to debts that arose from *2011*.

(c) The 2 Dec 2011 Meeting minutes do not provide evidential support for the Alleged Debts – purportedly stated in the 2011 Financial Statement – incurred *prior* to that Meeting.

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62 Poh's 3rd Affidavit at [33].

(d) As for the letter from Vermont to Goldsland dated 23 March 2010, its contents support Poh's explanation that this was a request by Vermont to Goldsland to provide it with another short-term bridging loan.[63] Nevertheless, it is doubtful if any amount paid by Goldsland on Vermont's behalf in 2010, and pursuant to this letter, could have formed part of the Alleged Debt in Suit 260, as Li attested that the subject of Suit 260 pertained to sums paid on Vermont's behalf only from 2011.

(e) The June 2010 Request to Borrow Capital which showed that Vermont had borrowed moneys from Goldsland or Sin Hua in 2010 or prior to that date is also irrelevant if Li's case is that Suits 260 and 261 pertained to sums disbursed from 2011.

(f) Next, the two Citibank application forms (see [46(c)] and [46(d)] above) showed that Vermont *repaid Goldsland*.

(g) Turning to Vermont's resolution dated 18 August 2014, this merely shows that credit facilities were to be granted "from time to time … up to US$4 million", but again did not show that money was indeed disbursed from Goldsland or Sin Hua or when it was disbursed.

50 In addition, it is telling that the Applicants were questioning Zou Bin on Suits 260 and 261 at Vermont's board meeting on 14 May 2018 ("14 May 2018 Directors' Meeting"). This was shortly after the Default Judgments were entered against Vermont and before the Applicants were served with the cause papers for the HK Proceedings. The Applicants stated at that meeting that they had "no idea" of the details behind the Alleged Debts, and asked Zou Bin to send them

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63 Poh's 3rd Affidavit at [52].

the formal documents and data that, according to Zou Bin at that meeting, were "pretty clear" in evidencing the said debts. Zou Bin did not contradict the Applicants at that meeting on their alleged ignorance as to how the Alleged Debts accrued and he even conceded that "the origin of the money is *ambiguous*" [emphasis added].[64]

51 I note the following regarding the 14 May 2018 Directors' Meeting.

(a) The discussion at that meeting supports the Applicants' assertion that they left the day-to-day running of Vermont to the Majority Directors. Throughout the meeting, it was *Zou Bin* who was providing the updates and information to the Applicants, and the Applicants appeared to be ignorant of Vermont's operations and why it had been sued. They claimed they had "no idea" how the money was transferred in and out of Singapore, and Zou Bin did not contradict their ignorance on this. He even said that he "can understand" that the Applicants "only knew that money is gone, but how is it gone, [they] have no idea".[65]

(b) The discussion supports that there were doubts regarding the basis of the Alleged Debts. Zou Bin had stated that "the origin of the money is *ambiguous*".

(c) Despite Zou Bin informing the Applicants at that meeting that the data was "pretty clear" in evidencing the debts, the evidence was actually less than clear (for the reasons that I have explained). Ms Sia

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64 Poh's 1st Affidavit at [64(e)] and pp 641–642.

65 Poh's 1st Affidavit at p 641.

conceded that the underlying supporting documents were sparse.[66] This suggests that Zou Bin had undertaken a less than diligent scrutiny of Goldsland's and Sin Hua's claims at the material time, and had deliberately caused Vermont to fail to defend Suits 260 and 261. This also suggests that Zou Bin was seeking to give the Applicants the false impression (by claiming that the evidence supporting the Alleged Debts were clear) that Vermont had no viable defence to the Suits.

52 It is also curious that Goldsland did not name *any* of Vermont's present or past Majority Directors in the application for order for examination of Vermont as the judgment debtor ("EJD Application"). Notably, a number of them would also have been or are directors of Sin Hua and/or Goldsland. Li explained that the present Majority Directors (*ie*, Zou Bin, Zhong and Tong) have "little knowledge about [Vermont's] assets" as they were only appointed as Vermont's directors in 2017.[67] If so, it is strange that the Majority Directors were able to conclude that Vermont had *no* defences to Suits 260 and 261 and that Zou Bin was able to state at the 14 May 2018 Directors' Meeting that the evidence of the Alleged Debts was "pretty clear".

53 The above would thus support the Applicants' assertion that the Majority Directors had deliberately procured the Default Judgments without a reasonable basis, as they were also directors of Goldsland and/or Sin Hua.[68]

54 For completeness, I find that the alleged Guangxin Agreement does not assist the Applicants because there is no documentary record of this Agreement.

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66 23/10/19 NE at pp 3–6.

67 Li's 2nd Affidavit at [64].

68 Poh's 1st Affidavit at [143].

Nevertheless, I find that the Applicants have shown that the proposed derivative action to set aside the Default Judgments and to defend Suits 260 and 261 on Vermont's behalf is legitimate and arguable.

The Applicants' reasons for the default and delay

55 I next consider the Applicants' reasons for Vermont's default and their delay in applying to set aside the Default Judgments. The Applicants attested as follows.

