IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 142

Suit No 441 of 2016

Between

(1) OUE Lippo Healthcare Ltd (formerly known as International Healthway Corp Ltd)
(2) IHC Medical Re Pte Ltd

… *Plaintiffs*

And

(1) Crest Capital Asia Pte Ltd
(2) Crest Catalyst Equity Pte Ltd
(3) The Enterprise Fund III Ltd
(4) VMF3 Ltd
(5) Value Monetization III Ltd
(6) Fan Kow Hin
(7) Aathar Ah Kong Andrew
(8) Lim Beng Choo

… *Defendants*

JUDGMENT

[Companies] — [Directors] — [Shadow directors]
[Companies] — [Capital] — [Share capital]
[Tort] — [Conspiracy]
[Agency] — [Evidence of agency]
[Agency] — [Principal]
[Trusts] — [Accessory liability]

[Equity] — [Fiduciary relationships] — [When arising] — [Duties]
[Equity] — [Remedies] — [Equitable compensation]
[Equity] — [Remedies] — [Rectification]
[Contract] — [Illegality and public policy] — [Statutory illegality]
[Contract] — [Contractual terms] — [Implied terms]
[Restitution] — [Unjust enrichment]
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v
Crest Capital Asia Pte Ltd and others

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High Court — Suit No 441 of 2016
Hoo Sheau Peng J
3–5, 9–12, 23–26 July, 13–16, 20–22 August, 23 August 2019, 29 November 2019, 22 June 2020

9 July 2020 Judgment reserved.

Hoo Sheau Peng J:

Introduction

1 In this suit, the plaintiffs claim against the defendants for their roles in causing the first plaintiff, OUE Lippo Healthcare Ltd (formerly known as International Healthway Corp Ltd) ("IHC"), to enter into a credit facility (to be referred to as the "Standby Facility"), and to use the funds to indirectly acquire its own shares.

2 The plaintiffs rely on three causes of action. First, the plaintiffs claim that as officers of IHC, the sixth defendant, Mr Fan Kow Hin ("Mr Fan") and the eighth defendant, Ms Lim Beng Choo ("Ms Lim"), acted in breach of their duties to IHC. Second, the plaintiffs claim that the first to fifth defendants (the funding entities which are collectively referred to as the "Crest entities"), the

seventh defendant, Mr Andrew Ah Kong Aathar (a substantial shareholder of IHC whom I shall refer to as "Mr Aathar") and Ms Lim provided dishonest assistance to Mr Fan. Third, the plaintiffs claim that all the defendants engaged in a conspiracy by unlawful means to injure IHC. As a result of the defendants' conduct, the plaintiffs suffered losses in connection with the Standby Facility, as well as another credit facility known as the "Geelong Facility".

3 The Crest entities and Mr Lim defend the claims on various grounds. They also brought counterclaims against the plaintiffs. Although Mr Fan is a bankrupt, the plaintiffs obtained leave to continue with the action against him. Mr Fan, however, did not file a defence. He is not represented in the proceedings. Mr Aathar filed a bare defence. However, by the time of the trial, there was a stay of the proceedings against him. This was pursuant to a voluntary arrangement approved by Mr Aathar's creditors under the Bankruptcy Act (Cap 20, 2009 Rev Ed). Nonetheless, Mr Aathar, as well as Mr Fan, gave evidence before me.

4 The trial concerns both liability and quantum, save that there is bifurcation in relation to the quantification of one category of loss, *ie,* loss arising from the termination and sale of the plaintiffs' Australian business.

5 I pause to highlight that after the trial, but before the parties filed their closing and reply submissions, the Court of Appeal released *The Enterprise Fund III Ltd and others v OUE Lippo Healthcare Ltd (formerly known as International Healthway Corp Ltd)* [2019] 2 SLR 524 ("*The Enterprise Fund III*"), and determined that the Standby Facility which funded the indirect acquisition by IHC of its own shares is void under by s 76A(1)(*a*) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act") for contravention of

s 76(1A)(*a*)(i) of the same. This determination, as well as some of the observations within the Court of Appeal's judgment, are pertinent to this case.

6 Having heard the evidence, and considered the closing and reply submissions of the parties, this is my judgment.

Background

The parties

7 IHC is a Singapore-incorporated company listed on the Catalist board of the Singapore Exchange ("SGX").[1] The second plaintiff, IHC Medical Re Pte Ltd ("IHC Medical Re"), is a wholly-owned subsidiary of IHC. IHC Medical Re is the ultimate holding company for IHC's Australian business through IHC Healthcare REIT (Singapore Trust).[2] The Australian business consisted primarily of three properties in Australia (the "Australian properties") as follows:[3]

(a) two properties at 541 and 553 St Kilda Road, Melbourne, Victoria, Australia (the "St Kilda properties"); and

(b) a property at 73 – 79 Little Ryrie Street, Geelong, Victoria, Australia (the "Geelong property").

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[1] Yet Kum Meng's Affidavit of Evidence-in-Chief ("AEIC") at [5].

[2] Yet's AEIC at [64].

[3] Yet's AEIC at [63].

8 IHC is also the holding company of two other subsidiaries, namely IHC Management Pte Ltd ("IHCM") and IHC Management (Australian) Pty Ltd ("IHCM(A)").[4]

9 Mr Fan and Mr Aathar were founders of IHC. Both held large shareholdings in IHC, reported as 23.67% and 8.73% respectively in the Annual Report of 2015.[5] On 17 May 2015, by way of a service agreement,[6] IHC appointed Mr Fan as its Group Chief Executive Officer ("Group CEO"). On 30 June 2015, upon the departure of the previous CEO, Mr Chia Kwok Ping ("Mr Chia"), Mr Fan was re-designated as Chief Executive Officer ("CEO").[7] He remained in this position until 31 January 2016.[8] Mr Aathar did not hold any formal position in IHC.[9]

10 From 30 October 2013 to January 2015, Ms Lim was the Financial Controller (Corporate Finance and Real Estate Investment Trusts) of OUELH Medical Assets Pte Ltd (formerly known as IHC Medical Assets Pte Ltd).[10] From January 2015, she was appointed IHC's Vice-President (Investments), and maintained that position until 6 January 2016.[11] On 7 January 2016, Ms Lim

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[4] Yet's AEIC at [64].

[5] Yet's AEIC at [7].

[6] Fan Kow Hin's AEIC at p 841.

[7] Fan's AEIC at [2.24].

[8] Fan's AEIC at [2.54].

[9] Aathar Ah Kong Andrew's AEIC at [2.6].

[10] Lim Beng Choo's AEIC at [3].

[11] Lim's AEIC at [4].

was appointed IHC's CEO and Executive Director. She held those positions until 23 January 2017.[12]

11 Turning to the Crest entities, the first defendant, Crest Capital Asia Pte Ltd ("Crest Capital"), is a fund administration company.[13] It is the holding company of the second defendant, Crest Catalyst Equity Pte Ltd ("Crest Catalyst"), which is a fund management company that manages affiliated private equity funds. The third to fifth defendants, The Enterprise Fund III Ltd ("EFIII"), VMF3 Ltd ("VMF3") and Value Monetisation III Ltd ("VMIII"), are three such funds administered and managed by Crest Capital and Crest Catalyst.[14]

12 Mr Tan Yang Hwee, also known as Glendon Tan ("Mr Tan"), is the Investment Director of Crest Capital.[15] Mr Tan was the main representative handling Crest Capital's business deals with IHC since its incorporation in 2013, including the deals that resulted in the Standby Facility and the Geelong Facility. Prior to that, Crest Capital had business dealings with a group of companies, which included Healthway Medical Development Pte Ltd, founded by, amongst others, Mr Fan and Mr Aathar.[16] IHC was incorporated to expand the healthcare services offered by the group internationally.[17]

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[12] Lim's AEIC at [33] and [37].

[13] Tan's AEIC at [1].

[14] Tan's AEIC at [1]. See also the Crest entities' Defence (Amendment No 6) and Counterclaim (Amendment No 3) (the "D6CC3") at [5].

[15] Tan's AEIC at [1].

[16] Tan's AEIC at [16] and [19].

[17] Tan's AEIC at [19].

The Standby Facility and the Geelong Facility

13 The Standby Facility was a short-term credit facility of up to S$20m granted to IHC by EFIII, VMF3 and VMIII. The Standby Facility agreement was executed on 30 July 2015,[18] and the facility was to be used as "general working capital".[19] It provided for fixed interest (termed "standby fees") on the full sum of S$20m at 3.5% per month for a minimum of five months[20] with default interest being levied on any sums due and unpaid at an additional rate of 2% per month.[21]

14 I should add that an initial facility agreement was fully executed on or around 21 July 2015,[22] and backdated to 16 April 2015 (with the maturity date falling two months from the date of disbursement of 16 April 2015, *ie,* 15 June 2015)[23]. At that time, the three funds involved were EFIII, VMIII and The Enterprise Fund II Ltd ("EFII"). Essentially, the Standby Facility agreement was executed to supersede the initial facility agreement, and to extend the tenure of the facility to five months from 30 July 2015.[24] Additionally, VMF3 replaced EFII as an investing party.[25]

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[18] Yet's AEIC at [16].

[19] Agreed Core Bundle ("ACB"), Vol. 1 ("1ACB") at p 243 at (J).

[20] 3ACB at p 1283.

[21] 3ACB at p 1285.

[22] Lim's AEIC at [46h].

[23]Tan's AEIC at [21]-[22]; Lim's AEIC at [46h].

[24] 1ACB at p 245.

[25] Tan's AEIC at [45].

15 The Geelong Facility was a mezzanine loan of S$11.5 million granted to IHC Medical Re by EFIII and VMIII, with the agreement dated 17 June 2015.[26] The purpose was to partially finance the acquisition of the Australian properties.[27] It provided for interest at the rate of 3.35% per month on the outstanding principal,[28] with default interest on any sums due and unpaid at an additional rate of 3% per annum.[29]

16 The payments of sums due under both facilities were secured by personal guarantees from Mr Fan and Mr Aathar, as well as charges granted by IHC over *all* the shares of IHC Medical Re, IHCM and IHCM(A) (the "Charged Shares").[30] This was done by two Deeds of Share Charges dated 17 June 2015[31] and 30 July 2015,[32] which secured payment of sums due under the Geelong Facility and the Standby Facility respectively. For convenience, I shall refer to these Deeds of Share Charges as the "17 June Deed of Charge" and the "30 July Deed of Charge".

17 Subsequently, there was a dispute over the Standby Facility.[33] According to IHC, this triggered its default on the Geelong Facility,[34] which in turn led to

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[26] ACB, Vol. 1 ("1ACB") at p 159.

[27] Tan's AEIC at [53].

[28] 1ACB at p 171.

[29] 1ACB at p 171.

[30] Tan's AEIC at [50] and [57].

[31] 1AB at p 305.

[32] 1ACB at p 278.

[33] Tan's AEIC at [65].

[34] 3ACB at p 1824.

IHC incurring further consequential losses. As mentioned at [1] above, IHC took issue with the defendants' respective roles in causing IHC to enter into the Standby Facility in the first place.

The genesis of the Standby Facility

18 In this connection, the relevant events began on 3 April 2015 when Mr Tan, Mr Fan and Mr Aathar met at Serangoon Gardens, pursuant to arrangements made by Mr Aathar.[35]

19 On 4 April 2015, at 9.06am, Mr Aathar sent Mr Tan an email, copied to Mr Fan, with the subject stated as "Standby Facility" (the "first 4 April 2015 email"). The email provided a "recap" of the group's discussion at the meeting and contained a formal request for "a standby line" of S$20m from the Crest entities to combat an imminent short seller's attack on IHC's shares. The material portions of the email are reproduced as follows:[36]

> Dear Glendon,
>
> **We** spoke yesterday and recap the following:
>
> a. **We** noticed an unusual sale pattern on Thursday 2/4/15, particularly from one single account.
>
> **We** then analysed the transactions with industry specialist… The pattern is that of a shortist and they now have between 71-75m shares.
>
> There is a high probability that this stealth plot would lead to an imminent shorting of IHC shares this coming Monday given that they commenced activity last week. The shortist have about 75m shares ($21.3m). This is probably being carried out by a small fund given the amount they held.

[35] Aathar's AEIC at [3.2] to [3.3].

[36] 1ACB at p 393.

> b. **We** look to Crest to provide a standby line of $20m for use against this activity.
>
> The terms could be the following:
>
> **1.Short term of 1-2months.**
>
> **2.Interest of 3.5% per month.**
>
> **3.Shares can be bought and held by Crest directly.**
>
> c. As time is of essence, **we** look to putting facility into place as soon as possible with a very small amount available ($3-$5m) on Monday morning 9am for standby.
>
> **We** are most grateful for your support.
>
> [emphasis added]

20 At 1.08pm, Mr Aathar sent another email to Mr Tan, copied to Mr Fan, again with the subject stated as "Standby Facility" (the "second 4 April 2015 email").[37] In it, Mr Aathar stated that, "[he] can give [Tan] a firm undertaking from IHC that all security arrangements will be restored and reinstated by IHC promptly, in the same terms and conditions, to the satisfaction of Crest."

21 I now go to four emails dated 9 April 2015, which continue to deal with the subject of "Standby Facility" as follows:

> (a) At 9.29am, Mr Tan sent an email[38] to Mr Aathar and Mr Fan, asking them both to review, sign and return an enclosed term sheet dated 6 April 2015. The term sheet provided for a loan amount of "up to S$20 million", for a tenure of "2 months from first drawdown date", to be used for "general working capital" and with an "interest coupon of 3.5% p.m." after the "first draw down date". It also expressly stated that the

[37] 1ACB at p 548.

[38] 1ACB at p 546.

facility would be secured, *inter alia*, by joint and several personal guarantees by Mr Aathar and Mr Fan, as well as a "[p]ledge of IHC shares purchased through Fund".[39]

(b) At 12.52pm, Mr Tan sent a further email to Mr Aathar and Mr Fan, asking them to provide him with "the contact point details, email address for the person in charge of IHC for documentation" in order to complete the legal documents for the facility. This was copied to Mr Lim Chu Pei ("Mr CP Lim"), an Investment Analyst with Crest Capital.[40]

(c) Shortly after, at 12.57pm, Mr Fan replied to Mr Tan, and informed him that the relevant persons in charge were Mr Chia and Ms Lim. The email was also addressed to Mr Aathar, Ms Lim and Mr Chia, and was copied to Mr CP Lim.[41]

(d) I should add that Mr Tan had included the first and second 4 April 2015 emails sent by Mr Aathar to his first email at 9.29am, and they remained a part of the chain below Mr Fan's 12.57pm email.[42]

(e) In response, at 1.36pm, Mr Tan forwarded the term sheet and draft loan documents, namely, loan agreement, personal guarantees, deeds of undertaking, share charges, to Mr Chia and Ms Lim for their review, copying Mr Aathar, Mr Fan and Mr CP Lim.[43]

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[39] 1ACB at pp 550 - 551.

[40] 1ACB at p 547.

[41] 1ACB at p 558.

[42] 1ACB at pp 559-560.

[43] 1ACB at pp 561-684.

22 According to the plaintiffs and the Crest entities, Mr Aathar's request for the standby line made (on behalf of IHC) at the 3 April 2015 meeting was the genesis of the Standby Facility.[44] The term sheet captured the three key terms as set out in the first 4 April 2015 email.[45] Thereafter, the parties worked towards the finalisation of the legal documents for the Standby Facility.[46]

23 Mr Fan and Mr Aathar provided a completely different explanation for these events. Mr Aathar asserted that at the meeting and in the first 4 April 2015 email, he merely raised a *personal* request for the Crest entities to invest in IHC shares to combat a short seller's attack, with Mr Aathar agreeing to pay the Crest entities a return for doing so. After checking with the Crest entities, Mr Tan informed Mr Aathar that they were not agreeable to the risky private arrangement. Nonetheless, the Crest entities were prepared to extend a working capital facility to IHC, provided that IHC reinstated the security arrangements that it had furnished for a previous facility.[47] In response, Mr Aathar sent the second 4 April 2015 email giving the "firm undertaking from IHC" to reinstate the security arrangements. He was merely giving the "firm undertaking" from the personal guarantors, *ie,* Mr Fan and himself, and not IHC.[48] In any event, the IHC deal was still "exploratory" in nature.[49] Subsequently, the Crest entities

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[44] Plaintiffs' Closing Submissions ("PCS") at [103]; 1st to 5th Defendants' Closing Submissions ("1DCS") at [83]-[87].

[45] 1ACB at p 550.

[46] PCS at [44]-[47]; 1DCS at [87]-[92].

[47] Aathar's AEIC at [3.5]-[3.10] and [3.12].

[48] NE, 23 July 2019, p 161 line 2 to p 163 line 12

[49] Aathar's AEIC at [3.12]-[3.13].

then proposed to IHC, and IHC agreed to, the Standby Facility – a deal quite separate from the private arrangement that did not materialise.[50]

24 Mr Fan's evidence was largely similar.[51] However, Mr Fan said that while Mr Aathar purported to give a firm undertaking on behalf of IHC, he was clearly not authorised to do so.[52]

25 As for Ms Lim, she acknowledged that the first 4 April 2015 email was forwarded to her as part of Mr Fan's email on 9 April 2015. However, she did not see it as it was at the bottom of the chain.[53] As far as she was concerned, the proposed facility was one for "general working capital".[54]

Events leading to the execution of the Standby Facility

26 On 10 April 2015, Mr Chia, Mr Aathar and Mr Fan signed the term sheet, as CEO and the two personal guarantors respectively. This signed term sheet was sent via email to Mr Tan.[55] Later the same day, Mr CP Lim sent the term sheet, now duly signed by Mr Tan via email to Mr Chia and Ms Lim, copying Mr Tan, Mr Aathar and Mr Fan.[56] Separately, in accordance with the

[50] Aarthar's AEIC at [3.14].

[51] Fan's AEIC at [2.15]-[2.17].

[52] NE, 10 July 2019, p 77 lines 14-25.

[53] Lim's AEIC at [46a].

[54] Lim's AEIC at [65].

[55] ACB, Vol. 2 ("2ACB") at p 690.

[56] 2ACB at pp 694, 701.

term sheet, Mr Aathar and Mr Fan also executed personal guarantees dated 10 April 2015.[57]

27 On 17 May 2015, Mr Fan was appointed Group CEO. Subsequently, Mr Fan vetted a board paper prepared by Ms Lim. The board paper was dated 29 May 2015 and was meant to be put before the IHC's board of directors to obtain their approval for the Standby Facility,[58] together with the legal documents prepared based on the draft documents sent by Mr Tan.[59]

28 On 29 May 2015, the board paper was circulated by email to the members of the IHC board. The email and the board paper stated that the Standby Facility was to be "utilised for general working capital" and "[f]or general working capital purpose[s]" respectively.[60] The only securities listed in the covering email and the board paper were the Charged Shares and the personal guarantees provided by Mr Aathar and Mr Fan. There was no mention of a pledge of IHC shares acquired by drawing down on the Standby Facility.

29 At the material time, the IHC board of directors consisted of Dr Jong Hee Sen ("Dr Jong") (who was the Non-Executive Chairman), Mr Dennis Siew Teng Kean ("Mr Siew") (who was the lead independent director)[61] and Mr Ong

[57] 2ACB at p 715.

[58] 3ACB at p 1308.

[59] 3ACB at p 1271.

[60] 3ACB at pp 1270, 1308.

[61] 1ACB at p 370.

Lay Khiam ("Mr Ong") (also an independent director). Board approval was obtained through a two-thirds majority on 3 June 2015.[62]

30 Essentially, Dr Jong and Mr Siew approved IHC's entry into the Standby Facility by way of a written resolution backdated to 29 May 2015.[63] Importantly, Mr Siew's approval was on the premise that the Standby Facility "with the accompanying interest charge [was] essential for the continued operations of the company".[64] Mr Ong, however, declined to approve the matter, explaining in an email dated 29 May 2015 that he "[found] it difficult to justify approving a credit facility bearing the proposed high interest rate and fee". He also questioned whether IHC was "so much in need of funds to raise this type of financing".[65]

31 Eventually, as described at [14] above, the initial facility agreement was fully executed on 21 July 2015, but backdated to 16 April 2015.[66] More specifically, 21 July 2015 was the date on which Mr CP Lim returned all documents, duly executed by the Crest entities, to IHC.[67] Upon the request of IHC, by way of a letter dated 28 July 2015, the Crest entities agreed to extend the tenure of the facility, and to enter into a second facility agreement in order to do so.[68] Thereafter, the Standby Facility agreement was executed, and this

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[62] Fan's AEIC at [2.33].