(a) The Majority Directors "did not reach out to [them] to discuss how [Vermont] should deal with" Suits 260 and 261.[69]

(b) The sequence of events relating to the Suits "appears to have been calculated to keep [the Applicants] in the dark, and to prevent any opportunity for [the Applicants] to compel [Vermont's] board of directors to deliberate and decide on whether to defend [the Suits]". While the Suits were commenced on 12 March 2018, "the first time" the Applicants were informed of the Suits was by an email from Tang Ke (then Vermont's General Manager[70]) on 20 March 2018. The Default Judgments were entered shortly after, on 23 March 2018, and Tang Ke's next email to Vermont's directors was on 16 April 2018 to inform them that Default Judgments had been entered.[71] It was only at the 14 May 2018 Directors' Meeting that Zou Bin claimed that Goldsland had loaned about US$100 million to Vermont between 2010 and 2011, of

69 Poh's 1st Affidavit at [6(h)].

70 Li's 1st Affidavit at [42].

71 JBT at Tab 14; Poh's 1st Affidavit at p 622.

which only US$60 million was repaid. However, no documents were provided to the Applicants to support Zou Bin's claim. The Suits' relevant documents were never made available to the Applicants, although they sought information from VGL by a letter of 9 July 2018.[72]

(c) Zou Bin – being a Majority Director of Vermont at the time of the Suits, a director of VGL, a director and the chief executive of Goldsland, and a director of Sin Hua – is "likely to be the person … who engineered [Vermont's] inaction in defending the [Suits]".[73]

56 I find that the Applicants' explanations for Vermont's default and their delay are reasonable and supported by the surrounding circumstances.

57 First, the evidence suggests that the Applicants did not have time to react before the Default Judgments were entered and this may have been the result of concealment by the Majority Directors in relation to the Suits.

(a) The writs in Suits 260 and 261 were filed on 12 March 2018 and served on the same date at 4.15pm.[74] The writ stated that appearance had to be entered within eight days after service of writ, *ie,* by 21 March 2018 (as the writs were served after 4pm: see O 62 r 8 read with O 12 r 4(*a*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed)). However, Tang Ke emailed Vermont's directors (including Poh and Koh) *only* on 20 March 2018. This left the Applicants with *one day* to react. In the email dated 20 March 2018, Tang Ke stated that the writ was received

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72 Poh's 1st Affidavit at [64] and pp 652–657.

73 Poh's 1st Affidavit at [70]–[71].

74 Memorandum of Service for Suits 260 and 261 of 2018; 23/10/19 NE at pp 1–2.

"yesterday" *viz* 19 March 2018.[75] This was false and raises the issue as to whether Tang Ke intended to mislead the Applicants. It should be noted that Tang Ke, who is also currently VGL's director (since August 2018), has not explained his conduct on this matter, whilst Li (who has never been involved in Vermont) had readily filed affidavits for VGL.

(b) Notably, when Tang Ke emailed Vermont's directors (including Poh) on 26 March 2018 to inform them that the pre-trial conference ("PTC") had been rescheduled to 19 April and asked the directors whether Vermont should engage a lawyer to respond to the lawsuit and attend the PTC, it is likely that Zou Bin, Zhong and Tong (the Majority Directors at the material time) would have known by then that Default Judgments had been entered against Vermont, as they were also directors of Sin Hua and/or Goldsland and the amounts claimed in Suits 260 and 261 were not insubstantial.

58 Tang Ke's conduct, taken with Zou Bin's position at the 14 May 2018 Directors' Meeting that the Alleged Debt were "pretty clear" (see [50] above), suggests that Tang Ke was aligned with Vermont's Majority Directors who were also directors of Sin Hua and/or Goldsland. Indeed, Tang Ke's emails of 20 and 26 March 2018 (at [55] and [57] above) were addressed to Zhong at his *Goldsland email address*. Being directors of Goldsland or Sin Hua, the Majority Directors would likely have known of Suits 260 and 261 (including the pleadings and cause papers) earlier, *and had consciously decided* to not enter an appearance for Vermont. They would likely have known of the Default

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75 JBT at Tab 12; Poh's 1st Affidavit at [64] and p 608.

Judgments when they were obtained.[76] This suggests, as the Applicants submitted, that Zou Bin was coordinating Goldsland and Sin Hua's actions against Vermont and had directed Tang Ke on how Vermont should deal with the Suits, including keeping the Applicants "in the dark" by providing notice of the proceedings to them late. Nevertheless, it is not necessary to determine conclusively whether the Majority Directors had intentionally concealed the Suits from the Applicants until it was "too late". I am satisfied that any delay on the Applicants' part at that time is, at least, not due to their fault.

59 I then consider whether the Applicants should have acted sooner after they were alerted by Tang Ke on the purported status of Suits 260 and 261. The Applicants did not reply to Tang Ke's emails from 20 March until 16 April 2018. This is even after Tang Ke had asked Vermont's directors whether to engage lawyers to defend the Suits and after he had (in his 16 April 2018 email) asked for advice on the Default Judgments.

60 The circumstances show that the Applicants have a legitimate and arguable case to assert that their delay in applying to set aside the Default Judgments was reasonable. First, the Applicants claimed that they had left the day-to-day running of Vermont to the Majority Directors (see also [51(a)] above). The transcript of the 14 May 2018 Directors' Meeting showed the Applicants were constantly asking Zou Bin about the Suits and Zou Bin had replied that the evidence against Vermont in the Suits was "pretty clear". Second, the Applicants were not provided with the relevant information surrounding the Suits by the Majority Directors, despite their requests for them (see [55(b)] above). Poh had attested that the "relevant documents in relation to

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[76] Poh's 1st Affidavit at pp 622–623; JBT at Tab 14.

the [Suits] were never made available to [the Applicants]" and that his letter dated 9 July 2018 "was completely ignored"[77] – the Respondents did not contradict this. The Applicants thus had to undertake their own investigations into the veracity of the Alleged Debts, which would have taken some time.

61 Furthermore, it was not as if the Applicants did not raise any issues at all. Shortly after the Default Judgments were entered, they had called for the 14 May 2018 Directors' Meeting whereby they queried the Alleged Debts and maintained their ignorance of the details of the debts. This meeting was called even before the Applicants were served with the writ for the HK Proceedings.

62 Assessing the evidence in the round, I find that the Applicants have a legitimate and arguable claim on the merits for Vermont to set aside the Default Judgments and defend the Suits, and that their delay in seeking to set aside the Default Judgments are reasonable.

Majority Directors' breach of fiduciary duties

63 I next deal with the Applicants' proposed derivative action to bring claims against the Majority Directors for breach of fiduciary duties. I am satisfied that the Applicants have a legitimate and arguable case in this regard.

Applicable law and parties' submissions

64 The Applicants submitted that the Majority Directors had breached their directors' duties as they were in positions of conflicts of interests but failed to disclose these interests and obtain the necessary approval or ratification from

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77 Poh's 1st Affidavit at [64].

Vermont's board of directors.[78] In particular, the Majority Directors had breached the no-conflict rule. First, they had breached the double employment rule by causing Vermont to enter into the respective debts with Goldsland and Sin Hua without obtaining Vermont's informed consent, when they were also directors in Goldsland and Sin Hua. Second, the Majority Directors (Zou Bin, Zhong and Tong) acted in conflict of interest when they allowed the Default Judgments to be entered against Vermont. The Majority Directors also breached their fiduciary duties: (a) by authorising the alleged debts in excess of US$1 million without all the shareholders' consent (particularly the Applicants') in writing, in breach of the Shareholders' Agreement; and (b) when they authorised loans to be taken from Goldsland or Sin Hua to finance Vermont's wrongful and speculative trading in breach of the Bunker Trading System.

65 The Respondents disputed the above.[79] The Applicants were at all times aware of the corporate structure of the Guangxin Group, and of the relationship between Goldsland, Sin Hua and Vermont. The Default Judgments were entered as the Alleged Debts were "undisputed debts well recorded in [Vermont's] accounting records, and [Vermont] has no valid defence". Further, the loan that was taken out was approved at the 2 Dec 2011 Meeting, and was in Vermont's best interests. But for the loan, Vermont would have breached its contractual obligations, would not have been able to issue letters of credit to counterparties, and would not have obtained various business opportunities. Finally, Vermont's debts were incurred as a result of payments made by Goldsland and Sin Hua to third party creditors. Even if Zhao had misused funds, Goldsland and Sin Hua

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78 Poh's 1st Affidavit at [92]–[103] and [138]–[141]; Applicant's written submissions ("AWS") at [76]–[95] and [159]–[172].

79 Li's 2nd Affidavit at [51]–[54] and [62].

did not know of this and had extended the loans on the basis that it would be used for Vermont's *bona fide* business operations.

66 A director owes a duty to act *bona fide* in the best interests of the company. This common law duty is also statutorily enshrined as the duty to act "honestly" in s 157(1) of the Companies Act: *Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] 2 SLR(R) 597 ("*Townsing*") at [59].

67 As an important facet of the duty of honesty, a director owes a duty of undivided loyalty to his company (*Townsing* at [60]). This encompasses two further distinct rules – the "no-profit rule" which proscribes the director from making a profit out of his fiduciary position, and the "no-conflict rule" which includes two different aspects that proscribes two different types of conflicts. The first proscribes the director from putting himself in a position where his own *interests* and his *duty* to his principal are in conflict: *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 at [135]; *Nordic International Ltd v Morten Innhaug* [2017] 3 SLR 957 ("*Nordic International*") at [53]–[54]. The second prohibits the director from acting in a situation where there is a conflict between his *duties* owed to more than one principal. The latter rule can be divided into four sub-categories, *ie*, the "double employment rule", the "duty of good faith", the "no inhibition principle", and the "actual conflict rule" (see *Townsing* at [64]–[65], citing *Bristol and West Building Society v Mothew* [1998] Ch 1).

68 To release a director from his breach of duty, the informed consent of the shareholders is required. Alternatively, a director's acts may be authorised by a resolution of the board of directors at a meeting convened and conducted in accordance with the company's constitution, or by informal but unanimous

assent of all the directors: *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 at [52], [58] and [59]; *Nordic International* at [92].