[63] 1ACB at p 370.

[64] 5AB at p 2324.

[65] 5AB at p 2326.

[66] 3ACB at p 1309.

[67] 3ACB at p 1309.

[68] 2ACB at p 1559.

extended the arrangement to five months from the date of execution, *ie,* 30 July 2015.[69] Dr Jong signed both the initial facility and Standby Facility agreements on behalf of IHC, while Mr Fan and Mr Aathar signed as personal guarantors.[70]

Drawdowns on the Standby Facility to acquire IHC shares

32 Meanwhile, according to the plaintiffs and the Crest entities, between 16 April 2015 and 24 August 2015, a total sum of S$17,332,081.15 was drawn down from the Standby Facility on 14 separate occasions by the Crest entities to purchase 59,304,800 IHC shares. The mechanism was that the shares were purchased by EFIII through EFIII's brokerage accounts but were held in the name of VMIII.[71]

33 Of these 14 occasions, eight occurred before the board paper had even been put to the IHC board of directors for their approval on 29 May 2015 and involved the sum of S$12,833,234.40. A further five drawdowns, amounting to S$2,788,556.13, had been made before the legal documents were formally executed on 21 July 2015.[72] The transactions were made on Mr Aathar's instructions to Mr Tan (which Mr Tan asserted were given through telephone calls, SMS messages and WhatsApp text messages).[73]

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[69] 1ACB at pp 242 and 245.

[70] 1ACB at pp 67 and 275.

[71] D6CC2 at [16] and [16A] and Reply (Amendment No 3) to the 1st to 5th Defendants' Defence (Amendment No 5) and Defence to the 1st to 5th Defendants' Counterclaim (Amendment No 2) at [2.2.5].

[72] Yet's AEIC at [24].

[73] Yet's AEIC at [24]; AB, Vol. 7 ("7AB"), pp 3478 to 3488.

34 In relation to these events, the consistent position of Mr Aathar, Mr Fan and Ms Lim was that there was no drawdown on the Standby Facility at all, and certainly not to purchase shares on IHC's behalf.[74] Instead, Mr Aathar claimed that the Crest entities had used their own funds to purchase IHC shares for themselves. To explain the messages exchanged with Mr Tan concerning share purchases, Mr Aathar said that from time to time, he advised Mr Tan in relation to investing in IHC's shares.[75]

Negotiations for repayment

35 On 9 September 2015, SGX announced that investors should exercise caution when dealing with IHC's shares. Its investigations revealed that from April to August 2015, 60% of IHC's traded share volume was conducted by a handful of individuals.[76] This triggered a plunge in IHC's share prices down to S$0.10 per share.[77]

36 On 19 October 2015, Crest Capital demanded repayment of sums due under both the Standby Facility and the Geelong Facility. In the letter of demand to IHC for the Standby Facility addressed to Dr Jong, and copied to Mr Fan and Mr Aathar, Crest Capital requested repayment of standby fees due and owing in the sum of S$2,754,850 for 16 June to 15 October 2015.[78] While it stated that the disbursement was made on 16 April 2015, there was no mention of the

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[74] Aathar's AEIC at [3.32]; Fan's AEIC at [5.9]; Lim's AEIC at [55].

[75] Aathar's AEIC at [3.23] to [3.27].

[76] Yet's AEIC at [29]; 3ACB at p 1893.

[77] Yet's AEIC at [31].

[78] Tan's AEIC at [70]; 3ACB at pp 1562 - 1563.

principal sum due under it.[79] I should add that the standby fees were paid for the period of 16 April to 15 June 2015.[80]

37 In the letter of demand to IHC Medical Re for the Geelong Facility, addressed to Ms Lim, and copied to Mr Fan and Mr Aathar, Crest Capital requested for payment of S$11,885.250, comprising of the principal of S$11,500,000, together with interest of S$385,250 accruing from 19 September 2015 (which was the maturity date of the facility).[81]

38 On 23 October 2015, Mr Aathar wrote an email to Crest Capital, as well as Mr Fan and Ms Lim, stating as follows[82]:

> We refer to your 3 letters namely in respect of *Geelong, IHC Placement and the Standby Facility.*
>
> We are putting together the different proposals for these respective accounts. We hope these proposals will lead to a workable solution to repay or restructure some of these funding. Please avail us the weekend to sort out the details and I will put forth next Tuesday our proposals for your consideration.
>
> [emphasis added]

39 I should explain that the term "IHC Placement" refers to 20.83m IHC shares purchased by EFII prior to IHC's listing in 2013, for which Mr Aathar, Mr Fan and Dr Jong had given a profit warranty (the "placement shares"). This transaction gave rise to a separate set of proceedings in which EFII obtained

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[79] 3ACB at p 1562.

[80] Tan's AEIC at [65], 1ACB at pp 237, 363; 8AB at pp 4103, 4104.

[81] 3ACB at p 1565.

[82] 3ACB at p 1577.

judgment against Dr Jong for the profit: see *The Enterprise Fund II Ltd v Jong Hee Sen* [2020] 3 SLR 419.

40 Negotiations over repayment involving Mr Aathar, Mr Fan and Mr Tan commenced on 27 October 2015. In an email to Mr Tan, copied to Mr Fan, Mr Aathar set out proposals concerning the placement shares, "market shares of $17.2m or 59.3m shares" and "Geelong loans" (referring to the amount outstanding under the Geelong Facility).[83] The exchange of emails with Mr Tan continued until end 2015,[84] which consistently included discussions on the sum of S$17m used to purchase the 59,304,800 IHC shares. No other IHC representatives appear to have been privy to these settlement discussions.

41 In the course of the negotiations, there was never any dispute over the intent and purpose of the Standby Facility, as Mr Fan and Mr Aathar well knew about the drawdowns. This was the position of IHC and the Crest entities. However, Mr Aathar asserted that after suffering losses in their investments in IHC shares, the Crest entities decided to pin their losses on IHC, by claiming that there were disbursements under the Standby Facility. By way of his proposals, he was merely assisting the Crest entities to find an "exit plan".[85] As for Mr Fan, he said that he found out only on 21 October 2015 that Mr Tan had improperly used funds from the Standby Facility to purchase IHC shares.[86]

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[83] 3ACB at p 1591.

[84] 3ACB at p 1591-1756.

[85] Aathar's AEIC at [3.37] to [3.46].

[86] Fan's AEIC at [2.47].

Dispute over the Standby Facility

42 In December 2015, IHC made two payments to the Crest entities. The first payment of a sum of S$3.5m was made on 4 December 2015. It was applied towards the Geelong Facility (which IHC did not take issue with).[87] The second payment of S$3,883,950 was made on 18 December 2015.[88] The Crest entities applied this payment towards the Standby Facility.[89] IHC took issue with this, and contended that the payment was always intended for and should have been applied to the Geelong Facility, and not the Standby Facility.

43 From 11 February 2016, a flurry of correspondence between the finance team of IHC (represented by Ms Tan Siew Yee) and the finance team of the Crest entities (represented by Ms Evelyn Ordinario) took place. In general, IHC denied having drawn down on the Standby Facility, and requested the Crest entities to provide supporting evidence of any alleged drawdowns. In response, the Crest entities generally asserted that drawdowns had taken place, while refusing to provide further particulars to IHC. Instead, IHC was asked to check with Mr Fan and Mr Aathar for the details.[90]

44 On 7 April 2016, the solicitors for the Crest entities, WongPartnership LLP ("WongPartnership") served a letter of demand on IHC to claim for sums due under the Standby Facility[91] and a letter of demand on IHC Medical Re to

[87] 3ACB at p 1801.

[88] 3ACB at p 1778.

[89] 3ACB at p 1782.

[90] 3ACB at pp 1815 to 1819.

[91] 3ACB at p 1822.

claim for sums due under the Geelong Facility.[92] These claims were resisted by IHC's then solicitors, Pinnacle Law LLC ("Pinnacle"), responding by way of a letter to state that IHC did not record any liability under the Standby Facility.[93] IHC also stated that the Crest entities had wrongly attributed the payment of S$3,883,950 to the Standby Facility instead of the Geelong Facility, and asked the Crest entities to rectify that error. IHC also stated that unless the Crest entities did so, it would not be making any further repayments toward the Geelong Facility.[94]

45 On 13 April 2016, WongPartnership replied by way of a letter stating that the Crest entities would provide "their substantive response shortly".[95] However, on 15 April 2016, pursuant to cl 8 of the 17 June Deed and the 30 July Deed, the Crest entities appointed receivers over the Charged Shares (the "Crest Receivers"),[96] thereby gaining control over IHC Medical Re and the Australian properties.

The present action

46 On 28 April 2016, the present action was commenced by IHC seeking, *inter alia,* to remove the Crest Receivers.

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[92] 3ACB at p 1820.

[93] 3ACB at p 1824.

[94] 3ACB at p 1825.

[95] 3ACB at p 1826.

[96] 3ACB at p 1827.

47 On 23 January 2017, IHC held an extraordinary general meeting in which the then incumbent board of IHC (which included Ms Lim) were removed.[97]

48 Since then, there have been two significant developments in the proceedings. On 7 June 2017, IHC departed from its initial stance that there were no drawdowns from the Standby Facility to purchase IHC shares, and agreed with the Crest entities that IHC shares were acquired on the instructions of Mr Aathar for IHC using the funds. The plaintiffs also brought in Mr Fan and Mr Aathar as the sixth and seventh defendants.[98] Thereafter, on 8 May 2018, Ms Lim was joined as the eighth defendant.[99]

Some related proceedings

49 I should also mention some related proceedings.

50 On 28 April 2016, the same day this action was commenced, IHC transferred IHC Medical Re's sole unit in IHC Healthcare REIT (Singapore Trust) (which held the Australian properties) to IHC Japan for S$1. Upon discovering this, on 5 August 2016, the Crest entities commenced High Court Suit No 856 of 2016 ("Suit 856") against, *inter alia,* IHC, Mr Fan, Mr Aathar and Ms Lim for unlawful conspiracy in relation to the transfer.[100] On 8 August 2016, the Crest entities obtained injunctive relief to prevent IHC from

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[97] Lim's AEIC at [38]-[39].

[98] Statement of Claim (Amendment No 2).

[99] Statement of Claim (Amendment No 3).

[100] Statement of Claim in HC/S 856/2016 at [45].

interfering with the Crest entities' security. On 16 August 2016, the asset was transferred back to IHC Medical Re.[101]

51 Shortly after, on 25 August 2016, the Australian properties were placed in receivership.[102] The Australian properties were subject to senior mortgages held by three Australian financial institutions, National Australia Bank Limited ("NAB"), Westpac Banking Corporation Limited ("Westpac") and Qualitas Real Estate Finance Pty Ltd ("Qualitas").[103] According to the plaintiffs, the appointment of the Crest Receivers triggered notices of default under these mortgages.[104] NAB and Westpac then appointed their own receivers from KPMG Australia and KordaMentha (the "Australian Receivers") over the Australian properties.[105] Eventually, the Australian Receivers proceeded to sell the Australian properties.[106]

52 Upon the application of IHC in Suit 856 to set aside the injunction, on 20 October 2016, Andrew Ang J ordered that the surplus sale proceeds from the Australian properties were to be applied towards repayment of the undisputed amount of the principal outstanding under the Geelong Facility (inclusive of interest up to the date of payment). Thereafter, the quantum representing the principal amount of the disputed Standby Facility, the disputed portion of the Geelong Facility and all costs, fees and expenses incurred by the Crest entities

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[101] HC/ORC 5440/2016 in HC/S 856/2016.

[102]Yet's AEIC at [75(n)], [76(l)].

[103] Yet's AEIC at [75(a)], [76(a)].

[104]Yet's AEIC at [75(b)], [76(c)].

[105] Yet's AEIC at [75(n)], [76(l)].

[106] Yet's AEIC at [80].

in respect of or in connection with the receivership, was to be held in escrow in a bank account and secured by a banker's guarantee to be issued in favour of IHC.[107] I shall refer to this as the "20 October Court Order". As the Crest entities discontinued the action on 2 July 2019, by consent, I granted an order in the present action which replicated the terms of the earlier order.[108]

53 In the meantime, on 6 April 2017, under its new management, IHC commenced the proceedings against the Standby Facility investors in High Court Originating Summons No 380 of 2017 ("OS380") which culminated in *The Enterprise Fund III* ([5] *supra*), where the Court of Appeal held that the Standby Facility, as well as the acquisition of shares using the funds drawn down from it, were void by virtue of s 76A(1)(*a*) of the Companies Act, and that IHC did not owe any contractual liability under the Standby Facility (at [134]).

54 With this context in mind, I turn to the parties' cases.

The parties' cases

The plaintiffs' case

55 As pleaded in Statement of Claim (Amendment No 4) (the "SOC4"), there are three causes of action against the defendants.

56 First, the plaintiffs allege breach of duties by Mr Fan and Ms Lim. Mr Fan was the Group CEO of IHC from 17 May 2015 to 30 June 2015 and

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[107] Yet's AEIC at [79].

[108] HC/SUM 3659/2019, HC/ORC 6101/2019.

subsequently acted as CEO of IHC from 30 June 2015 to 31 January 2016. He was also, at all material times, the shadow director of the plaintiffs. He thus owed the following six duties to the plaintiffs:[109]

(a) A duty to act *bona fide* in their best interests;

(b) A duty to exercise his powers for proper purposes;

(c) A duty of fidelity;

(d) A duty to avoid any conflict between his duties and his personal and other interests;

(e) A duty to exercise due skill, care and diligence in the discharge of his duties; and

(f) A statutory duty under s 157(1) of the Companies Act imposed on directors to act honestly and use reasonable diligence in discharging the duties of office.

57 As an officer of IHC during the material period of time, Ms Lim owed the first five duties as set out above at [56(a)] - [56(e)] to IHC.[110]

58 At all material times, the defendants intended, and in fact, used the Standby Facility for the purpose of acquiring IHC shares for IHC in contravention of s 76 of the Companies Act.[111] There was no commercial

[109] Statement of Claim (Amendment No 4) (the "SOC4") at [1.6] - [1.7].

[110] SOC4 at [1.8] – [1.9].

[111] SOC4 at [2.2.4].

purpose for the Standby Facility, and it served mainly to benefit the substantial shareholders, namely, Mr Fan and Mr Aathar.[112] In addition, the terms of the Standby Facility were disadvantageous to IHC.[113]

59 In breach of their duties, Mr Fan and Ms Lim caused IHC to enter into and draw down on the Standby Facility to purchase IHC shares.[114] I pause to observe that while the plaintiffs plead that Mr Fan owed IHC Medical Re duties, they only allege breach of duties towards IHC.

60 Second, the Crest entities, Mr Aathar and Ms Lim knew or ought to have known that Mr Fan was acting in breach of his duties to IHC. They dishonestly assisted in his breach of duties as follows:[115]

(a) The Crest entities agreed to extend the Standby Facility to IHC.

(b) Mr Aathar negotiated with the Crest entities on the Standby Facility with the knowledge and authority of Mr Fan, and extended his personal guarantee to the Crest entities to facilitate the grant of the Standby Facility.

(c) Ms Lim prepared and finalised the Standby Facility documents, and prepared and circulated the board paper to recommend IHC's approval of the Standby Facility.

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[112] SOC4 at [2.2.6]

[113] SOC4 at [2.2.7] - [2.2.8].

[114] SOC4 at [2.2.9] – [2.2.13].

[115] SOC4 at [2.2.10] – [2.2.11].

61 Third, all the defendants engaged in an unlawful means conspiracy to injure IHC by means of Mr Fan's breach of duties and the contravention of s 76 of the Companies Act, in causing IHC to enter into and draw down on the Standby Facility.[116]

62 Accordingly, the defendants are jointly and severally liable by way of damages and/or equitable compensation for losses sustained by IHC and/or IHC Medical Re as a result of entering into and drawing down on the Standby Facility, and consequential losses connected with the Geelong Facility.[117] I shall set these out in detail at [219] below.

The Crest entities' case

63 In the Crest entities' Defence (Amendment No 6) and Counterclaim (Amendment No 3) (the "D6CC3"), they plead that the Standby Facility was for general working capital, and was widely worded to allow the IHC to use the funds for any purpose (including the purchase of IHC's own shares).[118]

64 Thus, the Crest entities deny that they had "intended" to use the Standby Facility for the specific purpose of IHC acquiring its own shares. They admit, however, that Mr Fan and Mr Aathar had indicated that they intended for the funds to be used to acquire IHC's shares, and eventually that the funds were disbursed for such a purpose. They granted the Standby Facility because of the

[116] SOC4 at [2.2.14].

[117] SOC4 at [4.1.1], [4.1.2], [4.1.2A] and [4.1.2B].

[118] D6CC3 at [13].

long-standing business relationship with IHC (and its associated companies), as well as IHC's ability and willingness to provide sufficient security.[119]

65 The Crest entities deny that the terms of the Standby Facility were disadvantageous to IHC, and assert that given the short-term and urgent nature of the facility, its terms (*eg,* the high interest rates imposed) are not out of line with comparable short-term working capital loan facilities of a similar nature.[120]

66 Further, the Crest entities claim that they were not obliged to enquire into whether there was any non-compliance with the Companies Act, and were not alerted to any contravention in relation to the Standby Facility. They were not aware of any contravention of s 76 of the Companies Act by IHC.[121]

67 Also, the Crest entities claim that they relied on IHC's actions and representations that all necessary actions or steps to ensure that the obligations in the Standby Facility would be legally enforceable, and that the performance of the obligations would not violate any law or regulation.[122]

68 As such, the Crest entities were not aware of any breach of duty by Mr Fan to IHC. They did not dishonestly assist in any such breach of duty by Mr Fan. Also, they did not conspire with Mr Aathar and Ms Lim to injure IHC by unlawful means.[123] At all material time, there were other officers and employees

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[119] D6CC3 at [15B].

[120] D6CC3 at [15H] - [15I].

[121] D6CC3 at [15C].

[122] D6CC3 at [15D].

[123] D6CC3 at [15K] and [15O].

of IHC who were involved in the transaction, including Mr Chia and Dr Jong, which only reinforced the impression given to the Crest entities that there could not have been anything amiss.[124]

69 Turning to the losses allegedly suffered by the plaintiffs, the Crest entities deny such losses.[125]

70 In the counterclaim, the Crest entities seek a set-off and/or an indemnity from IHC under cl l0.1 of the Standby Facility and/or cl 10.1 of Geelong Facility to recover the sums drawn down from the Standby Facility amounting to S$17,332,081.15, as well as legal fees of S$21,614 in respect of the Standby Facility.[126] It seems to me that the claim has been abandoned altogether as there are no submissions on the matter. Indeed, in light of the Court of Appeal's judgment in *The Enterprise Fund III* ([5] *supra*), the Crest entities cannot enforce cl 10.1 of the Standby Facility. Also, there is no basis for the Crest entities' reliance on cl 10.1 of the Geelong Facility to claim the losses under the Standby Facility. I note, however, that the Crest entities prayed and submitted for *costs* on an indemnity basis based on the provision.[127]

71 In the alternative, the Crest entities seek to recover the drawdowns on the Standby Facility on the ground of unjust enrichment.[128]

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[124] D6CC3 at [15KA].

[125] D6CC3 at [29B].

[126] D6CC3 at [42]-[44], read with [29E] – [29G].

[127] D6CC3 at [47(f)]. 1DCS at [404].

[128] 1DCS at [323].

72 Finally, on the ground of mistake, the Crest entities seek to rectify the default interest clause in the Geelong Facility which expressly provided for default interest charge at 3% per annum to 3% per month.[129]

Ms Lim's case

73 In her Defence (Amendment No 2) and Counterclaim (the "D2CC"), Ms Lim admits that she owed the same duties to IHC as Mr Fan allegedly did (as per the plaintiffs' pleadings).[130] However, she pleads that there were, *inter alia,* two implied terms of her employment:[131]

(a) that she would obey and co-operate with IHC to carry out all lawful and reasonable directions given by IHC; and

(b) that IHC would not cause Ms Lim to carry out any order, instruction or direction other than lawful or reasonable ones.