69 The remedy for a breach of fiduciary duty depends on whether the breach was a non-custodial or custodial breach. In the former, the usual remedy would be a compensatory monetary award such as equitable compensation, and alternatively an account of profits where the fiduciary earned profits from the breach. In the latter, an award of substitutive compensation may be awarded against the fiduciary: *Sim Poh Ping v Winsta Holding Pte Ltd and another and other appeals* [2020] 1 SLR 1199 at [104]–[105], [108]–[109] and [124]–[126].

Breach of duty in allowing Default Judgments to be entered against Vermont

70 In the present case, I find that there is a legitimate and an arguable claim against some of the Majority Directors for breaches of their duties, in particular the duty to act in Vermont's best interest and to avoid positions of conflict, in allowing the Default Judgments to be entered against Vermont.

71 The relevant Majority Directors at the material time and presently were also directors of Goldsland and/or Sin Hua. Their duties to Goldsland and Sin Hua would have been to pursue the Alleged Debts and obtain judgment in Suits 260 and 261, while their duty to Vermont would have been to scrutinise Goldsland and Sin Hua's claims to see if Vermont had a credible defence. The Majority Directors, being also directors of Goldsland and/or Sin Hua, would have known of the Suits when they were filed. They did not obtain the informed consent of the Applicants (who were also shareholders of Vermont) as to whether Vermont should defend the Suits. Further, the Respondents claimed

that the Alleged Debts in the Suits were "undisputed debts".[80] The evidence, as a whole, suggests that there was an attempt to conceal the Suits from the Applicants until late in the day and that the Majority Directors did not intend for Vermont to defend the Suits because they had predetermined that Vermont had no valid defence (see also [57]–[60] above). Vermont would thus have a legitimate and arguable claim against the relevant Majority Directors for the loss they caused to it in allowing the Default Judgments to be entered.

72 I make a further observation. The Respondents have adduced *no evidence* from any of Vermont's present or past Majority Directors in these proceedings. Instead, VGL's affidavits are deposed by Li, who is a director of VGL only from 22 March 2018 and *never* a director of Vermont.[81] While Yang and Mac have allegedly disappeared, there were other personnel directly involved in the issues in dispute such as Zou Bin and Tong. Zou Bin has been a director of Vermont since 3 February 2017 and a director of VGL, Goldsland and Sin Hua since 2016. He was the one answering the Applicants' queries at the 14 May 2018 Directors' Meeting,[82] and received Tang Ke's emails informing Vermont's directors of Suits 260 and 261. *Li was not involved in any of this*. Pertinently, Zou Bin readily affirmed affidavits to support Vermont's winding up. Tong has been a director of VGL since October 2012 (until around 12 May 2020) and the Applicants claimed that Tong was at the 2011 HK Meeting. The Respondents have not denied that this meeting took place.[83] Zou Bin's and Tong's silence on the issues raised by the Applicants, particularly the

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80 Li's 2nd Affidavit at [62].

81 JBTC at Tab 2 at s/n 14.

82 Poh's 1st Affidavit at pp 630–650.

83 Poh's 3rd Affidavit at p 431; 10/6/20 NE at p 2.

claim that the Majority Directors breached their duty to Vermont by allowing the Default Judgments to be entered, is telling.

Trading in breach of the Trading Limit

73 I also find that the Applicants have a legitimate and arguable claim that the substantial debts allegedly incurred by Vermont in 2010 (or pre-2011) arose from a breach of Zhao's duties to Vermont. The Majority Directors at that time were Zhao, Ngai Man, and Lu, who were also directors of Goldsland and Sin Hua. According to Poh, Zhao "fully controlled" Vermont's operations.[84]

74 The Applicants submitted that Zhao had breached the Trading Limit of the Bunker Trading System around end 2010 by causing Vermont to enter into unauthorised short positions in excess of the Trading Limit, and Poh produced what were apparently reports created by the then Majority Directors and sent to the Guangxin Group around mid-2011.[85] If Zhao – a director of Vermont, Goldsland and Sin Hua – caused Goldsland and Sin Hua to lend money to Vermont to "fund his own wrongful trading" in breach of the Trading Limit, then that, the Applicants submitted, would be a breach of his fiduciary duties.[86]

75 Ms Sia submitted that Zhao could not have breached the Trading Limit as this limit was only implemented around May 2011 when Zhao was no longer Vermont's director, and relied on the minutes of a board meeting in May 2011.[87] However, the evidence suggests that the Trading Limit was implemented since

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84 AWS at [83]; JBTC at Tab 2 at s/n 9, 19, 21, 32, 36; Poh's 1st Affidavit at [93(a)].

85 Poh's 1st Affidavit at [113(c)]; AWS at [162]–[167].

86 9/6/20 NE at pp 22–23.

87 9/6/20 NE at p 11; Poh's 1st Affidavit at [17(a)]; JBT at Tab 2.

Vermont's incorporation. Poh had attested that it was at the incorporation of Vermont that the Trading Limit was put in place, and he further attested that, at a board meeting in November *2010*, he had "emphasised" the Trading Limit.[88] The minutes of the May 2011 meeting do not support Ms Sia's position, as it merely recorded that Vermont decided to "maintain" the overbuying or overselling scale within 10,000 metric tons.