74 As far as Ms Lim was concerned, at the material time, the Standby Facility was a credit facility for IHC's working capital.[132] There was no drawdown on the Standby Facility for any purpose in which she was involved or of which she had any knowledge.[133] The Crest entities had bought the IHC

[129] D6CC3 at [46].

[130] Lim Beng Choo's Defence (Amendment No 2) and Counterclaim ("D2CC") at [8].

[131] D2CC at [10]–[11].

[132] D2CC at [17], [18] and [20].

[133] D2CC at [28] and [33].

shares with the funds drawn down from the Standby Facility for themselves without the authority of IHC.[134]

75 Therefore, Ms Lim's case is that she did not dishonestly assist or procure Mr Fan's breach of his fiduciary duties. She prepared and finalised the legal documents for IHC's entry into the Standby Facility and circulated the board paper to the IHC board of directors for the purpose of seeking their approval for the Standby Facility upon the instructions of Mr Chia (and then Mr Fan). She acted honestly and reasonably in carrying out the assigned tasks, taking into account fiscal considerations (*eg,* repayment, security and other requirements), and IHC's cash flow situation.[135] She also denies that she had engaged in an unlawful means conspiracy with the other defendants to injure IHC.[136]

76 Ms Lim also avers that IHC had paid money erroneously toward the Standby Facility, and therefore she was not liable for principal, standby fee or default interest claimed by it as losses under the Standby Facility.[137]

77 As for losses under the Geelong Facility, Ms Lim avers that IHC had sufficient means to pay off the outstanding amount and interest under the Geelong Facility, even after erroneously paying down the Standby Facility. IHC could and ought to have deployed available funding to do so. In the alternative, liability was incurred solely because of IHC's impecuniosity.[138]

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[134] D2CC at [36D].

[135] D2CC at [30]. 8th Defendant's Closing Submissions ("8DCS") at p 35, [20(a)].

[136] D2CC at [34].

[137] D2CC at [44A].

[138] D2CC at [44B] – [44C].

78 Ms Lim denies liability for the remaining categories of losses.[139]

79 In her counterclaim, Ms Lim seeks an indemnity against IHC for any sums she might be found liable for on the basis of Art 153 of IHC's Articles of Association, or alternatively, an implied indemnity arising out of the terms of her employment with IHC.[140] She also seeks relief under ss 391(1) and 391(3) read with s 76A(13) of the Companies Act.[141]

The positions of Mr Fan and Mr Aathar

80 Mr Fan did not file a defence to the action, while Mr Aathar filed a four-page defence comprising mainly of bare denials on 18 April 2018. They each filed an affidavit of evidence-in-chief ("AEIC"), and testified at the trial. I have set out their evidence on the key matters above at [23]–[24], [34] and [41]. Their general position is that the Standby Facility was not intended for, and was not used to purchase IHC shares.

Issues to be determined

81 Based on the above, the following issues fall for determination in relation to each of the plaintiffs' claims:

(a) Breach of duties towards IHC

(i) whether Mr Fan owed and breached any duties to IHC; and

[139] D2CC at [44D] – [44E].

[140] D2CC at [47].

[141] D2CC at [49].

(ii) whether Ms Lim owed and breached any duties to IHC.

(b) Dishonest assistance

(i) if Mr Fan acted in breach of his duties to IHC, whether the Crest entities, Mr Aathar and/or Ms Lim assisted in such breach; and

(ii) whether such assistance was dishonest.

(c) Conspiracy by unlawful means

(i) whether the contravention of s 76 of the Companies Act for IHC to enter into and draw down on the Standby Facility to purchase its own shares and/or Mr Fan's breach of duties are/is unlawful for the purposes of the tort of unlawful means conspiracy;

(ii) whether the Crest entities, Mr Fan, Mr Aathar and/or Ms Lim had acted in combination with and/or in furtherance of an agreement to cause IHC to enter into and draw down on the Standby Facility to purchase its own shares and/or Mr Fan's breach of duties; and

(iii) whether the Crest entities, Mr Fan, Mr Aathar and /or Ms Lim had the intention to cause loss or damage to IHC.

82 Should any party be found liable for any of the three causes of action, further issues arise as to whether such party caused any of the losses, as well as the proof and quantification of such losses (save for the quantification of any loss of the Australian business held through IHC Medical Re which will be dealt with separately).

83 As for the counterclaim by the Crest entities, the issues are:

(a) whether IHC is liable for the claim for unjust enrichment for the sums disbursed by them pursuant to the Standby Facility, which was void for illegality by virtue of s 76A(1)(*a*) of the Companies Act;

(b) whether the default interest clause under the Geelong Facility should be rectified; and

(c) whether the Crest entities are entitled to an indemnity from IHC.

84 In relation to Ms Lim's counterclaim, the issue is whether IHC should indemnify her in respect of any loss she may be found liable for.

The underlying factual disputes

85 Prior to dealing with the issues, it is necessary to resolve two underlying factual disputes between the plaintiffs and the Crest entities (on the one hand), and Mr Fan, Mr Aathar and Ms Lim (on the other hand). These concern the purpose of the Standby Facility, and whether IHC shares were acquired on behalf of IHC using funds from the Standby Facility on the instructions of Mr Aathar.

86 I should add that *The Enterprise Fund III* ([5] *supra*) proceeded on a factual premise agreed upon by IHC and the Standby Facility investors (*ie,* EFIII, VMF3 and VMIII) that the Standby Facility was meant to fund IHC in its acquisition of its shares, and that IHC shares were purchased for IHC using such funds. This is also the position of the plaintiffs and the Crest entities here. However, I agree with Ms Lim that *res judicata,* specifically issue estoppel, does not apply *vis-à-vis* Mr Fan, Mr Aathar and Ms Lim on these issues. Four

elements must be established in order to give rise to issue estoppel, including the requirement that the two actions must involve the same parties: *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal and other matters* [2017] 2 SLR 12 ("*Turf Club*") at [87]. There is no identity of parties between the two sets of proceedings.[142]

Purpose of the Standby Facility

87 To reiterate, according to the Crest entities, the Standby Facility came about because of Mr Aathar's request made to Mr Tan at the 3 April 2015 meeting, followed up by the two 4 April 2015 emails, for up to S$20m to combat a short-selling attack on IHC's shares.[143] To that end, the Crest entities could directly buy and hold the IHC shares as security.[144] The plaintiffs adopt Mr Tan's account.

88 Mr Fan and Mr Aathar, however, contend that the discussion on 3 April 2015 and Mr Aathar's first email of 4 April 2015, related to Mr Aathar's personal request for the Crest entities to invest directly in IHC shares. Mr Aathar said that the second 4 April 2015 related to the Standby Facility which was proposed by Mr Tan, after the Crest entities refused to invest directly in IHC shares: see [23]–[24] above. Thereafter, it was the board of directors who approved the entry into the Standby Facility.[145]

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[142] 8DCS at [22].

[143] Tan's AEIC at [23]-[27].

[144] Tan's AEIC at [32].

[145] Aathar's AEIC at [4.13].

89 While Ms Lim did not throw light on the 3 April 2015 meeting or the two 4 April 2015 emails, she agrees with Mr Fan and Mr Aathar that the Standby Facility had nothing to do with the acquisition of IHC shares, and was one for "general working capital" only: see [25] above.

90 Having reviewed the evidence, I accept Mr Tan's version of events, and reject that given by Mr Aathar and Mr Fan for these reasons:

(a) Mr Tan's version is consistent with the contents of the first 4 April 2015 email which I reproduced at [19] above. Throughout the email, Mr Aathar used "we" instead of "I". Specifically, he wrote that "[w]e look to Crest to provide a standby line of $20m for use against this activity." As one of the terms of the standby line, he added that "[s]hares can be bought and held by Crest directly." Three points are evident:

(i) First, Mr Aathar did not make the request in his personal capacity. His explanation that "we" referred to Mr Tan and himself makes no sense. It was clearly a request by Mr Fan and him, on behalf of IHC.

(ii) Second, the request was to avail IHC of funds by way of a standby line to combat the short-selling activity.

(iii) Third, there was no mention of the Crest entities investing in the shares. The Crest entities were being asked to buy and hold the shares pursuant to the standby line.

(b) Mr Tan's evidence is also consistent with the contents of the second 4 April 2015 email. Given the proximity in time of the two

emails, it seems to me they concerned the same deal. Indeed, they both carried the same subject title of "Standby Facility". In it, Mr Aathar gave a firm undertaking on behalf of IHC in respect of the security arrangements for the facility, once again reinforcing the position that at all times, the request was for IHC.

(c) Subsequently, the term sheet and the Standby Facility captured the key terms within the first 4 April 2015 email, and required the security arrangements set out in the second 4 April 2015 email.

(d) Moreover, as I shall discuss later, in accordance with the first 4 April 2015 email, the Crest entities proceeded to purchase IHC shares and hold them as security.

91 In contrast, the version proffered by Mr Fan and Mr Aathar would require a strained reading of the emails, and is inconsistent with the surrounding facts and circumstances. Therefore, I find that the Standby Facility originated from the 3 April 2015 meeting and the two 4 April 2015 emails. Its purpose was to avail IHC of funds for the acquisition of IHC shares. The Crest entities, Mr Fan and Mr Aathar well knew of this purpose for the standby line – which was eventually formalised as the Standby Facility.

92 While I thus reject Ms Lim's position that the Standby Facility was merely one for "general working capital", her knowledge of the state of affairs remains to be considered. In due course, at [197] below, I shall also consider the Crest entities' arguments that, in any event, they did not *intend* the acquisition

of the shares to be the *sole* purpose for the Standby Facility,[146] and that they did not know of any contravention of the Companies Act.[147]

Whether IHC shares were acquired for IHC with funds from the Standby Facility

93 According to the Crest entities, from April to August 2015, Mr Aathar instructed Mr Tan to purchase IHC shares. A total sum of S$17,332,081.15 from the Standby Facility was used to purchase 59,304,800 IHC shares (which were held on behalf of IHC). Again, the plaintiffs adopt this account: see [32] above. However, Mr Fan and Mr Aathar assert that the Crest entities invested in IHC shares for themselves, but decided to pin the losses on IHC by claiming that there were drawdowns from the Standby Facility. Similarly, Ms Lim says that there were no drawdowns: see [34] above.

94 Once again, it is the Crest entities' version that I accept for these reasons:

(a) The WhatsApp exchanges from Mr Aathar to Mr Tan clearly showed Mr Aathar activating the standby line, and giving instructions for Mr Tan to buy shares. As highlighted by the plaintiffs, these are some key messages:[148]

(i) On 15 April 2015: "Yes, very very very stressful...If cannot *tahan*, I may need to activate your line tomorrow. It is the same group selling as what we briefed you."

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[146] Tan's AEIC at [25].

[147] Tan's AEIC at [39].

[148] PCS at [118].

(ii) On 15 April 2015: "Thank you. Fan and me also feel if pressure we may have no choice but to seek your lines. Thanks."

(iii) 16 April 2015: "Hi Glendon, can queue to buy 5 million shares of IHC at 28.5c?"

(iv) 6 July 2015: "Hi Glendon can assist on purchase? Can do 4m at 30c."

These messages completely undermined Mr Aathar's explanation that he was simply giving advice to the Crest entities on their investments in IHC shares (see above at [34]).

(b) On 8 May 2015, Mr Tan sent Mr Aathar and Mr Fan a spreadsheet showing the shares "bought on behalf" of IHC which indicated that around 18m IHC shares were bought in three transactions from 16 April to 8 May 2015.[149]

(c) Even though the legal documents were not fully executed until 21 July 2015, Mr Fan approved the payment of standby fees for the one-month period of 16 April to 15 May 2015, made by way of two cheque payments of S$255,850 and S$399,000 dated 17 June 2015 and 2 July 2015 respectively.[150] In this connection, Mr Fan tried to explain that he signed the payment vouchers, which were "cleared by several set of people", in error.[151] The explanation is not believable. As pointed out by the plaintiffs, on 2 July 2015, when the second cheque payment was

[149] 4AB at p 2074.

[150] 1ACB at pp 237 and 363.

[151] NE, 10 July 2019, p 163 lines 10-19.

made, Mr Tan had emailed Mr Fan and Mr Aathar to chase for the outstanding standby fees, and Mr Fan had forwarded the email to Mr Aathar for discussion. Mr Fan knew that the request for standby fees was in relation to the Standby Facility which had been drawn down.[152]

(d) After Mr Fan insisted that IHC would not pay for the standby fees for 16 May to 15 June 2015, Mr Aathar paid for the standby fees of S$700,000 out of his own pocket on 31 July 2015.[153]

(e) The subsequent conduct of Mr Fan and Mr Aathar in engaging in negotiations for the repayment of the Standby Facility and the Geelong Facility also amply demonstrated that they knew about the drawdowns on the Standby Facility. As stated above at [36], on 19 October 2015, the Crest entities sent Dr Jong (with Mr Fan and Mr Aathar copied) a request for payment for the standby fees of the Standby Facility.[154] In the negotiations, Mr Aathar proposed to the Crest entities, in which Mr Fan must have acquiesced, to restructure the "market shares of S$17.2m or 59.3m shares".[155] This figure is broadly in accord with the drawdowns on the Standby Facility totalling S$17,332,081.15, which were used to purchase the 59,304,800 IHC shares. Mr Aathar's explanation (set out at [41] above) was that in the course of the negotiations, he was merely assisting the Crest entities to find an exit strategy. This simply did not ring true.

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[152] 5AB at pp 2466 – 2467.

[153] 8AB at pp 4103-4104.

[154] AB, Vol. 6 ("6AB") at p 2924.

[155] 6AB at pp 2946 – 2947.

95 Thus, the evidence points inexorably towards Mr Fan and Mr Aathar knowing about the drawdowns from the Standby Facility from 16 April 2015 to acquire IHC shares. I should add that Mr Aathar and Ms Lim argue that Mr Aathar was only a shareholder. He did not have the authority to instruct the drawdowns on behalf of IHC.[156] In relation to the claims and the counterclaims, Mr Aathar's authority is not a relevant legal issue, and would not affect any factual findings I have to make. Whether or not he was authorised to do so (which may be a matter for another day), the evidence showed that Mr Aathar gave the instructions to Mr Tan on the share acquisitions.

96 Here, again, while I reject Ms Lim's contention that there was no drawdown on the Standby Facility to acquire IHC shares, the question of her knowledge of these matters remains to be analysed below.

Conclusion

97 Having determined these two factual disputes in favour of the plaintiffs and the Crest entities, I observe, for completeness, that the Crest entities dispute the dishonesty and/or injurious intent requirements in the two substantive causes of action against them on the basis that Mr Tan's state of mind should not be attributed to each of the Crest entities. It seems to me that the argument is inconsistent with the Crest entities' complete reliance on Mr Tan's acts in relation to the transaction. In any event, as I elaborate below at [138] onwards, based on agency, Mr Tan's state of mind and intent could (and should) be attributable to each of the Crest entities. I now go to the plaintiffs' claim against Mr Fan for breach of duties.

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[156] Aathar's AEIC at [5.2]. 8DCS at [21].

Breach of duties by Mr Fan

98 According to the plaintiffs, Mr Fan owed IHC six duties as set out at [56] above, either as an officer of IHC from 17 May 2015 and/or as a shadow director at all material times.[157] Mr Fan denies that he was a shadow director. While he denies that he breached "any duty [he] owed to IHC as a CEO", he does not clearly concede that he owed IHC such duties as alleged by the plaintiffs.[158] Meanwhile, Ms Lim argues that Mr Fan owed certain (unspecified) fiduciary duties as CEO, but not in relation to the entry into the Standby Facility.[159]

99 I pause to observe that fiduciary duties are owed by directors of a company, and imposed on those employees considered to be fiduciaries of a company. The duties of honesty, fidelity and loyalty are core fiduciary obligations, but the duty to exercise due skill, care and diligence is not: *Bristol and West Building Society v Mothew* [1998] Ch 1 ("*Mothew*") at 16C; and *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 ("*Then Khek Koon*") at [104]. As for the statutory duty pursuant to s 157(1) of the Companies Act, it is imposed on directors.

100 Therefore, in order to impose all six duties on Mr Fan, the plaintiffs have to prove that he was a shadow director. It is to this question that I now turn.

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[157] PCS at [210]. See also 7AB at pp 3482 – 3484 and 3488.

[158] Fan's AEIC at [3] and [4].

[159] 8DCS at [20(c)(xix)].

Whether Mr Fan owed duties to IHC as a shadow director

101 A shadow director is defined by s 4(1) of the Companies Act as "a person in accordance with whose directions or instructions the directors or the majority of the directors of a corporation are accustomed to act". The policy impetus behind holding a person liable as a shadow director is that persons who are actually responsible for the important corporate decisions of a company should be held accountable regardless of what they are called and their motives or manner in making such corporate decisions: *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)* [2010] SGHC 163 ("*Raffles Town Club*") at [47].

102 To prove a shadow directorship, all that is required is evidence of a "discernible pattern of compliance with the shadow director's instructions or directions", with allowances for occasional departures from this pattern "for whatever reason". It is not necessary for the court to find that the *de facto* and *de jure* directors of the company "did not exercise any discretion or judgment" of their own: *Raffles Town Club* at [45] and [47].

103 The plaintiffs argue that Mr Fan was a shadow director of IHC based on the following:

(a) Mr Tan's evidence that he perceived Mr Fan and Mr Aathar to be the "decision-makers" for IHC throughout the Crest entities' business dealings with IHC.[160]

[160] PCS at [219]. NE, 13 August 2019, p 129 (lines 1-25) and p 130 (lines 1-18).

(b) Mr Fan was privy to information on IHC's financial position and business operations beyond that normally available to a substantial shareholder, owing to his regular meetings (once every three weeks) with Dr Jong.[161] The plaintiffs contend that this, combined with the fact that Mr Fan had control over IHC's management, explained his willingness to provide contractual warranties relating to the operational and management aspects of IHC.[162]

(c) On 4 April 2015, Mr Aathar had, after checking with Mr Fan, purported to give the Crest entities a "firm undertaking from IHC" that all security arrangements would be promptly restored. This was in Mr Aathar's second 4 April 2015 email. This indicated Mr Fan's decision-making powers over IHC.[163]

(d) The fact that Mr Chia and Ms Lim, as senior members of IHC's management, had simply followed up to execute and complete the legal documentation for the Standby Facility without raising further queries after Mr Fan had instructed them to do so indicated that they were accustomed to acting on Mr Fan's instructions.[164]

104 Even taking all of the above at the highest, they do not demonstrate the existence of a pattern of conduct in which the directors of IHC, or a majority thereof, were accustomed to act on Mr Fan's instructions. There was no

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[161] PCS at [220].

[162] PCS at [222]; 1st to 5th Defendants' Supplementary Bundle of Documents ("CESCB") at pp 175 to 176 and 188 to 190.

[163] PCS at [230].

[164] PCS at [231].

evidence showing that Mr Fan had even issued any instructions or directions to any of the directors of IHC. The fact that Mr Fan and Mr Aathar might have held themselves out as authorised deal negotiators whose negotiated terms were accepted by IHC, as Mr Tan alleged,[165] did not in any way suggest that IHC's directors were accustomed to act on their instructions. In particular, the directors of IHC did not accept or approve the Standby Facility deal blindly, but questioned the basis for it before making their decision. As observed at [30] above, both Mr Siew and Mr Ong queried the need for the Standby Facility given the high interest rates, with Mr Siew approving the Standby Facility *only* if it was necessary for the continued operations of IHC. Mr Ong rejected the deal. These were plainly not the actions of directors who were accustomed to acting on the instructions of Mr Fan.

105 Accordingly, I do not think that IHC has successfully proved that Mr Fan was a shadow director of IHC, or that he owed any duties as a shadow director. It follows that Mr Fan did not owe IHC the statutory duty imposed on directors under s 157(1) of the Companies Act.

Whether Mr Fan owed duties to IHC as CEO

106 I next turn to the question of whether from 17 May 2015, as Group CEO, and then later as CEO, Mr Fan owed the other five duties to IHC. In this connection, I do not find the cases cited by the plaintiffs in the closing submissions to be of assistance, as they involve the imposition of such duties on directors and/or shadow directors of companies (and not on other officers/employees of the companies): see *Ho Kang Peng v Scintronix Corp Ltd*

[165] PCS at [233].