76 There is no evidence of any informed consent by Vermont's shareholders, particularly Poh and Koh, for Vermont to exceed the borrowing limit of US$1 million (see [7] above) during this period, save for some short-term bridging loans which Poh had agreed to. Ms Sia suggested that such consent could be inferred from Poh having signed the audit confirmation for 2011 evidencing some US$17 million loaned to Vermont by Goldsland. However, this did not necessarily show that Poh had acquiesced to exceeding the borrowing limit or how the US$17 million came about; as can be seen, Goldsland reverted on the audit confirmation to correct that what was owed to it was some US$13.26 million whilst about US$4.49 million was owed to Sin Hua. Further, Mr Seah had shown that the audit confirmation could not be relied on, and in any event Koh did not sign the audit confirmation.

77 Therefore, the evidence shows a legitimate and arguable claim that Zhao had breached his fiduciary duty to act *bona fide* in Vermont's best interests because he caused Vermont to trade in breach of the Trading Limit and caused loss to Vermont. This act supports a legitimate and arguable claim that Zhao breached the no-conflict rule. It is not disputed that Zhao was subsequently

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88 Poh's 1st Affidavit at [27].

removed as a director of Vermont in 2011 and that substantial losses were incurred by Vermont during Zhao's tenure as director.

Claims for dishonest assistance and conspiracy

78 The next issue is whether it is in Vermont's interests to commence proceedings against Goldsland and/or Sin Hua for dishonestly assisting the relevant Majority Directors in their breaches of fiduciary duties, and against them and the Majority Directors for conspiracy to harm Vermont. I am satisfied that there is a legitimate and arguable claim.

79 The Applicants claimed that it is "self-evident", from the cross-directorships in Vermont, Goldsland and Sin Hua, that Goldsland and Sin Hua knowingly or dishonestly assisted the Majority Directors in their breaches of fiduciary duties or conspired with them to cause Vermont to wrongfully take up liabilities in the form of the alleged loans. The suspicious method of procurement and repayment of the alleged loans also showed that Goldsland or Sin Hua had knowledge that the loans were wrongfully provided. Goldsland was effectively pulling the strings behind the scenes and, through Yang, appeared to have procured repayments to itself in breach of the Guangxin Agreement.[89] The Respondents denied these allegations. They claimed that there was no reason for Goldsland and Sin Hua to conspire with the Majority Directors to procure loans amounting to US$40 million to be extended by Goldsland and Sin Hua to Vermont.[90]

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89 Poh's 1st Affidavit at [124], [126] and [127].

90 Li's 2nd Affidavit at [56]–[60].

80 Vermont's Majority Directors were *concurrently* directors of Goldsland and/or Sin Hua at the material time. Pertinently, Zhao was concurrently a director of Vermont, VGL, Goldsland and Sin Hua. Consequently, it is arguable that the Majority Directors' knowledge of their conflict of duties to Goldsland and Sin Hua, on the one hand, and Vermont, on the other, and of any wrongful trading by Zhao, can be attributed to Goldsland and Sin Hua. Goldsland and Sin Hua had provided the alleged loans to Vermont and then sued Vermont for repayment of the loans in Suits 260 and 261, whilst Vermont would seemingly allow the Default Judgments to be entered (see [57]–[58] above). As I had also found, the veracity of the Alleged Debts is doubtful and the evidence suggests that the Majority Directors (who were also directors of Goldsland and/or Sin Hua at the material time) knew of this. The fact that Goldsland did not name Vermont's present Majority Directors in the EJD Application pertaining to Vermont is telling and buttresses the inference that Goldsland and Sin Hua's assistance to the Majority Directors is dishonest. As the threshold at this stage is low (see [28] above), I am satisfied that Vermont has a legitimate and arguable claim in dishonest assistance against Goldsland and Sin Hua.

81 As for the Applicants' intended claim for conspiracy against Goldsland, Sin Hua and/or the Majority Directors, I am satisfied that there is a legitimate and arguable case. The evidence suggests that the premise for the Default Judgments (*ie*, the Alleged Debts) was suspect, and that: (a) the Majority Directors would have known about Suits 260 and 261 and the Default Judgments obtained; (b) the Majority Directors had given the Applicants little time to deal with the Suits; (c) Zou Bin had little basis for insisting that the evidence against Vermont in the Suits was "pretty clear"; and (d) the Applicants were not given the requisite information on the Alleged Debts that they asked for. It must be remembered that Goldsland and Sin Hua indirectly owned 70%

of Vermont and, by 22 March 2018 (a day before the Default Judgments were entered), they indirectly owned all of Vermont. It cannot be put past that in Vermont failing to defend the Suits and allowing the Default Judgments to be entered, Goldsland's claim in the HK Proceedings against the Applicants on the Counter-Guarantees would be bolstered. Even if the evidence at this stage does not particularise in detail the conspiracy, the threshold for granting leave under s 216A of the Companies Act is low. The facts supporting the intended claim for dishonest assistance and conspiracy were also similar. Further, there is little or no prejudice to Vermont if the Applicants are prepared to fund the costs of the litigation.