(formerly known as TTL Holdings Ltd) [2014] 3 SLR 329 ("*Ho Kang Peng*"); *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] 3 SLR (R) 109; *Lim Weng Kee v Public Prosecutor* [2002] 2 SLR (R) 848.

107 The starting point is that an employee may owe fiduciary duties to his employer in certain circumstances. For this principle, I turn to *Nottingham University v Fishel and another* [2000] IRLR 471 ("*Nottingham University*") where Elias J said at [97]:

> … [in] determining whether a fiduciary relationship arises in the context of an employment relationship, it is necessary to identify with care the particular duties undertaken by the employee, and to ask whether in all the circumstances he has placed himself in a position where he must act solely in the interests of his employer. It is only once those duties have been identified that it is possible to determine whether any fiduciary duty has been breached …

108 Thus, whether a fiduciary relationship arises in the context of an employment relationship is heavily fact-dependent: *Quality Assurance Management Asia Pte Ltd v Zhang Qing and others* [2013] 3 SLR 631 ("*Quality Assurance*") at [25]. In *Clearlab SG Pte Ltd v Ting Chong Chai* [2015] 1 SLR 163 ("*Clearlab*"), a case cited by Ms Lim, Lee Seiu Kin J set out a framework for applying the *Nottingham University* test as follows:

> (a) The court will only regard an employee as a fiduciary if he is placed in a position where he must act solely in the interests of his employer. A mere employment relationship does not support the existence of a fiduciary relationship. It must be shown that there are particular functions of the employee, which requires him to pursue the

interests of his employer to the exclusion of other interests, including his own (at [272]).

(b) The conditions for the imposition of fiduciary obligations on an employee are (at [275]):

(i) The employee has scope for the exercise of some discretion or power.

(ii) The employee can unilaterally exercise that power or discretion so as to affect the company's legal or practical interests.

(iii) The company is peculiarly vulnerable to or at the mercy of the employee holding the discretion or power.

(c) An employee will not owe fiduciary duties in respect of all aspects of his employment. There is no wholesale importation of every kind of fiduciary duty into each case. The fiduciary duties that arise are context-dependent and must be accommodated within the terms of the employment contract without altering its intended operation. The real question is whether the employee owed specific fiduciary duties in the particular circumstances in which it is alleged that he had acted against the interests of the employer (at [278]).

109 It is a question of fact whether senior employees will owe the same fiduciary duties as that of directors. Applying the test in *Clearlab,* a senior employee who owes such fiduciary duties would need to be vested with broad discretionary powers of management over the company. Thus, in *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371 ("*Canadian Aero*"), the

defendants, a president and executive vice-president of a company, were held to owe fiduciary duties similar to directors because they were "top management" employees: at 381.

110 Similarly, in *ABB Holdings Pte Ltd and others v Sher Hock Guan Charles* [2009] 4 SLR(R) 111 ("*ABB*"), the High Court held that the defendant owed fiduciary duties akin to those owed by directors to the third plaintiff which he had breached by failing to inform the third plaintiff of the competitive intentions of potential competitors. This was because the defendant was in charge of all aspects of the third plaintiff's business, being responsible for its general management as well as business development, marketing and sales. He was also in a position to hire and fire employees, and attended meetings of the Country Management Team where the plaintiffs' various businesses were discussed. As such, at [42], he was found to have been "a very senior employee indeed" and therefore owed fiduciary duties which "have been formulated in various authorities as the duties owed by a director to his company and there is no reason to formulate the fiduciary duties of a senior employee any differently."

111 Fiduciary duties will not be imposed on an employee who is subject to a high degree of supervision and review by a more senior employee. That was the case in *Nagase Singapore Pte Ltd v Ching Kai Huat and others* [2007] 3 SLR(R) 265 ("*Nagase*") where two employees, even though they had some authority to negotiate contracts on the company's behalf or authorize the payment of invoices, were not held to be fiduciaries because they were members of the company's middle management and had to obtain their superiors' sanction for their decisions (at [29]). Similarly, in *Griffin Travel Pte Ltd v Nagender Rao Chilkuri and others* [2014] SGHC 205 ("*Griffin Travel*"), the

employees in question were heads of their respective departments (one of them being the company's Chief Financial Officer). Nevertheless, they were not held to be fiduciaries because they had to report to two more senior employees and obtain their sanction for many of their decisions.

112 It is clear from the authorities that fiduciary duties will likely only be imposed on an employee who is, effectively, the "ruler in his own domain", subject to minimal levels of supervision and having a wide discretion over critical aspects of the company's business. Fiduciary duties akin to those owed by a director would likely be imposed on senior employees whose domain extended to all or substantially all of the business of the company, as in *ABB* and *Canadian Aero*.

113 Returning to the present case, I find that, Mr Fan, as Group CEO and subsequently CEO of IHC, was, from 17 May 2015, a member of IHC's senior management. Indeed, his evidence at trial was that he was the leader of its management:[166]

> Q. That's because on 17 May you had been appointed as group CEO?
>
> A. That's correct.
>
> Q. So now you were in the management of the company, you were the leader of the management team?
>
> A. That's correct.

114 In my view, this clearly shows that Mr Fan stood in a position analogous to the defendant in *ABB* in that he had broad powers of management over IHC. Indeed, Mr Fan was not only part of IHC's top management, he was its top

[166] NE, 10 July 2019, p 134, lines 14 to 19.

executive. This is a case in which the full range of fiduciary duties owed by the directors of IHC ought to be imposed on Mr Fan, similar to the approach taken in *ABB* and *Canadian Aero*.

115 Imposing fiduciary duties on Mr Fan in respect of IHC would not be inconsistent with the terms of his service agreement with IHC dated 17 May 2015 which requires him to act to promote the interests of the company. I set out the relevant extracts as follows:[167]

> **3. Duties**
>
> 3.1 The Executive shall undertake such responsibilities, diligently perform such duties and exercise such powers in relation to the Company and its business as may form from time to time be assigned to him by or under the authority of the Board of Directors of the Company or vested in the Executive and shall comply with all regulations and directions made by or under the authority of the Board of Directors of the company from time to time.
>
> 3.2 During the Appointment, the Executive shall faithfully serve the Company and use his utmost endeavours to promote the interests of the Company and shall devote his full time, attention, abilities and skill to the affairs of the Company.
>
> [emphasis in original]

116 By the above, I find that upon his appointment as Group CEO and subsequently as CEO, Mr Fan owed to IHC the duties as pleaded (other than the statutory duty under s 157(1) of the Companies Act), *ie,* a duty to act *bona fide* in the best interest of IHC; a duty to exercise power for a proper purpose; a duty of fidelity; a duty to avoid any conflict; and a duty to exercise due skill, care and diligence.

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[167] Fan's AEIC at p 841.

Whether Mr Fan breached his duties to IHC

117 I now consider whether Mr Fan breached his duties to IHC. According to the plaintiffs, he did so by:

(a) procuring IHC to enter into and draw down on the Standby Facility to purchase IHC shares, which was a contravention of s 76 of the Companies Act;[168] and

(b) actively concealing the illegal nature of the Standby Facility from others at IHC, including IHC's board.[169]

118 Contrary to the assertions of Mr Fan, Mr Aathar and Ms Lim, as I found above (at [90]), the purpose of the Standby Facility was for IHC to acquire its own shares. Mr Fan was, alongside Mr Aathar, one of the two key persons involved in negotiating the terms of the Standby Facility with the Crest entities. Furthermore, I also found (at [95]) that Mr Fan knew about the drawdowns of the funds from 16 April 2015 to acquire IHC shares. I should add that in his evidence, Mr Fan admitted that he was aware of the prohibition against a company buying its own shares without a proper share buy-back mandate.[170] Indeed, Mr Aathar admitted to the same.[171]

119 Not only was such an arrangement illegal, it was *prima facie* inimical to IHC's interests, as IHC's future resources would be diminished by such

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[168] PCS at [241].

[169] PCS at [242].

[170] NE, 23 July 2019, p 46 line 20 to p 47 line 4.

[171] NE, 13 August 2019, p 20 lines 15-20.

acquisitions of its own shares: *Public Prosecutor v Lew Syn Pau* [2006] 4 SLR(R) 210 ("*Lew Syn Pau*") at [126]. Indeed, Mr Fan's conduct demonstrated that he knew that it was illegal and detrimental to IHC's interests.

120 With such background knowledge in mind, as Group CEO and subsequently CEO of IHC, Mr Fan vetted, approved and submitted the board paper to the IHC board of directors for their consideration.[172] This board paper did not mention that funds drawn down on the Standby Facility would be used to purchase IHC shares. Instead, the board paper simply (and misleadingly) characterised the Standby Facility as being a loan facility for "*general working capital purposes*" (emphasis added).[173] In my view, there would be no reason for Mr Fan to omit all mention of the purchase of shares if, to his mind, that was perfectly legal or in IHC's interests.

121 This action was significant in causing IHC to enter into the Standby Facility. As I observed at [104], Mr Siew's vote in favour of the Standby Facility, which broke the tie between the votes cast by Dr Jong and Mr Ong, was given on the basis that the Standby Facility was necessary for operational purposes. As such, it is questionable whether his approval would have been given had he been aware that the Standby Facility would be used to purchase IHC shares, with the result that IHC would likely not have entered into the Standby Facility in the first place.

122 By entering into the Standby Facility, IHC then incurred substantial liabilities in the form of the standby fees and drawdowns used to purchase its

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[172] 5AB at p 2322.

[173] 5AB at p 2322.

own shares. The plaintiffs argue that, from IHC's perspective, there really was no commercial purpose at all for IHC to enter into the Standby Facility.[174] Whether or not there was any purpose for IHC to prop up its share price, it was clear that the substantial shareholders (*ie*, Mr Fan and Mr Aathar) potentially stood to gain from the market interventions by such means. Mr Fan would have been well aware of this.

123 The above shows that, in breach of his duty to act *bona fide* in IHC's interests, Mr Fan caused IHC to pursue a course of action that was inimical to its interests. His duty of fidelity required him to not act for his own benefit or the benefit of any third party without the informed consent of IHC. However, he failed to disclose to IHC's board of directors that the funds had already been used from the Standby Facility to acquire IHC shares (which was the true purpose of the facility), and that this course of action may be of benefit to Mr Aathar and him. Along the same vein, he also put himself in a position of conflict, resulting in the breach of his duty to avoid conflicts of interest. I, therefore, find that Mr Fan had breached these core fiduciary duties he owed to IHC.

Breach of duties by Ms Lim

Whether Ms Lim owed duties to IHC

124 The law on the imposition of duties on an employee are set out above: see [107]–[112]. From January 2015 to 6 January 2016, inclusive of the date on which IHC entered into the Standby Facility, Ms Lim was the Vice-President (Investments) of IHC. In that capacity, she was mainly involved with asset

[174] PCS at [13].

management, financing and disposition activities around a portfolio of overseas medical real estate. She also assisted the Chairman (who was Dr Jong at the material time) with loan reviews and cash flow management for IHC.[175] In D2CC, Ms Lim admits to owing IHC the duties as pleaded by the plaintiffs.[176] Comparing Ms Lim's role and functions with those of the employees in *Nagase* ([111] *supra*) and *Griffin Travel* ([111] *supra*), I have some reservations as to whether Ms Lim was in such a senior position within IHC (especially in relation to entry into loans) as would justify imposing on her the core fiduciary duties owed by directors. Nonetheless, given the concession, I proceed on the basis that Ms Lim owed such duties to IHC.

Whether Ms Lim breached her duties to IHC

125 IHC argues that Ms Lim breached her duties to it for the following reasons:

(a) Ms Lim was aware of the purpose of the Standby Facility, and that it had been used to purchase IHC shares in contravention of the Companies Act.[177]

(b) While knowing that the true purport of the Standby Facility was to finance an illegal acquisition of shares, Ms Lim was instrumental in procuring IHC to enter into and draw down on the Standby Facility, by

[175] Lim's AEIC at [22].

[176] D2CC at [8] and Lim's AEIC at [34].

[177] PCS at [138]-[152].

finalising the legal documents and preparing the board paper for the consideration of IHC's board of directors.[178]

126 Ms Lim takes the primary position that the Standby Facility was not intended to be used (and was not used) to purchase IHC's shares. She was aware that to acquire its own shares, IHC would have required an approval for share buyback (or be in contravention of s 76 of the Companies Act).[179] Underlying this is a denial that she knew of the true state of affairs. In addition, Ms Lim contends that she had not breached her duties to IHC for four reasons:[180]

(a) She had acted in accordance with her superiors' instructions.

(b) She acted honestly.

(c) She had reason to consider the Standby Facility to be in the interest of IHC.

(d) She stood to make no personal gain.

127 I turn to the question of Ms Lim's knowledge. In the main, the plaintiffs rely on six pieces of evidence to prove that Ms Lim knew of the true state of affairs:[181]

(a) First, on 9 April 2015, Mr Fan forwarded the first 4 April 2015 email to Ms Lim as part of the chain of emails. To recapitulate, this was

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[178] PCS at [241].

[179] Lim's AEIC at [55].

[180] 8DCS at p 118, [(E)(h)(ii)]].

[181] PCS at [139]-[152].

the email capturing the key terms of the standby line – including the term "[s]hares can be bought and held by Crest directly**"**. Shortly after, the term sheet, which stated that the Standby Facility would be secured by a pledge of IHC shares "purchased through Fund" was sent by Mr Tan to Ms Lim. Ms Lim had been informed of the purpose of the standby line.

(b) Second, on 12 May 2015 at 6.15pm, Mr CP Lim sent Ms Lim an email requesting her to follow-up on the preparation of the "loan documents for the standby facility".[182] For her reference, he attached "the SGX statement on the purchase of shares till date".[183] The SGX statement, dated 16 April 2015, reflected the purchase of 11,100,000 IHC shares at the price of S$0.285 per share for the sum of S$3,173,316.34. In the same email, Mr CP Lim also stated that the Crest entities' account team had sent out the debit note to IHC's finance staff and that as the "first drawdown date is 16 Apr 2015", "the full interest and principal repayment shall be 15 June 2015". Ten minutes later, at 6.25pm, Mr CP Lim "recalled" the email.[184]

On 13 May 2015, Mr CP Lim sent another email to Ms Lim, without any mention of the purchase of IHC shares and without attaching the SGX statement.[185] This email, however, retained the references made in

[182] 2ACB at p 1067.

[183] 2ACB at p 1068.

[184] 2ACB at p 1069.

[185] 8th Defendant's Supplementary Bundle of Documents ("8DSB") at p 18.

his 12 May 2015 email to the first drawdown date (16 April 2015) and the full interest and principal repayment date (15 June 2015).

(c) Third, Ms Lim knew about the two payments that were made to the Crest entities for the standby fees that were accrued from 16 April to 15 May 2015. Again, this pointed to her knowledge of a drawdown on the Standby Facility.[186]

(d) Fourth, Ms Lim was content for the initial facility agreement to be backdated to 16 April 2015, even before the legal documents were finalised.

(e) Fifth, in December 2015, the Crest entities sought to direct IHC's repayment of S$3,883,000 towards the Standby Facility. In her WhatsApp message to Mr Fan on or about 18 December 2015, Ms Lim stated as follows:[187]

> Mr Fan, Chu Pei said the $3.88m payment to Crest is for the standby facility. IHC's books did not record any drawdown of the standby facility, hence we can't be paying for tat [*sic*]. We need to discuss how we can reconcile tat [*sic*].

Ms Lim did not raise any concerns as to whether the claim was legitimate.

(f) Sixth, as described at [43] above, in February and March 2015, when the finance teams from IHC and the Crest entities were engaged in the dispute regarding the outstanding amounts due under the Standby

[186] NE, 20 August 2019, p 103 line 5 to p 105 line 1.

[187] 8D2SB, 6.

> Facility and the Geelong Facility, the Crest entities repeatedly asked IHC to check with Mr Fan and/or Mr Aathar, Ms Lim merely forwarded the email chain to the latter two stating "FYI".[188] Ms Lim did not ask for any clarification. Implicit in her "FYI" email was the fact that she knew of the drawdowns to acquire IHC shares.

128 I note that on the first piece of evidence, Ms Lim's explanation is that she did not pay any particular attention to the other emails attached to the thread sent by Mr Fan on 9 April 2015. She did not know of the existence of the first 4 April 2015 email – which was the last email in the chain.[189] She was more concerned about the legal documents, but there were no documents attached to Mr Fan's email. As for the term sheet, even though she read it, she did not notice the mention of the pledge of the IHC shares.[190] In response, the plaintiffs argue that it is unbelievable that Ms Lim, as the person in charge of the legal documents, would not have familiarised herself with the underlying details of the proposed transaction by reading the email and the term sheet.

129 In my view, Mr Fan's email of 9 April 2015 was meant to introduce Mr Chia and Ms Lim to Mr Tan, so as to kick-start the process to formalise the transaction. As CEO, I would have expected Mr Chia to be more concerned about the purpose of the proposed transaction. As for Ms Lim, it is not unbelievable that she did not pay attention to the email right at the bottom of the chain because it is not entirely surprising that her focus would have been on the legal documents – which arrived via a subsequent email sent by Mr Tan.

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[188] 6AB at p 3199.

[189] Lim's AEIC at [46a].

[190] NE, 16 August 2019, p 87 lines 7-9, and p 95 line12 to p 96 line 7.

130 As for the term sheet, when she received it, Ms Lim noted that the purpose was for "general working capital". Even if she were to read the security term about the pledge of the IHC shares, the significance might not have been entirely clear to her without the necessary background information. In this connection, it is undisputed that Ms Lim was not involved in the initial negotiations over the Standby Facility, and that Mr Fan did not brief her on the deal.[191]

131 Even taking into account the other pieces of evidence, I do not find that it has been proved on a balance of probabilities that Ms Lim knew or ought to have known that the very purpose of the standby facility was to acquire IHC shares, and that funds were used to purchase the IHC shares. The fact that Mr CP Lim withdrew the 12 May 2015 email with the SGX statement showed that Ms Lim was not meant to be privy to the share acquisitions.[192] Ms Lim's role was intended to be peripheral in nature, *ie*, limited to the preparation of documents and the making of payments due under the Standby Facility. That said, I am of the view that the surrounding circumstances would have alerted Ms Lim to the existence of the drawdowns on the Standby Facility beginning on 16 April 2015 (albeit for unknown purposes).

132 Although the 13 May 2015 email by Mr CP Lim removed all mention of any shares bought with the Standby Facility, it clearly referred to a first drawdown on the Standby Facility on 16 April 2015. At trial, Ms Lim attempted to explain away this email by asserting that the drawdown referred to was the Crest entities' own drawdown from their own investors, and not a drawdown

[191] NE, 10 July 2019, p 108, lines 13-17; 16 August 2019 at p 85 lines 19 to 25, and p 86 line 1.
[192] 2ACB at p 403.

made by IHC. In fact, Ms Lim gave the same explanation for the fourth piece of evidence, as to why she accepted that the legal documents could be backdated to 16 April 2015.[193] I do not find the explanation believable.

133 Seen in this context, the only reasonable conclusion Ms Lim could reach was that IHC had drawn down on the Standby Facility on 16 April 2015. The drawdown was for unknown purposes, and done without full and proper documentation. However, Ms Lim did not discuss the matter with Mr Fan, or highlight that fact to the board of directors. Instead, it seems to me that she acted unquestioningly to prepare the legal documents for the Standby Facility and the board paper without querying the circumstances that should have alerted her to the presence of irregularities in the use of the Standby Facility.

134 As for the payment of standby fees, Ms Lim explains that both Mr Fan and she took the "mistaken view" that the minimum sum of two months' standby fees had to be paid to the Crest entities for the Standby Facility, and that it was payable from 16 April 2015, *ie,* when the Standby Facility had been put in place.[194] This was not a credible explanation. This, taken together with the fifth and sixth pieces of evidence on how she reacted when the Crest entities demanded for payment, reinforces my view that she was aware of the drawdowns from 16 April 2015. However, the evidence does not go further to show that she knew or ought to have known that the funds had been used for the acquisition of shares.

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[193] NE, 20 Aug 2019, p 78, lines 20-25 to p 79, lines 1-17. Lim's AEIC [46h(iii)].

[194] Lim's AEIC at para 58.

135 On the basis of the above, I find that Ms Lim breached her duty to IHC by failing to exercise due skill, care and diligence in the discharge of her duties. I accept that in her position, she remained answerable to Mr Chia, Mr Fan and Dr Jong, and had to take instructions from them. However, she should have made, but did not make, further enquiries as to the reasons for the drawdown on the Standby Facility, and to raise the matter to the board of directors before the signing of the legal documents had such reasons been unsatisfactory. As a result, IHC formally entered into the Standby Facility and incurred substantial liabilities to purchase its own shares.

136 Based on these findings, I do not think that Ms Lim breached the other duties. Without the requisite knowledge that the Standby Facility was for the illegal purpose of IHC acquiring its own shares, she would have thought that it was a facility for "general working capital", and thus could have been used for that purpose. There are insufficient grounds to say that Ms Lim had not acted *bona fide*, that she had acted for improper purposes, or that she had taken into account the interests of the substantial shareholders to the detriment of IHC's interests. Further, it was not seriously contended that Ms Lim stood to gain from the transaction. She did not put herself in a position of conflict of interests.

137 Having established that Mr Fan and Ms Lim owed and breached duties to IHC, I shall deal with the equitable compensation claimed by IHC later.

Whether Mr Tan's state of mind could and should be attributed to the Crest entities

138 To hold the Crest entities liable for the substantive causes of action, the plaintiffs have to show dishonesty and/or an injurious intent on the part of the Crest entities. Before addressing these substantive claims, as alluded to above

at [97], I deal with the question of whether Mr Tan's state of mind could and should be attributed to the Crest entities.

139 A company, not being a natural person, cannot possess a mental state. As such, the mental state of a natural person must be attributed to the company for it to be so liable: *Ho Kang Peng* ([106] *supra*) at [47]. The principles of attribution are well-settled, and are derived from Lord Hoffmann's analysis in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 ("*Meridian*").

140 As summarised by Vinodh Coomaraswamy J in *Ong Bee Chew v Ong Shu Lin* [2019] 3 SLR 132 at [140], Lord Hoffmann in *Meridian* grouped the rules of attribution into three sets.

(a) The first set comprises the primary rules of attribution which are found in the company's constitution or implied by company law which deem certain acts by certain natural persons to be the acts of the company (at 506D).

(b) The second set comprises the general rules of attribution by which a natural person may have the acts of another attributed to him, *ie*, the principles of agency; and by which a natural person may be held liable for the acts of another, such as estoppel, ostensible authority and vicarious liability (at 506F).

(c) The third set comprises special rules of attribution which the court must fashion in exceptional cases where applying the first or second set of principles would defeat the policy underlying a particular

provision of the substantive law as it was intended to apply to a company (at 507D–F).

Lord Hoffman's analysis was endorsed in *Ho Kang Peng* (at [47]–[48]).

141 The Crest entities submit that the plaintiffs have proceeded on the basis that each of the Crest entities could (and should) be affixed with any dishonesty and/or any injurious intent on the part of Mr Tan.[195] However, on the facts, Mr Tan was only an employee of Crest Capital, and a director (who sits on the investment committee) of EFIII only.[196] As the plaintiffs do not specifically identify the basis of such attribution in the pleadings, this renders the plaintiffs' case defective.[197] Further, the plaintiffs cannot proceed on the basis of agency as it was not pleaded. The plaintiffs have also not established that Mr Tan acted within the scope of authority given by the Crest entities in carrying out the unlawful means conspiracy.[198]

142 Having considered the Crest entities' submission, I agree with the plaintiffs that it is unmeritorious. At all times, the Crest entities understood the case against them to be based on Mr Tan's acts in the transaction, as the authorised representative of each of the Crest entities. Indeed, the Crest entities rely on the acts of Mr Tan; they do not dispute that he had acted with authority.

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[195] 1DCS at [165]-[168].

[196] 1DCS at [169].

[197] 1DCS at [163].

[198] 1DRS at [82].

143 To elaborate, at paras 2.2.4, 2.25 and 2.2.17(e) of SOC4, the plaintiffs plead Mr Tan's role and involvement in the Standby Facility, as "admitted to" by Mr Tan, the Investment Director of Crest Capital, in his affidavit filed in these proceedings on 10 May 2016 on behalf of the Crest entities. These material facts concerning Mr Tan thus form the basis of the plaintiffs' allegations of dishonesty and/or injurious intent on the part of the Crest entities.

144 In D6CC3, at para 5, the Crest entities plead that the Standby Facility investors (*ie,* EFIII, VMF3 and VMIII) were "managed in all aspects" by Crest Capital and Crest Catalyst. At paras 15A, 15B and 16 of D6CC3, the Crest entities do not dispute the events involving Mr Tan. None of the Crest entities disassociated themselves from Mr Tan's acts.

145 Therefore, I do not think that the plaintiffs' pleading is deficient. The material facts have been sufficiently pleaded. In fact, I agree with the plaintiffs that it was "curious" that the Crest entities raises this argument in the closing submissions.[199] This point is inconsistent with the Crest entities' pleaded case, as well as the position taken by the Crest entities in the proceedings. Specifically, the Crest entities rely on the acts of Mr Tan throughout the negotiations, during entry into the Standby Facility, and in respect of the subsequent drawdowns on the Standby Facility.

146 From all the facts and circumstances described above, Mr Tan's actual authority as agent is also plain to see. I only wish to add that in the term sheet

[199] PRS at [5]-[10].

sent by Mr Tan to Mr Fan and Mr Aathar via email on 9 April 2015, it was stated expressly as follows:[200]

> … [that it] summarizes the principal terms with respect to a potential funding into International Healthway Corporation Limited or its subsidiaries ("IHC") by Crest Capital Asia Pte Ltd *and/or its designated funds* ("Lender").
>
> [emphasis added]

147 The Crest entities cannot adopt the position that Mr Tan's acts were authorised on the one hand, and yet on the other hand, disavow his state of mind. For completeness, I should add that there is no dispute by the Crest entities that the agreements, *ie,* the initial facility agreement and the Standby Facility agreement, were properly executed by the investing funds.

148 To round off, the claim for dishonest assistance lies in equity, and that of unlawful means conspiracy lies in tort. For these claims, I do not know of any reason (nor was any offered by the Crest entities) to exclude attribution on the general principles of agency. As observed by Lords Walker and Hodge JJSC in *Bilta (UK) Ltd v Nazir (No 2)* [2015] 2 WLR 1168 at [205], "where a third party makes a claim against the company, the rules of agency will normally suffice to attribute to the company not only the act of the director or employee but also his or her state of mind, where relevant." Mr Tan was the agent of each of the Crest entities in relation to the Standby Facility. Hence, his knowledge, state of mind and intention could (and should) be attributable to the Crest entities.

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[200] 1ACB at p 550.

Dishonest assistance

149 I now turn to the substantive claim for dishonest assistance against the Crest entities, Mr Aathar and Ms Lim in respect of Mr Fan's breach of duties.

The elements of the cause of action

150 A claim in dishonest assistance is a type of accessory liability. As stated in *George Raymond Zage III and another v Ho Chi Kwong and another* [2010] 2 SLR 589 ("*George Raymond Zage*") at [20] and *Banque Nationale de Paris v Hew Keong Chan Gary* [2000] 3 SLR(R) 686 at [136], the elements of dishonest assistance are:

(a) the existence of a trust or fiduciary obligation;

(b) breach of that trust or fiduciary obligation;

(c) assistance rendered by the alleged accessory towards the breach; and

(d) such assistance rendered by the alleged accessory was dishonest.

151 Since I have found that Mr Fan owed and breached his fiduciary duties to IHC by causing IHC to enter into, draw down and incur significant liabilities under the Standby Facility, the first two elements are satisfied. The present analysis concerns the third and fourth elements.

152 The alleged assistance must be in relation to acts or omissions which have a causative effect on the breach of fiduciary obligation: *Brown and another v Bennett and others* [1999] 1 BCLC 649 at 659. This means that the acts of assistance alleged must be *referable* to the breach: *Clearlab* ([108] *supra*) at

[300]. The causative effect required does not need to rise to the level of inducing the breach of fiduciary duty. It is sufficient if it assists the breach: *Clearlab* at [296]. This is a lower threshold. It is generally sufficient, therefore, that some form of facilitative involvement in the breach concerned is shown.

153 Turning to dishonesty, in *George Raymond Zage* at [22], the Court of Appeal adopted the test set out by the Privy Council in *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd* [2006] 1 WLR 1476 at [15] ("*Barlow Clowes*"). A person has assisted dishonestly in a transaction if he knew at the time the assistance is given of the "irregular shortcomings of the transaction that ordinary honest people would consider it to be a breach of the standards of honest conduct if he failed to adequately query them". Mere foolishness, imprudence or negligence does not suffice: *MKC Associates Co Ltd and another v Kabushiki Kaisha Honjin and others (Neo Lay Hiang Pamela and another, third parties; Honjin Singapore Pte Ltd and another, fourth parties)* [2017] SGHC 317 ("*MKC Associates*") at [272].

Whether the Crest entities, Mr Aathar and Ms Lim rendered assistance

154 IHC's case against the Crest entities, Mr Aathar and Ms Lim is based on the following acts of assistance:[201]

(a) The Crest entities extending the Standby Facility to IHC, and carrying out drawdowns on the Standby Facility to purchase IHC's shares.

[201] SOC at [2.2.10] to [2.2.11].

(b) Mr Aathar negotiating with the Crest entities on the Standby Facility with Mr Fan's knowledge, and extending his personal guarantee to the Crest entities to facilitate IHC's entry into the Standby Facility.

(c) Ms Lim preparing and finalising the legal documents for the Standby Facility, as well as the board paper which was vetted by Mr Fan, to recommend the approval of the Standby Facility to IHC's board.

155 The Crest entities and Ms Lim do not deny the acts concerned. Their main contention is that they did not act dishonestly. Turning to Mr Aathar, at [118] above, I found that along with Mr Fan, he negotiated the terms of the Standby Facility. It is undisputed that Mr Aathar signed the personal guarantee thereafter, and executed the Standby Facility agreement as the personal guarantor. Therefore, I accept that all the alleged acts were carried out.

156 I am mindful that Mr Fan was not a shadow director of IHC, and did not owe IHC any fiduciary duties before 17 May 2015: see [116] above. Some of the acts of the Crest entities and Mr Aathar, *eg,* in negotiating the deal, and in respect of six out of 14 drawdowns and acquisitions of IHC shares, took place before 17 May 2015. Nonetheless, their conduct put in place the particular state of affairs that allowed Mr Fan to act in breach of his fiduciary duties from 17 May 2015, in order for IHC to formally enter into the Standby Facility. Thus, I am of the view that all the acts (including those before 17 May 2015) had a causative effect on Mr Fan's breach of fiduciary duties, and therefore assisted the same. With that, I turn to consider if any of the parties acted dishonestly.

Whether the Crest entities acted dishonestly

157 The Crest entities argue that while they were aware that the Standby Facility would involve IHC incurring liabilities to purchase its own shares, the Crest entities were ignorant of the fact that it was illegal to do so.[202] They did not know about any irregular shortcomings in the arrangements. Their case rests on the following grounds:

(a) Mr Tan had not been aware of the prohibition against public companies purchasing their own shares,[203] and had claimed that the Crest entities would not have participated in the scheme if he had known;[204] and

(b) the Crest entities did not know that IHC was unable to lawfully enter into the Standby Facility, and to draw down on the Standby Facility to purchase its own shares,[205] given the contractual warranties given by IHC (in cll 3.2(e), 3.2(f) and 3.2(g) of the Standby Facility agreement)[206] which were to the effect that the Standby Facility was lawful, that IHC had taken the necessary steps to ensure that the Standby Facility was valid, and that the performance of the obligations would not be in breach of any law.[207]

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[202] 1DCS at [217].

[203] 1DCS at [218].

[204] 1DCS at [219].

[205] 1DCS at [217].

[206] 1ACB at p 40.

[207] 1DCS at [316].

158 I deal with the second point first. In *The Enterprise Fund III* ([5] *supra*) at [131], the Court of Appeal noted that considerable caution must be taken before generic representations and warranties of the sort in the Standby Facility agreement can be relied on to establish an estoppel that would allow the Crest entities to simply sidestep the stringent statutory requirements in ss 76B to 76G of the Companies Act for effecting a "whitewash" of a company's acquisitions of its own shares. Such representations and warranties are commonplace in commercial contracts, and to allow reliance on such terms would dilute the significance of the statutory prohibitions in s 76(1A)(*a*)(i) of the Companies Act. *Vis-à-vis* the Crest entities, the Court of Appeal held that IHC was not estopped from voiding the Standby Facility: see [125]–[126].

159 I note that in D6CC3, the Crest entities plead that IHC was estopped from asserting that it had not obtained the necessary consents and approvals to purchase its own shares.[208] Given the ruling in *The Enterprise Fund III* ([5] *supra*), the Crest entities no longer rely on this point. However, they continue to rely on the representations and warranties to deny the Crest entities' knowledge of any contravention of the Companies Act. For the same reasons stated by the Court of Appeal, I do not find the Crest entities' explanation persuasive.

160 On the first point, I am not convinced that Mr Tan did not know of the prohibition under s 76 of the Companies Act for the following reasons:

(a) First, Crest Capital and Crest Catalyst are professional fund administrators and managers. Mr Tan is the Investment Director of Crest

[208] D6CC3 at [15D]-[15E].

Capital, and is the licence holder under the regime by the Monetary Authority of Singapore.[209] It seems to me far-fetched for Mr Tan to claim that he would not know of the legal prohibition.

(b) Second, when the Crest entities prepared the legal documents for the Standby Facility which were sent by Mr Tan to IHC, the security in the form of the IHC shares held by the Crest entities was completely omitted despite it being a term stated in the term sheet. This was a glaring omission which pointed to an awareness of something amiss regarding the share purchases.

(c) Third, from April 2015 to 5 February 2016, the Crest entities did not send any confirmation of the principal drawn down from the Standby Facility to IHC, despite their requests for the standby fees. During that period, there were at least five statements of accounts and over 20 debit notes issued, but it was not until 5 February 2016 that the statements/debit notes reflected that the principal was drawn down under the Standby Facility.[210] Mr Tan was unable to give an explanation for this.

(d) In all, there were only two emails which suggested that the Crest entities had purchased IHC shares on IHC's behalf using the funds from the Standby Facility:

(i) The first email was a summary table sent by Mr Tan to Mr Fan and Mr Aathar by way of an email of 8 May 2015,

[209] NE, 13 August 2019 p 111 lines 15-17.

[210] PCS at [80].

containing details of the purchase of IHC shares.[211] However, this was a personal update to Mr Fan and Mr Aathar, and Mr Tan did not provide any official update to IHC.

(ii) The second email was the 12 May 2015 email from Mr CP Lim to Ms Lim, containing the SGX statement showing one purchase of IHC shares. Even then, it was recalled barely ten minutes later with Mr CP Lim asking Ms Lim to ignore it.

Once again, the failure by Mr Tan (and anyone else from the Crest entities) to update IHC on the purchase of the shares is telling. Apart from Mr Fan and Mr Aathar, Mr Tan could not identify anyone else in IHC who might have known about the purchase of 59,304,800 IHC shares on IHC's behalf.[212]

(e) For the drawdowns, Mr Tan did not follow the mandatory procedure that was laid down in the Standby Facility agreement (which the Crest entities drafted and which he communicated to IHC) for drawdowns to be made. In accordance with cl 7 of the Standby Facility agreement, the requirements for a disbursement were as follows:[213]

> **7. DISBURSEMENT**
>
> 7.1 Subject to the *Disbursement Request being in order* and to the terms of the Disclosure Letter, if any, and the results of the Investors' due diligence on the Group, the Properties and/or the Geelong Property being acceptable to the Investors, *the Investors will procure the Disbursement of the Facility, by way of bank*

[211] PCS at [119]; 4AB at p 2074.

[212] NE, 14 August 2015, p129, line 7 to p 130 line 25.

[213] 3ACB at p 1282.

> *transfer, directly to the Company Account, as soon as practicable and in any event not later than 3 Business Days following receipt of the Disbursement Request.*"
>
> [emphasis added]

A "Disbursement Request", defined in cl 6.1(j) as a written request for disbursement furnished by IHC to the Standby Facility investors (*ie,* EFIII, VMF3 and VMIII) is, therefore, a prerequisite for effecting any drawdown. Furthermore, if the drawdowns were made properly in accordance with the Standby Facility agreement, the funds would have to be disbursed, by way of bank transfers to IHC's bank account. The funds thus obtained could *not* be used directly by the Crest entities to purchase *any* shares at all.

Despite this, Mr Tan allowed Mr Aathar to instruct him to draw down on the Standby Facility to purchase IHC shares.[214] This flagrantly contravened the procedure set out in the Standby Facility agreement, and Mr Tan was unable to provide a satisfactory explanation why he permitted this course of action.

(f) Even after the dispute arose in February 2016, the Crest entities did not provide IHC with information about the drawdowns. As stated at [43], IHC's finance team had asked the Crest entities' finance team for supporting documents for the drawdowns, contending that there had not been any drawdown. Instead of providing the details, the Crest entities responded by asking IHC to check with Mr Fan or Mr Aathar.

[214] 7AB at pp 3478 to 3488.

161 Contrary to the position argued by the Crest entities, I do not consider actual knowledge of the statutory prohibition a requirement for proving dishonesty. However, as the point arises again in the context of the unlawful means conspiracy, I will address the factual dispute. Based on the various strands of evidence set out above, on a balance of probabilities, I find that at the very lowest, Mr Tan ought to have known of the prohibition under the Companies Act. There is no other conceivable reason for him to disregard the procedural safeguards in the Standby Facility agreement on disbursements, and for the conduct displayed by the Crest entities above. In fact, I am prepared to conclude that he had actual knowledge of this fact.

162 That said, to reiterate, the test of dishonesty is an objective one – that a defendant knew at the material time the assistance is given of the "irregular shortcomings of the transaction that ordinary honest people would consider it to be a breach of the standards of honest conduct if he failed to adequately query them". Even leaving aside the question of the knowledge of the statutory provision, Mr Tan (and thus the Crest entities) well knew about the serious irregularities in the various drawdowns from the Standby Facility (especially prior to its formalisation). They did not query these irregularities but allowed the arrangement to continue and even formalised the Standby Facility with IHC. Their participation involved a breach of the standards of honest conduct.

163 For completeness, I note that the plaintiffs plead that the Crest entities knew or ought to have known of Mr Fan's breaches of fiduciary duties.[215] The Crest entities deny this. While the parties' closing and reply submissions do not

[215] SOC4 at [2.2.10].

address this issue substantively, I think it is necessary to discuss this, as it has some relevance in the claim for unlawful means conspiracy.

164 Turning to the law, it is not necessary for the Crest entities to know specifically that Mr Fan owed and breached fiduciary duties. In *Barlow Clowes* ([153] *supra*), Lord Hoffmann observed that it was not necessary for it to be proved that the defendant had actual knowledge that monies disposed (in breach of trust) were actually held in trust, saying at [28]:

> First, it was not necessary … that Mr Henwood should have concluded that the disposals were of moneys held in trust. It was sufficient that he should have entertained a clear suspicion that this was the case. Secondly, it is quite unreal to suppose that Mr Henwood needed to know all the details to which the court referred before he had grounds to suspect that Mr Clowes and Mr Cramer were misappropriating their investors' money. … In *Brinks Ltd v Abu-Saleh* [1996] CLC 133, 151 Rimer J expressed the opinion that a person cannot be liable for dishonest assistance in a breach of trust unless he knows of the existence of the trust or at least the facts giving rise to the trust. *But their Lordships do not agree. Someone can know, and can certainly suspect, that he is assisting in a misappropriation of money without knowing that the money is held on trust or what a trust means …*
>
> [emphasis added]

165 On the evidence, it seems clear to me that Mr Tan ought to have known (or certainly suspected) that IHC's entry into and drawing down on the Standby Facility to purchase its own shares were against IHC's interests in some way, and that he was assisting Mr Fan in breaching the duties that Mr Fan owed to IHC. Again, I rely on the matters at [160]. I would also add a few more facts to the mix. First, Mr Tan knew that Mr Fan and Mr Aathar were substantial shareholders of IHC, and had their own interests to protect as shareholders which were separate and distinct from IHC's interests. Second, there was a

fairly long delay in the formal execution of the Standby Facility, from the time the draft documents were sent to IHC on 9 April 2015 to 21 July 2015 when the duly executed documents were returned by Mr CP Lim to IHC. I compare this with the Geelong Facility which was fully executed by 17 June 2015, but for which negotiations started later in time. Third, it took the changeover from Mr Chia as CEO to Mr Fan as Group CEO and then CEO before the process was completed. Despite all these circumstances, Mr Tan allowed the drawdowns and acquisitions of shares on the instructions of Mr Aathar, in non-compliance with the proper procedure provided in the Standby Facility agreement (and only furnished updates to Mr Aathar and Mr Fan).