Whether the winding up of Vermont is more appropriate

82 The Respondents submitted that it is more appropriate for Vermont to be wound up, for the following reasons.

(a) The Alleged Debts in Suits 260 and 261 are "undisputed debts" and Vermont has no defence.

(b) Vermont has no funds to support the Applicants' litigation. Its latest audited financial statement as at 31 December 2016 shows that its liabilities (of US$46,228,148) exceed its assets (of US$17,971,750, including just US$88,409 in cash).[91]

(c) Vermont has not only lost its main object but is also no longer a going concern because it has ceased all active operations around April 2016 as a result of the CPIB investigations and the revocation of the

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91 Li's 3rd Affidavit at [45(b)]; Zou's CWU affidavit dated 19 July 2019 ("Zou's CWU Affidavit") at [18(1)].

MPA Licence; and VGL, Sin Hua, and Goldsland are no longer agreeable to extend funding to Vermont.[92]

(d) There is no longer any trust between the Applicants and the other directors and shareholders of Vermont.

(e) Any investigation and adjudication of Goldsland's and Sin Hua's claims can and should be carried out by a liquidator. Vermont has applied to be wound up by the Court. The liquidator would be well equipped and have the powers to apply for the Default Judgments to be set aside and investigate into whether Vermont has a cause of action against Goldsland, Sin Hua or Vermont's present or former directors.[93]

83 The Applicants stated that they were willing to pay the costs of the litigation upfront on Vermont's behalf, and will only seek an indemnity for such costs if Vermont succeeds in setting aside the Default Judgments.[94] They want to keep Vermont alive. Poh attested that although Vermont had lost its MPA Licence, that did not mean that Vermont had to cease operations. It had vessels that it could charter and could still turn a profit because of its "foundation and customer base in trading". Poh claimed that it was normal market practice for a company without bunker supply or operating licences to trade through other companies that had the requisite licences, which Vermont did when it was incorporated and before it obtained a bunker supply licence from MPA. Poh

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92 Li's CWU Affidavit at [40].

93 Li's 3rd Affidavit at [47]–[48].

94 Poh's 3rd Affidavit at [94].

also claimed that some bunker supply companies with the requisite licences had approached him subsequently to suggest that Vermont trade through them.[95]

84 The question is whether it would be *prima facie* in Vermont's interest to commence a derivative action when winding up is an available alternative. In this regard, I refer to *Tam Tak Chuen v Eden Aesthetics Pte Ltd and another (Khairul bin Abdul Rahman and another, non-parties)* [2010] 2 SLR 667 ("*Tam Tak Chuen*"). The applicant, Tam, and Khairul were equal shareholders and directors of Eden Aesthetics Private Limited ("EA") and Eden Healthcare Pte Ltd ("EH"). Tam applied for leave to commence a derivative action on behalf of EA and EH against Khairul and KAR Pte Ltd ("KAR"), for an account of profits and for damages for losses suffered by EA and EH as a result of alleged breaches of Khairul's director's duties owed to them. It was alleged that Khairul diverted business away from EA and EH to KAR (of which he was the sole shareholder and director). Two months after Tam filed the derivative action, Khairul commenced proceedings to wind up EA and EH on the ground that it was just and equitable to do so.

85 Judith Prakash J (as she then was), emphasised that there was *no rule* that "as long as the alternative of winding up the company was available, leave [for a derivative action] would be refused, however meritorious the proposed claim may be": *Tam Tak Chuen* at [24]. The question was whether the remedy of winding up would be more beneficial to EA and EH than the commencement of derivative proceedings against Khairul and KAR.

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95 Poh's 1st Affidavit at [51]–[52].

86 Prakash J held that winding up was the "less appropriate" course in the circumstances of that case. First, EA and EH had a *prima facie* meritorious claim against Khairul for breach of his directors' duties. Second, a successful claim against KAR – which had made substantial revenues after the diversion – would be of monetary value to EA and EH and would not result in only a paper judgment. Third, winding up would incur EA and EH additional costs as they would have to pay the liquidator's costs and the costs of solicitors to be instructed by the liquidator if the liquidator decided to sue Khairul and KAR. There would also be some delay in prosecuting the claim if EA and EH were wound up since the liquidator and his solicitors would have to study the companies' records and the merits of the claims. On the other hand, Tam already had the necessary information and was prepared to fund the litigation.

87 In the present case, I am satisfied that winding up is not more beneficial to Vermont than the commencement of the proposed derivative actions for the following reasons.

(a) First, Vermont has legitimate and arguable claims in Suits 260 and 261, and against the relevant Majority Directors, Goldsland and Sin Hua.

(b) Second, if Vermont succeeds in defending the Suits and in its claim against the Majority Directors, Goldsland or Sin Hua, that would be of real monetary value to Vermont. The total quantum of the Default Judgments amount to US$40,804,754.94, while Vermont's liabilities based on its financial statement for 2016 is US$46,228,148, which suggests that the bulk of Vermont's current liabilities are due to the Default Judgments.