Whether Mr Aathar acted dishonestly

166 As I found above at [93] and [95], Mr Aathar knew that the purpose of the Standby Facility was for IHC to incur liabilities to purchase its own shares, but still gave the instructions to the Crest entities to acquire the shares. At the trial, he admitted that he knew of the prohibition against a company buying its own shares without a proper share buyback mandate.[216] With such knowledge while negotiating the deal, Mr Aathar facilitated IHC's entry into the Standby Facility by giving a personal guarantee. He also executed the Standby Facility agreement (as a personal guarantor). I have no doubt he knew that Mr Fan (who had taken over as Group CEO and then CEO) dealt with the process in breach of his duties. Mr Aathar had clearly breached the ordinary standards of honest conduct.

[216] NE, 13 August 2019, p 20 lines 15-20.

Whether Ms Lim acted dishonestly

167 Ms Lim was not involved in negotiating the Standby Facility, or drawing down on it. As I found at [135]–[136] above, her conduct was negligent. However, she was not necessarily also dishonest. For her to be dishonest, she must be shown to have suspected that something was wrong but chose not to want to know the truth: *MKC Associates* ([153] *supra*) at [272].

168 On the facts, Ms Lim's purported knowledge of any impropriety in the Standby Facility could only come from her knowing that the purpose of the Standby Facility was to purchase IHC shares, and that funds had been used to do so.

169 While I accept that Ms Lim acquired some knowledge that the Standby Facility had been drawn down for unknown purposes, this could well have included drawdowns for working capital. Relying on what I have previously found at [131]–[135] above, Ms Lim owed it to IHC to investigate further but did not. However, there is insufficient evidence for me to conclude on a balance of probabilities that Ms Lim knew that the Standby Facility had been drawn down for the acquisition of IHC's own shares. There is no doubt Ms Lim was negligent. I do not, however, consider her negligence to rise to the level of dishonesty. She is not liable for dishonest assistance.

Conclusion

170 To sum up, in my view, the Crest entities and Mr Aathar (but not Ms Lim) dishonestly assisted in Mr Fan's breaches of fiduciary duties to IHC.

Unlawful means conspiracy

The elements of the cause of action

171 I move on to the claim in unlawful means conspiracy. In *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 ("*EFT Holdings*"), the Court of Appeal set out the elements of the tort of unlawful means conspiracy as follows at [112]:

(a) there was a combination of two or more persons to do certain acts;

(b) the alleged conspirators had the intention to cause damage or injury to the plaintiff by those acts;

(c) the acts were unlawful;

(d) the acts must be performed in furtherance of the agreement; and

(e) the plaintiff suffered loss as a result of the conspiracy.

172 Unlawful acts have been found to encompass criminal acts, intentional tortious acts, breaches of contract and breaches of fiduciary duties. IHC alleges that the unlawful means forming the basis for its claim are:[217]

(a) the entry into and drawdowns on the Standby Facility, which contravened s 76(1A) of the Companies Act; *and*

(b) the breaches of Mr Fan's fiduciary duties owed to IHC.

[217] PCS at [276].

173 In response, the Crest entities and Ms Lim do not seriously dispute that if established, these would constitute unlawful acts. Their contentions relate to the remaining four elements, and I shall go through those shortly. Over and above the elements set out above, the Crest entities submit that actual knowledge of the unlawful nature of the act is a requirement of the claim.[218] In relation to the factual dispute as to whether Mr Tan (and thus the Crest entities) knew of the legal prohibition against a company buying its own shares, I had already made certain findings: see [161] above. I proceed now to deal with the Crest entities' contention that ignorance of the legal prohibition would absolve the Crest entities of liability.

Whether knowledge of the illegal nature of the acts is required

174 The starting point is *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd and others* [1994] 1 SLR(R) 513 ("*Multi-Pak*"), which endorsed the legal position in *Belmont Finance Corporation Ltd v Williams Furniture Ltd and others* [1979] 1 Ch 250 ("*Belmont Finance*"), and held that ignorance of the illegality of the act is not a defence to an unlawful conspiracy claim.

175 Knowledge of the alleged conspirators features, however, in relation to two elements of the tort. First, as stated in *EFT Holdings* ([171] *supra*), proof of a mere intention to injure suffices to succeed in a claim founded on unlawful means conspiracy, whereas for a lawful means conspiracy, a predominant intention to injure must be proved. If the defendants are to *intend* the damaging consequences of their actions, they must necessarily also actually *know* that such an act carries the damaging consequences alleged: at [73], [99]–[101].

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[218] 1DCS at [182].

176 Second, the element of combination requires proof of two or more persons and an agreement between or among them to do certain acts: *Nagase Singapore Pte Ltd v Ching Kai Huat* [2008] 1 SLR(R) 80 at [23]. Agreement is often inferred from the circumstances and acts of the alleged conspirators, provided that the alleged conspirators must have been "sufficiently aware of the surrounding circumstances and share the object for it properly to be said that they were acting in concert at the time of the acts complained of": *EFT Holdings* at [113]. To reframe this, an agreement may be inferred from the parties' knowledge of the facts on which the conspiracy is founded, even if they did not appreciate the legal effect of those facts: see Gary Chan Kok Yew, *The Law of Torts in Singapore* (Academy Publishing, 2011) at [15.054].

177 The Crest entities are essentially arguing for proof of a further mental state – *ie,* that of actual knowledge by the alleged conspirators of the unlawful nature of the means deployed – before a claimant can succeed in an unlawful means conspiracy claim. Thus, they contend that the Crest entities must be proven to have actual knowledge of the illegality of the Standby Facility. While the Crest entities do not submit specifically on this, it seems to follow that their position is that it must also be proven that they knew of Mr Fan's breaches of his fiduciary duties. While the Crest entities acknowledged the position established in *Multi-Pak*, they relied on a trio of subsequent cases, namely, *Douglas v Hello! Ltd* [2006] QB 125 ("*Hello!*"), *Beckkett Pte Ltd v Deutsche Bank AG* [2008] 2 SLR(R) 189 ("*Beckkett*") and *Meretz Investments NV and another v ACP Ltd and others* [2008] 2 WLR 904 ("*Meretz*")[219] to support their

[219] 1DCS at [183]-[186].

proposition that the position has changed. In response, the plaintiffs submitted that as a matter of law, this is wrong.[220]

178 I return to *Belmont Finance*, an instructive case where the unlawful means consisted of a breach of a UK statutory prohibition against a company providing financial aid to third parties to purchase its shares. Buckley LJ said, at 269-270:

> … Dishonesty was not a necessary ingredient of the claim of conspiracy; all that would be necessary to support that claim would be *actual, or possibly imputed, knowledge of the facts which rendered the transaction an illegal one.* 'Crime' and 'fraud' are not synonymous; a criminal act may well be committed without any fraud or dishonesty.
>
> [emphasis added]

179 Concurring with this view, Goff LJ citing the speech of Viscount Dilhorne in *R v Churchill* [1967] 2 AC 224 at 237, said that (at 271):

> … In answer to the question posed by the Court of Criminal Appeal in this case, I would say that mens rea is only an essential ingredient in conspiracy in so far as there must be an intention to be a party to an agreement to do an unlawful act; *that knowledge of the law on the part of the accused is immaterial and that knowledge of the facts is only material in so far as such knowledge throws a light on what was agreed.*
>
> …
>
> The question is, 'What did they agree to do? *If what they agreed to do was, on the facts known to them, an unlawful act, they are guilty of conspiracy and cannot excuse themselves by saying that, owing to their ignorance of the law, they did not realise that such an act was a crime…*
>
> [emphasis added]

[220] Plaintiffs' Reply Submissions ("PRS") at [26].

180 *Multi-Pak* was a case where unlawful means conspiracy was alleged against the defendant and the directors of the company for breach of directors' duties under s 157 of the CA. Chao Hick Tin J (as he then was) held at [50]–[51] that:

> 50 In the present case, in order to succeed in conspiracy, it must be shown that there was a conspiracy to do an unlawful act which caused damage to the plaintiffs. On the facts as discussed before, I am of the view that a case has been made out. Intraco and the two directors were working very closely to effect the assignment. Intraco knew the full facts. *If, as I hold it is, that the directors had acted in breach of their fiduciary duties when they agreed with Intraco to take an assignment of the receivables, it seems to me to follow that Intraco and the directors had acted in concert to do an unlawful act: to cause a breach of s 157(1) of the Act, which is an offence under s 157(3). …*
>
> 51 *The fact that Intraco might not have known that the directors of Multi-Pak would be acting in breach of s 157(1) is beside the point so long as Intraco was aware of all the relevant facts. …*
>
> [emphasis added]

181 I go to *Hello!* ([177] *supra*). As the Crest entities submit, its reasoning was adopted by *EFT Holdings* ([171] *supra*), in that the Court of Appeal accepted that actual knowledge as to the consequences is required to establish the tort of unlawful means.[221] I have set this out at [175] above. I agree with the plaintiffs that *Hello!* analyses the various states of mind that could amount to an intention to injure, and decided that knowledge of the consequences is required. However, *Hello!* does not stand for the proposition that knowledge of the illegality of the act is required, or that ignorance of the illegality is a defence.

[221] 1st to 5th Defendants' Reply Submissions ("DRS") at [99].

182 Turning to *Beckkett* ([177] *supra*), the case concerned both lawful and unlawful means conspiracy in a forced sale of shares. In relation to the intention to injure, at [121]–[122], Kan Ting Chiu J (as he then was) held as follows:

> If Deutsche Bank and DSM did not knowingly fix the price at an undervalue, there can be no agreement to cause Beckkett injury by transacting at an undervalue. Taking the argument a step further, even if DSM had known that US$46m was an undervalue, that is not evidence of a predominant intention on its part to injure Beckkett because its primary interest was to purchase the shares at the lowest price, and not to injure Beckkett, and it cannot be said that the predominant intention of the combination was to cause injury.
>
> Beckkett also relied on the agreement to seek court approval for the sale by the *penetapans* as evidence of the conspiracy to injure. *Prima facie,* the agreement to obtain the court approvals ex parte was to facilitate the transaction. ***There was no evidence that Deutsche Bank or DSM knew at that time that penetapans were inappropriate and that putusans were required.*** There can be no inference that they ***intended*** to do something ***unlawful***. It would of course be different if they had agreed to do something they knew to be wrong, *eg*, to under-declare the sale price.
>
> [emphasis in original in italics; emphasis added in bold italics]

183 Read in context, again, it seems to me that *Beckkett* is concerned with actual knowledge that goes towards proving the combination/agreement, and/or towards proving the intention to injure. Indeed, *Multi-Pak* is not discussed in *Beckkett*, and I do not agree that *Beckkett* marked a departure from the former.

184 Along the same vein, in *Meretz* ([177] *supra*), Arden LJ held, in the context of the tort of inducing breach of contract, that a person does not have the *requisite intention to injure* another as a means to further his own interests if the causative act is something which that person believes he was entitled to do, because all that he intends is to produce a result which he believed he was entitled to produce: at [127]. Toulson LJ expressed the view (albeit *obiter*) that

this could be extended to the tort of unlawful means conspiracy, such that it was a defence if the defendant not only acted to protect his own interests but did so in the belief that he had a lawful right to act as he did: at [174]. Once again, the concern is with proof of the intention to injure.

185 Accordingly, I do not agree with the Crest entities that knowledge of illegality is a distinct requirement of unlawful means conspiracy, or that ignorance of illegality is a defence. However, knowledge of the facts and surrounding circumstances is relevant, insofar as knowledge goes to prove the combination/agreement of the alleged conspirators, and/or the intention to injure.

Whether there was an agreement to do certain acts

186 I have set out the law on the element of combination at [171] above. To summarise, there must be an agreement by the alleged conspirators to pursue a particular course of action. I should add that alleged conspirators need not have participated in the alleged conspiracy at the same time, nor do they need to know what they have each agreed to do. All that is necessary is for a plaintiff to establish that the conspirators are "sufficiently aware of the surrounding circumstances and share the same object": *EFT Holdings* ([171] *supra*) at [113].

187 I am satisfied that the Crest entities, Mr Fan and Mr Aathar formed an agreement to cause IHC to enter into and draw down on the Standby Facility to purchase IHC shares. The backdrop of their agreement was a potential short-seller's attack on IHC shares, and a desire on the part of Mr Aathar and Mr Fan to stabilise IHC's share price. After the three of them discussed the matter on 3 April 2015, they followed up with a series of emails the next day regarding the precise terms of the Standby Facility. The parties envisaged that IHC would be

able to avail itself of funds under the Standby Facility to purchase its own shares, and this was the common object.

188 Turning to Ms Lim, she entered the picture later. As I found above, she acted negligently in her role in the preparation and finalisation of the legal documents. However, there is insufficient evidence to find that she knew the true purpose of the Standby Facility, or that there had been drawdowns for the acquisition of IHC shares. Indeed, Mr Fan did not brief her on the deal. I am unable to infer from the surrounding circumstances that she acted in combination with the Crest entities, Mr Fan and Mr Aathar.

Whether acts were performed in furtherance of the agreement, and whether the acts were unlawful

189 I also find that the Crest entities, Mr Fan and Mr Aathar furthered their common object through procuring IHC's entry into and subsequent drawdowns on the Standby Facility. At the risk of repetition, Mr Aathar gave Mr Tan instructions to draw down on the Standby Facility, and to acquire IHC shares on IHC's behalf. Mr Fan was instrumental in obtaining approval from the IHC board for the Standby Facility, namely by clearing and endorsing the board paper. Both Mr Fan and Mr Aathar personally guaranteed the Standby Facility, which further facilitated IHC's entry into the Standby Facility. Without their involvement, IHC would not have entered into the Standby Facility, nor would it have used the facility to purchase its own shares.

190 The Standby Facility was illegal for contravention of the Companies Act, while Mr Fan breached his fiduciary duties by virtue of his role in the transaction. The Crest entities well knew of all the surrounding facts regarding IHC's purchase of its own shares using the Standby Facility. Any claim of

ignorance of the statutory provision is not a defence. Admittedly, Mr Tan might not have been fully aware of how Mr Fan acted in breach of his fiduciary duties to procure IHC's formal execution of the Standby Facility. However, it is not a requirement to show that a conspirator knew exactly what each co-conspirator had agreed to do (or had then proceeded to do).

Whether there was any intention to injure

191 On the issue of the intention to injure on the part of the alleged conspirators, it is insufficient for IHC to simply show that harm to IHC would be a likely, probable or even inevitable consequence of the conduct. That the conspirators intended injury to IHC as a means to an end or an end in itself must be established. Additionally, if the conspirators are to *intend* the damaging consequences of their actions, they must necessarily also actually *know* that such an act carries the damaging consequences alleged: *EFT Holdings* ([171] *supra*) at [99]–[101].

192 IHC argues that the requisite intention to injure IHC on the part of the Crest entities, Mr Fan, Mr Aathar and Ms Lim was made out on the following bases:

(a) The conspiracy to cause or procure IHC to enter into and draw down on the Standby Facility to purchase IHC shares was clearly targeted and directed at inflicting injury to IHC. As IHC was the contractual party to the Standby Facility, it was certain to be saddled with substantial liability for the principal drawn down, interest/standby fees (which IHC submits are exorbitant) and price fluctuations for the

shares. IHC also stood to lose its Australian business if the liabilities were not discharged.[222]

(b) With regard to the Crest entities in particular, the standby fees were the means by which the Crest entities intended to achieve their end objective of profiting from the transaction.[223]

The Crest entities

193 It seems to me that as against the Crest entities, there is a clear intention to injure. On the facts, the Crest entities well knew that IHC would incur substantial liabilities upon entry into the Standby Facility. The standby fees amounted to S$700,000 per month, and there was a guaranteed minimum of seven months of such fees.

194 The Crest entities stressed that this was purely a commercial deal. They enjoyed a long business relationship with IHC.[224] When Mr Fan and Mr Aathar requested for them to grant the facility to IHC,[225] they agreed to do because of their good business relationship with IHC and the sufficiency of security provided by IHC. The standby fees charged under the Standby Facility of 3.5% per month were comparable to other commercial deals with other IHC entities.[226]

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[222] Plaintiffs' Reply Submissions ("PRS") at [14] to [15].

[223] PRS at [17].

[224] 1DCS at [196].

[225] 1DRS at [147].

[226] 1DRS at [148].

195 Further, the Crest entities argue that there was nothing to incentivise them to embark on the deal with an intention to injure IHC.[227] They could not have intended to injure IHC economically, as IHC's financial health would have had a direct impact on the extent to which the Crest entities would be able to recover the principal sum extended to IHC under the Standby Facility.[228]

196 I am mindful that a predominant intention to injure is not required. It could well be that in granting the facility, the Crest entities had all the other commercial considerations in mind and were also motivated by the returns from the transaction. However, unlike other commercial deals, the Standby Facility was intended for IHC to acquire its own shares (which the Crest entities knew or ought to have known to be in contravention of the Companies Act). This was sufficient, in and of itself, to show an intention to injure on the part of the Crest entities. Put in another way, the intended injury is simply the imposition of the liability – including the standby fees – on IHC for the purchase of its own shares.

197 Linked to the above is the Crest entities' argument that the acquisition of shares was not the sole purpose of the Standby Facility, and that the Standby Facility was broadly framed as a loan for "general working capital". However, given that Mr Tan proceeded to take instructions from Mr Aathar and to acquire IHC shares, he well knew that the Standby Facility was for the *very* purpose of share acquisitions. Indeed, as highlighted by the plaintiffs, this was tantamount to arguing that the Standby Facility was a plain vanilla credit facility while the

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[227] 1DCS at [198].

[228] 1DCS at [199]-[200].

acquisition of shares was a separate agreement. Such an argument had been rejected in *The Enterprise Fund III* ([5] *supra*) at [83].[229]

198 In my judgment, therefore, the Crest entities possessed the requisite intention to injure IHC. IHC's claim of unlawful means conspiracy against them is made out.

Mr Fan and Mr Aathar

199 Apart from being the ones who procured the Standby Facility from the Crest entities, both Mr Fan and Mr Aathar knew and intended that IHC would incur substantial liabilities for the prohibited purpose of purchasing its own shares. The Standby Facility was the means to the end of supporting the IHC share price. As major shareholders of IHC, they had an interest in maintaining the IHC share price. Viewed in the round, Mr Fan and Mr Aathar had the requisite intention to injure IHC.

Ms Lim

200 Given my finding that Ms Lim was not part of the conspiracy, it is strictly speaking unnecessary for me to deal with this. For completeness, I should state there is no basis for me to conclude that Ms Lim prepared the legal documents for the Standby Facility and the board paper intending thereby to injure IHC. There is nothing to suggest that Ms Lim expected to benefit from the transaction. She was IHC's senior employee, and her employment security depended in part on IHC's financial health. I do not see how Ms Lim could have had any conceivable interest in inflicting injury on IHC.

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[229] PCS at [255].

Damage

201 On the last element of this claim, it cannot be disputed that IHC suffered damage as a result of its entry into the Standby Facility. IHC had already paid standby fees on 17 June and 2 July 2015,[230] and an amount of S$3,883,950 was paid towards the principal on 18 December 2015.[231]

Conclusion

202 Accordingly, I find that the elements of unlawful means conspiracy are made out against the Crest entities, Mr Fan and Mr Aathar, but not against Ms Lim.