(c) Third, Vermont may incur additional costs if it is wound up as it would have to pay both the liquidator's costs and the costs of solicitors to be instructed by the liquidator if the liquidator decides to pursue the claims that are currently being contemplated. There might also be some delay in prosecuting any claims since the liquidator would need time to study Vermont's records and the merits of the claims to determine if they should be pursued. The Applicants already have the necessary information after conducting their own investigations and are prepared to fund the litigation. Even if they were to hand over the fruits of their investigation to the liquidator to assist him, the liquidator would still need to exercise his own independent inquiry and judgment in determining if Suits 260 and 261 should be defended or whether to pursue claims against Goldsland, Sin Hua or the Majority Directors. Hence, a winding up may not necessarily be a less costly route for Vermont.

88 Importantly, the present case involves significant issues of conflicts of duty. In this regard, the Court of Appeal's decision in *Chong Chin Fook v Solomon Alliance Management Pte Ltd and others and another matter* [2017] 1 SLR 348 ("*Chong Chin Fook*") is instructive. There, the Court granted conditional leave to the appellant – a minority shareholder and former sole director of an entity "Solomon" – to take over Solomon's conduct of proceedings in an *ongoing* suit brought by it against the respondent majority shareholders. This is *even though* Solomon appeared to be diligently conducting the action. This was because the clear conflicts of interest on the part of Solomon's two new directors meant that it was probable that Solomon would not prosecute the ongoing action diligently: *Chong Chin Fook* at [76]–[83].

89 In the present case, there are conflicts of duty on the part of the Majority Directors. Their decision not to defend Vermont in Suits 260 and 261 is one that is tainted by this conflict. It is telling that Vermont (via its Majority Directors) and VGL are resisting OS 166 and that Vermont is pursuing a winding up only in July 2019 after OS 166 had been filed, despite Li claiming that Vermont had been dormant since 2016 and had failed to satisfy the Default Judgments since March 2018. It would seem that the Majority Directors, acting on VGL's instructions, are in a hurry to wind up Vermont *after* OS 166 was commenced by the Applicants. This suggests that VGL (which is owned by Sin Hua, which is in turn owned by Goldsland) is attempting to put a stop to the Applicants challenging the Alleged Debts underlying the Default Judgments, as the Alleged Debts would support Goldsland's recovery against the Applicants in the HK Proceedings based on the Counter-Guarantees.[96] It cannot be ignored that the HK Proceedings would enable a substantial recovery *directly against the Applicants*, when any recovery against Vermont in Suit 260 may be futile given its financial position. It is pertinent to note that Li is representing VGL in rigorously contesting OS 166, is representing Vermont in its winding up, and is also currently a director of Goldsland (and Sin Hua). Likewise Zou Bin, a Majority Director who is supporting the winding up of Vermont, is also currently a director of VGL, Goldsland and Sin Hua.

90 However, I am cognisant that Vermont does not have the financial capability to engage in a protracted litigation. Nevertheless, the Applicants have agreed to bear all of Vermont's ensuing legal costs for the proceedings in Suit 260 and Suit 261 and in its claims against the Majority Directors, Goldsland and Sin Hua. Vermont is also not yet in liquidation and, besides Goldsland and Sin

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96 Poh's 1st Affidavit at [83].

Hua, there seems to be only one other creditor that has issued a statutory demand against Vermont.[97] Critically, the quantum of the Default Judgments forms the bulk of Vermont's total liabilities. If the Default Judgments are set aside and the claims against the Majority Directors, Goldsland or Sin Hua succeed, Vermont may well be able to continue operations and apply for a new bunker supply licence from MPA. Further, even if there is no longer any trust and confidence between VGL and the Applicants, the Applicants are not precluded from buying out VGL's shares in Vermont (which they intimated they propose to do when Vermont's assets become clear through the derivative action)[98], and a winding up of Vermont is also not precluded at a later stage.

Whether the Applicants are acting in good faith

91 Next, I am satisfied that the Applicants are acting in good faith.

92 To determine if the Applicants have an "honest and reasonable" belief that a good cause of action exists for Vermont to prosecute, it is imperative to scrutinise their *basis* for doubting the legitimacy of the Alleged Debts claimed in Suits 260 and 261. In this regard, VGL claimed that the Alleged Debts, and Vermont's decision not to defend the Suits, were based on the audit confirmations (see [42] above). However, the evidence suggests that: (a) the underlying figures reflected in the audit confirmations could not be relied on; (b) various other documents which could have potentially supported the veracity of the figures in the Suits, such as Vermont's financial statements, the Goldsland Breakdown of Debts and the Kingdee Documents, were not consistent; and (c) Li's own evidence cast doubts on the claims in the Suits. The evidence does, as

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97 See Zou's CWU Affidavit at [19].

98 9/6/20 NE at p 27.

I have found, cast doubt on the legitimacy of the quantum of the Alleged Debts. Hence, I am satisfied that the Applicants have an honest and a reasonable belief that a good cause of action exists for Vermont to prosecute.