Miscellaneous issues

Sufficiency of pleadings

203 Before I close the discussion on liability, I touch briefly on two matters raised by the Crest entities.

204 The first is a point on pleadings. The Crest entities submit that the plaintiffs have ventured beyond their pleadings by relying on acts of the Crest entities in concealing and/or camouflaging the nature of the Standby Facility (especially as part of the unlawful means conspiracy claim).[232] They argue that this is an impermissible expansion of their case.

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[230] 1ACB at pp 237 and 363.

[231] 3ACB at p 1779.

[232] 1DCS at [143], [146]-[154].

205 In response, the plaintiffs contend that the unlawful acts relied on (and pleaded) were the entry into and drawdowns on the Standby Facility (which was in contravention of the Companies Act) and Mr Fan's breach of duties. These have been pleaded. The omissions, concealment or acts of camouflaging were merely evidential matters surrounding the unlawful acts.

206 I agree. For instance, as set out above at [160] above, the plaintiffs rely on what the Crest entities did not do, *eg,* the pledge of shares was not mentioned in the facility documents, the failure to provide updates of share purchases to IHC, *et cetera*, as evidence that the Crest entities knew of the contravention of the Standby Facility. There has not been a failure to plead the material facts.

Adverse inferences to be drawn from failure to call witnesses

207 The second point relates to the complaint that the plaintiffs failed to call Dr Jong and Mr Chia as witnesses for the trial. It is argued that this should attract a range of adverse inferences, especially the adverse inference that the IHC board knew of the purpose of the Standby Facility, and that there were drawdowns under it.[233]

208 By s 116(*g*) of the Evidence Act (Cap 97, 1997 Rev Ed), the court may presume "that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it". The law on making adverse inferences in civil matters for a party's failure to call material witnesses was stated by the Court of Appeal in *Tribune Investment Trust Inc v Soosan Trading*

[233] 1DCS at [40]-[50].

Co Ltd [2000] 2 SLR(R) 407 at [50], and followed in *ARS v ART and another* [2015] SGHC 78 at [135]:

> … The regime of drawing adverse inferences is derived from s 116(*g*) of the Evidence Act (Cap 97). Whether or not in each case an adverse inference should be drawn depends on all the evidence adduced and the circumstances of the case. There is no fixed and immutable rule of law for drawing such inference…

209 I am doubtful that Mr Chia and Dr Jong would have been able to give material evidence for this case. Mr Chia was the CEO for only a brief period from 2 March 2015 to 17 May 2015, and in fact, he indicated that he intended to leave by end of April 2015.[234] His role in the Standby Facility was not substantial.

210 Similarly, from the evidence before me, it appears that Dr Jong was not substantially involved in the events of concern, *ie,* the negotiations leading into the entry of the Standby Facility, the drawdowns and the subsequent negotiations for repayment involving Mr Fan, Mr Aathar and Mr Tan. Furthermore, the board paper did not mention the drawdowns to purchase the IHC shares. From the responses of the directors, Mr Ong and Mr Siew, the true purpose of the Standby Facility, and the drawdowns under it, were not formally disclosed to Mr Ong and Mr Siew. Therefore, I am not sure what material evidence Dr Jong would have given on this.

211 I do not think, therefore, that the failure to call either Dr Jong and/or Mr Chia warrants the drawing of adverse inferences against the plaintiffs.

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[234] Lim's AEIC at [19].

Damages and/or equitable compensation for losses suffered

212 The plaintiffs claim that the defendants are jointly and severally liable for damages and/or equitable compensation for the alleged losses. In this connection, I set out briefly the applicable principles in relation to each cause of action.

213 In *Sim Poh Ping v Winsta Holding Pte Ltd and another and other appeals* [2020] SGCA 35 ("*Winsta*"), the Court of Appeal affirmed that the court has jurisdiction to make an award of equitable compensation for a breach of fiduciary duty (at [129]). More importantly, the Court of Appeal settled the controversy on the applicable test of causation, and set out the approach in relation to the breach of core fiduciary duties as follows (at [254]):

> (a) In a claim for a non-custodial breach of the duty of no-conflict or no-profit or the duty to act in good faith, the plaintiff-principal must establish that the fiduciary breached the duty and establish the loss sustained.
>
> (b) If the plaintiff-principal is able to meet the requirements of (a), a rebuttable presumption that the fiduciary's breach caused the loss arises. The legal burden is on the wrongdoing fiduciary to rebut the presumption, to prove that the principal would have suffered the loss in spite of the breach.
>
> (c) Where the fiduciary is able to show that the loss would be sustained in spite of the breach, no equitable compensation can be claimed in respect of that loss.

(d) Where the fiduciary is unable to show that the loss would be sustained in spite of the breach, the upper limit of equitable compensation is to be assessed by reference to the position the principal would have been in had there been no breach.

214 As I found above, Mr Fan breached his core fiduciary duties to IHC, *ie,* his duty to act *bona fide*, duty of fidelity and duty to avoid conflict. Thus, the approach set out above is applicable in considering whether Mr Fan is liable for any of the alleged losses. I note, however, that the parties' closing and reply submissions were filed before *Winsta.* Without the benefit of the extensive analysis in *Winsta,* the plaintiffs briefly submitted that they may claim equitable compensation to restore them to the position they would have been in *if not* for the breach, citing the line of cases of *Quality Assurance* ([108] *supra*)*, Then Khek Koon* ([99] *supra*) and *Tongbao (Singapore) Shipping Pte Ltd and another v Woon Swee Huat and others* [2018] SGHC 165 ("*Tongbao*").[235] The Crest entities also relied on the same line of cases, submitting (perhaps more completely than the plaintiffs) that the approach within such cases is that where a fiduciary had breached his duty of honesty and fidelity, a plaintiff should still prove that the breach was in some way connected to the loss, so as to shift the burden to the fiduciary to prove that the principal would have suffered the loss regardless of the fiduciary's breach.[236] In my analysis below, where necessary, I recast the parties' arguments within the framework set out in *Winsta*.

215 I should add that in relation to two areas of loss, I thought it necessary to consider whether the chain of causation had been broken by intervening

[235] PCS at [281].

[236] 1DRS at [165].

events. Thus, I invited parties to submit specifically on the question whether other common law limiting doctrines, especially intervening causes, apply to equitable compensation. This question was left open in *Winsta* (at [216]). I shall deal with this point from [276] below.

216 Unlike Mr Fan, I found that Ms Lim breached her duty of due skill, care and diligence. This is not a core fiduciary duty (see *Winsta* at [253]) and, accordingly, the presumption of causation does not apply. Instead, her liability for equitable compensation is subject to the common law doctrines of foreseeability, causation and remoteness: *Mothew* ([99] *supra*) and *Then Khek Koon* at [108].

217 Liability for dishonest assistance is secondary in nature. Thus, a party who is a dishonest accessory to another's breach of fiduciary duty is made jointly and severally liable for equitable compensation to the plaintiff for the losses suffered in respect of that breach. Thus, there is no need for causation to be established between the assistance rendered and the loss suffered: *Tongbao* at [131]. It follows that the Crest entities and Mr Aathar, as dishonest accessories, are jointly and severally liable with Mr Fan for any losses that would not have been suffered by IHC but for Mr Fan's breaches of fiduciary duties. Given this position, it is unsurprising that the Crest entities made substantive arguments in relation to the losses Mr Fan should be liable for (which I duly consider below).

218 In the case of unlawful means conspiracy, joint and several *primary* liability attaches to the tortfeasors in respect of loss that would not have been sustained "but for" their commission of the tort: *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR

655 at [387]–[388]. This applies to the Crest entities, Mr Fan and Mr Aathar. Such damages in tort are generally intended to place the plaintiff in the same position as he would have been in had the tort not been committed.

219 Adopting the approaches and tests above, I will assess the defendants' liability for the losses claimed by the plaintiffs. The losses are set out in the AEIC of Ng Chuan Tee ("Mr Ng"), the Group Senior Finance Manager of IHC,[237] with some updates on the quantification in the closing submissions and include the following:

(a) The sums paid by IHC towards the Standby Facility totalling S$4,538,800 ("Payments towards the Standby Facility").[238]

(b) The interest which would not have accrued on the Geelong Facility if the sums in (a) had been applied towards the Geelong Facility until its eventual repayment date on 26 February 2018[239] amounting to S$4,531,596.97 ("Loss of use of payments made towards the Standby Facility").[240]

(c) On the basis that the outstanding liability under the Geelong Facility would have been fully satisfied on its maturity date of 28 February 2016 ("Losses in default of the Geelong Facility"):

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[237] AEIC of Ng Chuan Tee at [32]-[66] read with NCT-9

[238] PCS at [291].

[239] PCS at [298].

[240] PCS at [296] to [298]; [299].

(i) The post-maturity interest and default interest accrued on the Geelong Facility, *ie*, after 28 February 2016, amounting to S$3,615,066.07. The alternative figure of S$3,799,783 is erroneous.[241]

(ii) The costs and expenses of the Crest Receivers.[242]

(iii) The loss which is equivalent to the value of IHC's Australian business, the quantification of which has been bifurcated and which will be determined in separate proceedings.[243]

(d) The losses connected with the 20 October Court Order as follows:

(i) The cost of the banker's guarantee taken out pursuant to the 20 October Court Order in the sum of A$423,912.97.[244]

(ii) The Crest entities' overcharging of interest, default interest and foreign exchange difference amounting to S$1,930,423.60, due to the delay in applying the surplus proceeds from the sale of the Australian properties (which were remitted to them in February 2018) towards the Geelong Facility until July 2018.[245]

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[241] PCS at [334].

[242] PCS at [358].

[243] PCS at [372].

[244] PCS at [402].

[245] PCS at [343]; [356].

Mr Fan's liability for breach of fiduciary duties

Payments towards the Standby Facility

220 Between 17 June 2015 and 18 December 2015, IHC paid a total of S$4,538,800 to partially discharge its liabilities under the Standby Facility. The breakdown is as follows:

(a) S$255,850 paid on 17 June 2015;[246]

(b) S$399,000 paid on 2 July 2015;[247] and

(c) S$3,883,950 on 18 December 2015,[248] which IHC contends was intended for the Geelong Facility but was applied by the Crest entities towards the Standby Facility instead.

221 Mr Fan disputes that he caused the loss. He alleges that the payments of 17 June 2015 and 2 July 2015 were duly approved by the board of directors as minimum standby fees for the privilege of maintaining the availability of the Standby Facility.[249] He maintains that there was no drawdown on the Standby Facility.[250] The Crest entities wrongfully diverted the sum of S$3,883,950 intended for the Standby Facility towards the Geelong Facility.[251]

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[246] 1ACB at p 237.

[247] 1ACB at p 363.

[248] 3ACB at p 1779.

[249] Fan's AEIC at [6.2].

[250] Fan's AEIC at [6.3].

[251] Fan's AEIC at [6.2]-[6.4].

222 Notwithstanding Mr Fan's contentions, IHC would not have paid the first two sums as standby fees to the Crest entities *but for* its entry into the Standby Facility, which Mr Fan's conduct brought about. The same is true for the third sum paid to the Crest entities (purportedly for the Geelong Facility). These losses were therefore caused by Mr Fan's conduct. Mr Fan is thus liable to pay IHC for the losses.

223 For completeness, I should add that the Crest entities contended that pending applications for just and equitable relief under s 76A(4) of the Companies Act made it premature for any conclusion to be drawn on the question whether IHC had suffered any losses in respect of the Standby Facility, and that the losses claimed by IHC in the present action should be disregarded.[252] This submission is unmeritorious. Section 76A(4) of the Companies Act gives rise to a distinct remedy for just and equitable relief and does not preclude IHC from proving and recovering its losses based on the causes of action in this case. It is, in fact, not disputed that the Crest entities have yet to return the sum of S$4,538,800 to IHC.

Loss of use of payments made towards the Standby Facility

224 IHC's claim for loss of use of the total sum of S$4,538,800 is premised on the assumption that had it not entered into the Standby Facility, the sum would have been available to pay off the liabilities under the Geelong Facility, which would have prevented interest from accruing thereon up to 26 February 2018 (the date at which the Geelong Facility was fully repaid). While IHC Medical Re was the contracting party for the Geelong Facility, the liabilities it

[252] DCS at [261].

incurred thereunder were eventually satisfied out of the security furnished by IHC (*ie*, the Charged Shares by way of the 17 June Deed of Charge). The Crest entities had "helped themselves" to the interest accrued out of the surplus proceeds from the sale of the Australian properties.[253]

225 Mr Fan's response is the same as set out at [221] above, *ie,* he denies that he was responsible for those payments in the first place. For the same reasons, I dismiss his contentions. Here, it is necessary to set out the Crest entities' detailed submissions to the effect that the loss would have been sustained in any event. While the Crest entities do not dispute the quantum of the interest claimed on this basis, they argue that:[254]

(a) There was nothing that prevented IHC from making full repayment of the Geelong Facility, and that IHC's failure to repay the Geelong Facility was not caused by the Standby Facility.

(b) IHC has failed to lead any evidence on why it did not repay the Geelong Facility on time but for the Standby Facility.

(c) IHC had never once offered to repay the undisputed portion of the Geelong Facility in order to stop the contractual and default interest from further accruing.

(d) The payment of $3,883,950 was not unequivocally intended for the Geelong Facility, and the WhatsApp message from Ms Lim to Mr

[253] PCS at [298].

[254] 1st to 5th Defendants' Reply Submissions ("1DRS") at [154].

Fan showed that IHC had every intention of using that sum to repay the Standby Facility. This WhatsApp message is set out at [127(e)] above.

226 On point (d), I observe that the WhatsApp message referred to does not show that IHC clearly intended to use the sum to repay the Standby Facility. This message shows that Ms Lim was raising the concern that there was no record in IHC's books of any drawdown on the Standby Facility justifying payment. This is consistent with the fact that the IHC finance team was querying the drawdowns on the Standby Facility alleged by the Crest entities at the time. I shall deal with points (a) to (c) in relation to the next area of loss.

227 For now, it suffices for me to say that the Crest entities' arguments miss the point for this category of losses. To rebut the presumption of causation, the issue is whether in any event, the funds would *not* have been applied towards the Geelong Facility. Having found that the S$4,538,800 represented otherwise available funds that could have been applied towards the Geelong Facility, the question is whether IHC would or would not have applied such funds to the Geelong Facility. Whether they would or would not have paid off the Geelong Facility in full, or whether they intended the S$3,883,950 for the Standby Facility, are irrelevant considerations. I do not see any reason why, if the Standby Facility had not been entered into in the first place, IHC would not have used these funds to partially satisfy the Geelong Facility. The S$3,500,000 payment it made towards the Geelong Facility on 4 December 2015 demonstrates this.[255] Clearly, the presumption of causation has not been rebutted.

[255] 3ACB at p 1801.

228 The plaintiffs' claim for such losses is computed as follows:[256]

Payment Date	Payment Sum (S$)	Description	Interest Accrued (S$)
17 June 2015	255,850	Interest at 3.35% per month from 17 June 2015 to 26 February 2018	277,992.81
		Default interest at 3.00% per annum from 19 September 2015 to 26 February 2018	18,714.92
2 July 2015	399,000	Interest at 3.35% per month from 2 July 2015 to 26 February 2018	426,295.88
		Default interest at 3.00% per annum from 19 September 2015 to 26 February 2018	29,187.12
18 December 2015	3,883,950	Interest at 3.35% per month from 18 December 2015 to 26 February 2018	3,432,568.57

[256] PCS at [299].

		Default interest at 3.00% per annum from 18 December 2015 to 26 February 2018	256,021.47
Total			**4,440,779.85** (see below)

229 As the Crest entities deducted the amount of accrued interest from the surplus sale proceeds of the Australian properties (which should be released to IHC), this represented a loss to IHC. Having found that such interest would not have accrued but for Mr Fan's breach of duties, he is liable to pay the sum to the plaintiffs. I note that in Mr Ng's AEIC, the amount claimed was a higher sum of S$4,446,212.23.[257] In the closing submissions, the plaintiffs claimed for a total sum of S$4,440,779.85 (as shown above). However, there is an error in the addition by the plaintiffs. Having verified the addition of the figures within the closing submissions, the amount I award is S$4,440,780.77.

230 I note that the plaintiffs also claim that the Crest entities had unjustifiably overcharged default interest amounting to S$90,816 on the outstanding principal of S$8,735,325 from 19 September 2015,[258] given that the Crest entities' position was that the Geelong Facility matured on 28 February 2016.[259] This claim, however, is not supported by any evidence. Mr Ng's AEIC is silent on this claim, apart from stating the fact that the Geelong Facility

[257] Ng's AEIC at [40].

[258] PCS at [299].

[259] D6CC3 at [26(c)].

matured on 18 September 2015 and was extended to 18 December 2015 and again to 28 February 2016.[260] It is raised only in closing submissions. Therefore, I reject this claim.

Losses in default of the Geelong Facility

231 In this next category, the plaintiffs claim that the losses suffered by reason of its default on the Geelong Facility would not have been suffered had Mr Fan's breach not caused IHC Medical Re to default on the Geelong Facility. I should also reiterate that the plaintiffs may avail itself of the presumption in *Winsta* ([213] *supra*), that any losses arising from its failure to pay the Geelong Facility would not have occurred *but for* Mr Fan's breach. The legal burden is then on Mr Fan to rebut the presumption, to prove that the plaintiffs would have suffered the losses in spite of the breach.

232 Without the advantage of the clarification in *Winsta,* the plaintiffs argue that it had proven that but for Mr Fan's breach, IHC would have applied the sum of S$4,538,800 towards the Geelong Facility,[261] and then satisfied the remaining S$4,196,525 in outstanding principal under the Geelong Facility on its maturity date of 28 February 2016.[262] Meanwhile, the defendants, in particular, the Crest entities, rely on the arguments set out at [225] to assert that IHC would not have repaid the Geelong Facility anyway.

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[260] Ng's AEIC at NCT-9 at [5],

[261] PCS at [333].

[262] PCS at [332] and [334].

233 To expand on the above, IHC says that it was thrown into an "impossible situation" in early February 2016 owing to:

(a) the Crest entities' assertions that liability for drawdowns had been incurred under the Standby Facility;[263]

(b) IHC's finance department having been kept in the dark as to the existence of the drawdowns under the Standby Facility, as it had no records indicating the same, and the Crest entities' refusal to provide further details;[264] and

(c) the Crest entities' insistence on applying the sum of S$3,883,950 towards the Standby Facility rather than the Geelong Facility.[265]

234 As a result, IHC alleges that it withheld further payments to the Crest entities until the uncertainties over the existence of the drawdowns on the Standby Facility could be resolved.[266]

235 To my mind, the real question is whether IHC would have repaid the S$4,196,525 outstanding under the Geelong Facility, but for the problems with the Standby Facility. This depends, in turn, on two factors: its willingness and ability to repay.

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[263] PCS at [302].

[264] PCS at [302].

[265] PCS at [304].

[266] PCS at [305].

236 I deal first with IHC's willingness to repay the sum. In my view, the repayments of S$3,500,000 and S$3,883,950 clearly demonstrats such willingness on the part of IHC. I accept IHC's position that the confusion over the application of the S$3,883,950 towards the Standby Facility, which was caused by Mr Fan's breach, was the principal reason why further payments were not made.

237 The WhatsApp message sent by Ms Lim to Mr Fan raised a query about the Crest entities' application of the sum of S$3,883,950 towards the Standby Facility, and showed clearly that some confusion had been caused. Although Ms Lim should have been aware of the possibility of a drawdown or drawdowns, she remained unclear about what exactly happened. Such confusion would not have arisen if the Standby Facility had not even been entered into in the first place. It is also significant, in my opinion, that further payments to the Crest entities ceased after the dispute over the existence of drawdowns on the Standby Facility had arisen. Prior to this, IHC had made three payments to the Crest entities for the standby fees under the Standby Facility and the S$3,500,000 payment for the Geelong Facility. This lends credence to IHC's evidence that it was the dispute over the Standby Facility, which would not have occurred but for Mr Fan's breach, that caused it to withhold further payment under the Geelong Facility.