93 The next issue is whether and why the Applicants had delayed taking out OS 166 to defend Suits 260 and 261 and whether their conduct in taking out OS 166 is for a collateral purpose as to amount to an abuse of process. First, I had accepted the Applicants' explanation for any delay on their part to be reasonable. Next, I am satisfied that the Applicants' conduct in taking out OS 166 is not for a collateral purpose. As I have observed earlier, they had called for a meeting of Vermont's directors to query the bases for the Alleged Debts in the Suits. Furthermore, it is understandable and reasonable that the Applicants would need time to conduct their own investigations into Vermont's defences in the Suits, since the Majority Directors had refused to provide them with information surrounding the Suits.

94 Even if taking out OS 166 amounted to a collateral purpose for the Applicants to better defend themselves in the HK Proceedings, the question is whether the collateral purpose is sufficiently consistent with the purpose of doing justice to Vermont so that the Applicants are not abusing the statute and Vermont as a vehicle for their aims and interests (*Ang Thiam Swee* ([26] *supra*) at [31]). Any questionable motivations *per se* might not amount to bad faith, and the test is whether the Applicants' motivations constitute a personal purpose which indicates that Vermont's interest would not be served: *Chong Chin Fook* ([88] *supra*) at [54].

95 I am satisfied that the Applicants' collateral purpose of defending themselves in the HK Proceedings is consistent with the purpose of doing justice to Vermont. There is sufficient evidence to genuinely doubt the veracity of the

Alleged Loans in Suits 260 and 261. It will do justice to Vermont if an unmeritorious judgment for repayment of a loan is set aside. There is also no evidence to suggest that the Applicants are "so motivated by vendetta" that their judgment will be "clouded by purely personal considerations".

96 Further, allowing the Applicants control of Vermont's defence in Suits 260 and 261 is not prejudicial to criminal investigations against them, since CPIB has seized the relevant documents necessary for its investigation.[99] VGL's bare assertion that the Applicants wanted to use Vermont to prevent Goldsland from enforcing the Counter-Guarantees in the HK Proceedings is inadequate, and in any event should not be a reason to bar a legitimate claim that Vermont might have against Goldsland, Sin Hua or any of the Majority Directors. That the Applicants are "the subject of criminal charges in relation to their management of [Vermont]" is also neutral as any criminal proceedings are still pending.

97 As such, I am satisfied that the Applicants are acting in good faith and intending to bring the proposed derivative action in Vermont's interest.

Requirement under s 216A(3)(*a*) of the Companies Act

98 Finally, I find that the requirement under s 216A(3)(*a*) of the Companies Act has been fulfilled. The Applicants have given 14 days' notice to the other directors of Vermont.[100] The Applicants' proposed actions – to set aside the Default Judgments and to bring claims against the Majority Directors, Goldsland and Sin Hua – have hitherto not been commenced and it is clear that

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99 Li's 2nd Affidavit at [29]–[30].

100 Poh's 1st Affidavit at [149] and exhibit PFT-39.

Vermont's current Majority Directors did not and are not intending to diligently prosecute or bring these proposed actions.

Conclusion

99 In the round, I am satisfied that it is *prima facie* in Vermont's interests for the proposed derivative actions to be brought. I thus grant the Applicants conditional leave (see [100] below) under s 216A of the Companies Act to bring the following proceedings, and to have full charge and control over the conduct of such proceedings, on Vermont's behalf:

(a) To defend Suits 260 and 261 and to bring any counterclaims in those Suits.

(b) To bring any action against the present and/or previous directors of Vermont for breaches of directors' duties and conspiracy and in relation to the Alleged Debts in Suits 260 and 261.

(c) To bring any action against Goldsland and/or Sin Hua for dishonestly assisting the present and/or previous directors of Vermont in the latter's breaches of duties and for conspiracy.

100 The Applicants' application is granted subject to the following conditions:

(a) The Applicants bear all of Vermont's costs to be incurred in Suits 260 and 261 from the commencement of the application to set aside the Default Judgments until disposal of the Suits, and in any counterclaims, including any cost orders that may be made against Vermont.

(b) The Applicants bear all of Vermont's costs in bringing any action or claims against its present or previous directors, Goldsland or Sin Hua, including any counterclaims that such directors, Goldsland or Sin Hua may raise in Vermont's actions/claims. The costs that the Applicants are to bear include any costs orders that may be made against Vermont.

101 The Applicants will be reimbursed the costs (at [100] above) by Vermont only if Vermont succeeds in the respective actions, and up to the amount that it recovers in costs from the counterparties in the proceedings. Further, any party-and-party costs that Vermont recovers from an opposing party should first be applied to satisfy its outstanding obligation for costs to any opposing party (where a costs order is made in favour of that party) and it is only any balance remaining thereafter that is to be used to reimburse the Applicants for the costs borne by them on Vermont's behalf.

102 Unless the parties are able to agree on costs, they are to file written submissions, limited to five pages, as to the appropriate costs orders they contend I should make in OS 166. These submissions are to be filed and exchanged within one week of the date of this judgment.

Audrey Lim
Judge

Seah Zhen Wei Paul, Chan Yi Zhang, Aditi Ravi and Bryan Seah (Tan Kok Quan Partnership) for the applicants;
Alexander Yeo and Chew Jing Wei (Allen & Gledhill LLP) for the

first respondent;
Jennifer Sia and Goh Hui Hua (NLC Law Asia LLC) for the second respondent.