238 In relation to IHC's ability to repay the outstanding Geelong Facility liability of S$4,196,525, IHC asserts that it had available funds to repay the Geelong Facility in full upon maturity, *ie*, on 28 February 2016.[267] Thus, but for

[267] PCS at [308].

the state of confusion caused by Mr Fan having caused IHC to enter into the Standby Facility, none of the interest and default interest charged under the Geelong Facility post-maturity (*ie*, starting from 1 March 2016) to the date of its repayment from the surplus proceeds from the sale of the Australian properties, *ie,* 26 February 2018 would have been incurred. IHC's assertions are based on the following:

(a) IHC was able to channel substantial funds from its other projects and businesses to meet its obligations. It was able to raise funds to make the payments of S$3,500,000 and S$3,883,950 to the Crest entities in December 2015. Ms Lim testified at trial that the S$3,500,000 payment was raised from IHC's Holland Village China project.[268]

(b) IHC could rely on shareholder loans for liquidity. IHC had made repayments of shareholder loans in 2015 of over S$25 million to two companies, *ie,* Golden Cliff (which was controlled by Mr Fan) and Real Empire (which was controlled by Mr Aathar).[269] On 28 April 2016, IHC had repaid S$1.2 million to Mr Fan for his shareholder loan, and this sum could easily have been redirected or deferred since it was interest-free with no fixed repayment date.[270]

(c) According to Ms Lim, IHC could have sought funds from high net-worth private equity lenders, *eg*, Mr Lim Hock Eng, who had

[268] PCS at [312]; 8D2SB at p 8; NE, 20 August 2019, p 136, line 11 to p 137, line 2.

[269] PCS at [315].

[270] PCS at [316]; NE, 9 July 2019, p 76, line 15 to p 77, line 12.

previously extended loans of amounts as high as S$6.5 million to IHC at an interest rate of 15% per annum.[271]

(d) Bank statements showed that IHC, together with its wholly-owned subsidiaries (IHC First TMK, IHC Medical Asset, IHC Senior Housing (HK)), held substantial bank balances amounting to S$5.4 million to S$5.6 million as at 28 April 2016.[272] These bank accounts represented a ready source of funds which could be utilised to make full repayment of the Geelong Facility.

(e) Even if, as the Crest entities pointed out at trial, the bank balances were fully applied towards the Geelong Facility, there would still have been a shortfall of between S$500k to S$1.2 million remaining outstanding in the Geelong Facility, IHC could have easily raised that sum from shareholders' loans or other sources of financing.[273]

(f) In any case, expert evidence provided by IHC's expert witness, Richard Hayler ("Mr Hayler"), showed that IHC's financial position was strong enough for it to refinance outstanding amounts under the Geelong Facility of up to S$6 million, which it could then repay in the medium to long term.[274]

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[271] Lim's AEIC at [95].

[272] PCS at [320]; PB, Vol. 3 ("3PB") at p 1228 to 2136; NE, 9 July 2019, p 27, line 17 to p 29, line 9.

[273] PCS at [322].

[274] PCS at [323] to [324].

239 Therefore, assuming conservatively, that IHC had no ready internal sources of funds to pay off the outstanding liability on the Geelong Facility, and had to rely on refinancing, the question is whether it would have been able to obtain such refinancing. This depended principally on the actions of third parties, *ie*, whether third-party potential lenders would have been willing to extend loans to IHC before or on the Geelong Facility's maturity date (*ie*, on 28 February 2016). If, as the plaintiffs contend, third-party potential lenders would have been *willing* to do so, there would be a causal link between Mr Fan's breach in entering into the Standby Facility (which caused the confusion in IHC whether to make further payments) and IHC's failure to repay the Geelong Facility (which would not have occurred but for the confusion). Given the position in *Winsta* ([213] *supra*), if Mr Fan were to establish that IHC would not have been able to obtain third-party funding, the causal link would be broken.

240 I now go to the circumstances on or around 28 February 2016 to consider whether IHC had the ability to raise financing for the outstanding Geelong Facility of S$4,196,525. On this, IHC relies on the evidence of its expert Mr Hayler.

241 Mr Hayler opined that IHC's financial position was sufficiently healthy for a lender to extend loans of up to S$6 million.[275] His conclusions were based on the following:

(a) Based on the balance sheet as at 31 December 2015, the IHC Group had total net assets of at least S$62.18 million, which represented

[275] Richard Hayler's 1st AEIC ("RH1 AEIC") at p 32, [4.26].

"more than adequate headroom" for potential lenders to extend a S$6 million loan, provided that they believed that IHC would be able to repay. Mr Hayler arrived at these figures by conservatively excluding the whole value of IHC's China properties, which were the subject of a disclaimer of opinion by IHC's auditors as they were unable to verify their fair value.[276]

(b) IHC had a clean credit history which would put it in good standing with potential lenders such as banks. Mr Hayler relied on instructions given by IHC that it had not defaulted on any of its loans in the three years prior to its default on the Geelong Facility.[277] In this connection, Mr Hayler also observed that IHC was able to borrow at considerably lower rates compared to the Geelong Facility,[278] *eg*, a secured loan of S$3 million from IFS Capital at the interest rate of 9.335% per annum, compared to the interest rate under the Geelong Facility of 40.2% per annum (being 3.5% per month multiplied by 12 months).[279] This, in Mr Hayler's opinion, indicated IHC's good reputation as a borrower,[280] as the interest rates charged by lenders would otherwise be higher to account for the heightened risk of default.

(c) Mr Hayler was unable to safely conclude, based on IHC's historical financial data, that it would have generated cash flows that

[276] RH1 AEIC at p 32, [4.25] – [4.27].

[277] RH1 AEIC at p 32, [4.28].

[278] RH1 AEIC at p 32, [4.29].

[279] RH1 AEIC at p 32, [4.30].

[280] RH1 AEIC at p 32, [4.29].

were attractive, or at least acceptable to financiers.[281] He therefore relied on a number of "directional indicators" (*ie*, circumstantial financial metrics) in concluding that IHC's cash flows would have at least been acceptable to financiers, including:[282]

(i) IHC's revenue growth and stable gross profit margins;

(ii) what Mr Hayler assumed were value accretive decisions by IHC's management;

(iii) the willingness of reputable financial institutions including Westpac and NAB to provide secured financing to IHC;

(iv) IHC's flexibility in managing cash applied towards its investing activities; and

(v) IHC's ability to borrow even after its default on the Geelong Facility, *eg,* in the financial year 2016 where the IHC group was able to obtain additional net borrowings at S$10.84 million.

242 Mr Hayler's conclusions were challenged by the Crest entities' expert, Mr Jonathan Ellis ("Mr Ellis"), on the following bases:

(a) The directional indicators relied on by Mr Hayler were useful but insufficient, as they did not tell a prospective lender much about IHC's actual business, its ability to service the debt, its ability to repay the

[281] RH1 AEIC at p 32, [4.37].

[282] RH1 AEIC at p 32, [4.38] to [4.43].

principal, or what the company has to do to retain its gross revenues and profits.[283]

(b) The collapse in IHC's share price was a material factor that could have negatively affected how prospective lenders would perceive IHC, and this could have affected IHC's ability to access financing from the public markets, or increase the cost of such financing. The failure to take this into account was conceded by Mr Hayler at trial.[284]

(c) A rational lender would not only look at nominal financial figures showing the excess of the IHC group's total assets over its total liabilities, but also whether such assets were held in countries that were difficult to access and whether there was joint ownership throughout the corporate structure that would make enforcement difficult. These issues were not considered by Mr Hayler.[285]

243 I agree with Mr Ellis that Mr Hayler's "directional indicators" do not appear to be helpful in answering the question of whether IHC would have been capable of refinancing the outstanding liability under the Geelong Facility, as Mr Hayler took certain liberties in analysing how potential investors would have perceived the actions of IHC's management. For instance, at paragraph 4.39 of his expert report, Mr Hayler stated:[286]

> 4.39 **Second**, in general *I would not expect management acting in the best interest of their shareholders to make*

[283] 1DCS at [278(d)].

[284] 1DCS at [278(e)].

[285] 1DCS at [278(g)].

[286] RH1 AEIC at p 36, [4.39].

> *investments that they do not expect to be value accretive in an acceptable timeframe*. Since all of the investments were *relatively new, it is not unreasonable to assume, absent some material adverse change*, that the company still expected them either to be additive to cash flow or to be resold at a higher value.
>
> [emphasis in original in bold, emphasis added in italics]

244 It seems to me that Mr Hayler assumed that potential lenders would likely perceive any new investments made by the company to be value-accretive simply because management would not have entered into investments which appeared non-value-accretive. If this is correct, then potential lenders would generally have no reason to question any of the investment decisions made by the company simply because they are assumed to have been sound. I do not think this is a safe assumption to make.

245 Mr Hayler also noted that IHC's ability to "cut back on 'Investing activities'" showed that cash flows were reasonably well-managed.[287] I do not agree. Indeed, as Mr Ellis noted:[288]

> 6.61. The willingness of management to invest in assets may be for a number of reasons. There are circumstances where such investment is required to prepare assets for sale or to bring development assets to maturity. In general … when a business is capital constrained, it is helpful for management to reduce non-critical expenditure to allow cash to be used solely for critical expenditure.

246 Thus, I found it difficult to understand how Mr Hayler could have come to a definitive conclusion that IHC's cash flows were "reasonably well-

[287] RH1 AEIC at p 37, [4.41].

[288] Ellis AEIC, Expert Report at p 33, [6.61].

managed" without considering the rationale for the reduction in investments. As such, I do not accord this analysis much weight.

247 Nevertheless, Mr Hayler drew the court's attention to certain facts indicating that, at or before the time IHC defaulted on the Geelong Factor, it would have been able to refinance the Geelong Facility. The positive cash inflows from financing activities for the financial years 2015 and 2016[289] (between S$42.7 million and S$10.8 million) showed that IHC's financial position at the time would have been robust enough for lenders to found a reasonable expectation of repayment of debts at or larger than S$10 million. Indeed, the IHC group disclosed in its 2015 annual report that, after the date of the financial statements, it was able to refinance its Japan TMK bonds (of S$151.2 million),[290] showing that the refinancer was comfortable enough with IHC's credit risk to extend the due date for a significant amount of debt approximately around the first half of 2016, which was around or shortly after the Geelong Facility had matured and after IHC's share price had crashed following SGX's warning on 9 September 2015. Plainly, it could not be said that IHC was incapable of raising fresh financing to pay off the Geelong Facility on its maturity. The refinancing of the TMK bonds, in my view, indicates that IHC would have been able to refinance the Geelong Facility.

248 The refinancing of the Geelong Facility would have allowed IHC to avoid incurring interest and default interest at substantial rates of 3.5% per month and 3% per annum respectively. It would also have the added benefit of

[289] RH1 AEIC at p 34, [4.32].

[290] RH1 AEIC, p 67.

staving off any appointment of receivers over its Australian properties arising from a default on the Geelong Facility.

249 It seems to me that but for Mr Fan's breach, the plaintiffs would have been able to refinance the outstanding liabilities under the Geelong Facility and paid it off upon maturity. The plaintiffs have established the requisite causal link between its default on the Geelong Facility and Mr Fan's breach. Viewed through the lens of the *Winsta* ([213] *supra*) approach, Mr Fan has not discharged the legal burden of proving that in any event, the losses below would still have been sustained by the plaintiffs. I now turn to the specific losses claimed under this category.

Post-maturity interest and default interest

250 Since IHC Medical Re would not have defaulted on the Geelong Facility but for Mr Fan's breach, it follows that it would not have incurred *any* post-maturity interest or default interest on the Geelong Facility but for Mr Fan's breach. This refers to the amount charged on the outstanding principal on the Geelong Facility of S$4,196,525 after the Geelong Facility maturity date (*ie,* 1 March 2016) up to 26 February 2018, *ie,* the date when the Crest entities satisfied their debts (including said post-maturity interest and default interest) out of the security provided by IHC for the Geelong Facility (being the surplus proceeds from the sale of the Australian properties).

251 This loss is quantified as follows:[291]

[291] PCS at [334].

Item	Interest Accrued (S$)
Interest at 3.35% per month from 1 March 2016 to 26 February 2018 on the sum of S$4,196,525	3,363,964.41
Default interest at 3% per annum from 1 March 2016 to 26 February 2018 on the sum of S$4,196,525	251,101.66
Total	**3,615,066.07**

252 I should add that the figure of S$3,799,783 was also mentioned as the claimed amount in the closing submissions. I believe this figure is erroneously drawn from Ng's AEIC, where a higher outstanding sum of S$4,422,886 was used.[292] I therefore find that Mr Fan is liable for the sum of S$3,615,066.07.

Costs and expenses of receivership

253 The plaintiffs argue that the appointment of the Crest Receivers and the incurrence of all costs, fees and expenses in connection with their receivership would have been avoided but for Mr Fan's breach of duties. I agree. The receivership would not have been put in place over the Charged Shares but for IHC's entry into the Standby Facility, the drawdowns on the facility, the subsequent confusion that resulted from the demand for repayment, and the eventual default on the Geelong Facility by IHC Medical Re. Thus, the costs and expenses of such receivership, which, under IHC would be liable for under cl 8.5 of the 17 June Deed of Charge would have been avoided but for Mr Fan's breach of duties.

[292] Ng's AEIC at [45].

254 The Crest entities seek to claim costs and expenses relating to the receivership from IHC amounting to S$2,609,278.46,[293] and for the amount to be deducted from the surplus sale proceeds from the Australian properties (which are still being held in escrow) under the terms of the 20 October Court Order (which I have replicated in these proceedings). Thus, the remedy sought by the plaintiffs is a declaration that the Crest entities are not permitted to charge the plaintiffs for the costs, expenses and fees of the receivership.

255 I note that the Crest entities and Mr Aathar are jointly and severally liable for any loss that Mr Fan is found liable for. Having found that the requisite causal link between Mr Fan's breach and the costs and expenses from the receivership has been established, I consider that the declaration of non-liability to the Crest entities for this category of loss in favour of the plaintiffs to be an appropriate consequential relief.

Loss of the Australian business

256 As mentioned at [51] above, the Australian properties were subject to senior mortgages in favour of Westpac, Qualitas and NAB. Specifically, the St Kilda properties were subject to a first ranked mortgage in favour of Westpac, followed by a second ranked mortgage in favour of Qualitas. The Geelong property was subject to a mortgage in favour of NAB.[294]

257 The plaintiffs argue that the default on the Geelong Facility led to the Crest entities appointing the Crest Receivers over the Charged Shares on 15

[293] Yet Kum Meng's AEIC at [95].

[294] PCS at [372].

April 2016, which in turn triggered events of default under the loan agreements with the three Australian financial institutions. Each sent a notice of default: Qualitas on 13 May 2016; NAB on 15 June 2016; and Westpac on 20 June 2016.[295] The Australian Receivers were appointed pursuant to these notices of default and they proceeded to sell the Australian properties for a total of A$135.25m. While the combined sale price was higher than the combined valuation of A$114.5m as at 31 December 2015, significant costs and expenses were incurred in the course of the receivership. Also, the Geelong property was sold at A$10m less than the valuation of A$27.5m.[296]

258 The plaintiffs claim that they suffered loss from the appointment of the Australian receivers and the forced sale of the Australian business, and that Mr Fan should be liable for the value thereof. The quantification of this value has been bifurcated and is accordingly left to separate proceedings. The issue before me on this particular claim relates solely to liability, *ie*, whether the plaintiffs would have lost the Australian properties but for Mr Fan's breach.

259 Having already found that the plaintiffs would not have defaulted on the Geelong Facility but for Mr Fan's breach, it follows that the Crest entities would not have appointed the Crest Receivers in respect of that default but for Mr Fan's breach. Further, I agree with the plaintiffs' contention that the appointment of the Crest Receivers triggered events of default for the loans extended by Westpac, Qualitas and NAB.

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[295] PCS at [373].

[296] PCS at [375].

260 Qualitas' notice of default dated 13 May 2016 stated:[297]

> …
>
> (c) Based on the 3 May Announcement and 6 May Announcement, it seems that one or more Events of Default may have occurred under the Facility Agreement. These include:
>
> (i) The appointment of a receiver to any or all of IHC's assets or undertakings. This constitutes an Insolvency Event. The occurrence of an Insolvency Event in relation to IHC (which is a Guarantor and Obligor under the Facility Agreement) would constitute an Event of Default under clause 14.1(h);
>
> (ii) The failure to pay debt by IHC totalling at least $250,000 or its equivalent when due also constitutes an Event of Default under clause 14.1(e); and
>
> (iii) The corresponding enforcement of security over the assets of IHC in respect of a debt of at least $250,000 also constitutes an Event of Default under clause 14.1(i).

261 Westpac's notice of default dated 20 June 2016 stated:[298]

> **Events of Default**
>
> Events of Default have occurred pursuant to clause 10.1 of the Facility Agreement …
>
> It is an Event of Default pursuant to clause 10.1(m) if:
>
> (1) *a Controller is appointed, or any steps are taken to appoint a Controller; or*
>
> *(2) a resolution to appoint a Controller is passed, or any steps are taken to pass a resolution to appoint a Controller,*
>
> *to an Obligor, the Manager or over an asset of an Obligor or the Manager;*

[297] PB, Vol. 1 ("1PB") at p 162.

[298] 1PB at p 177.

> Westpac understands that a receiver has been appointed over the entire issued share capital of the Manager (which is owned by IHC, an Obligor) and accordingly, an Event of Default has occurred pursuant to this clause. …
>
> [emphasis in original]

262 NAB's notice of default dated 15 June 2016 stated[299]:

> 1. **EVENTS OF DEFAULT**
>
> Events of default have occurred under the Facility Agreement as follows:
>
> 1.1 Pursuant to clause 10.1(c) of the Facility Agreement, the Borrower has failed to perform the following undertakings or obligations (which failures are not remediable in the reasonable opinion of the Lender):
>
> …
>
> ***(c) Change in Control***
>
> Pursuant to clause 10.1(k), it is an Event of Default if a Change in Control occurs without the prior written consent of the Lender. A Change in Control occurred with respect to IHC Medical RE Pte Ltd in that by reason of the appointment of receivers to the entire issued share capital of IHC Medical RE Pte Ltd on 26 April 2016, IHC ceased to have the power to:
>
> (i) cast or control the casting of, more than 50% of the maximum number of votes that might be cast at a general meeting of holders of Marketable Securities in IHC Medical RE Pte Ltd;
>
> (ii) appoint or remove all, or the majority of the directors or other equivalent officers of IHC Medical RE Pte Ltd; or
>
> (iii) 'control' IHC Medical RE Pte Ltd within the meaning of section 50AA of the Corporations Act

[299] 3AB at p 1041.

> This Change in Control has occurred without the prior written consent of the Lender.
>
> [emphasis in original]

263 The three notices make clear that IHC Medical Re's default on the Geelong Facility and/or the appointment of the Crest Receivers triggered the appointment of the Australian Receivers. These events would not have occurred but for Mr Fan's breach.

264 In his evidence, however, Mr Fan stated that as far back as 14 August 2015, IHC intended to sell the Australian business. For strategic reasons, the board of directors had earmarked the Australian properties for divesting. He explained as follows:[300]

> … The Board of Directors of the 1st Plaintiff was implementing the strategic plan for the next 5 years through expanding its presence in China and Japan, reducing the group gearing, divesting the Malaysian and Australian assets. The plan was expected to expand the EBITDA …

According to him, the sale strategy was actively pursued, and eventually, IHC profited from the sale of the Australian properties.[301]

265 Similarly, the Crest entities argue that for strategic reasons, IHC had planned to exit the Australian market in as early as 2015, before the default on the Geelong Facility.[302] In support of this, they rely on the evidence of Mr Fan and Ms Lim. In cross-examination, Ms Lim agreed with Mr Fan's evidence set out above, and agreed with the Crest entities that even if the Crest entities did

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[300] Fan's AEIC at [6.6]-[6.7].

[301] Fan's AEIC at [6.12].

[302] 1DRS at [166].

not appoint the Crest Receivers over the Charged Shares, IHC would have gone ahead and disposed of the Australian properties.[303]

266 While the evidence goes some way in showing that IHC had considered the possibility of selling off the Australian properties, and had made exploratory efforts in obtaining potential offers for them, it did not go far enough in showing that IHC would, on a balance of probabilities, have disposed of the Australian properties. Strategic plans, unless committed to, are subject to changes. More importantly, a planned sale of the Australian properties is quite a different matter from a forced sale under receivership. I do not think there is sufficient evidence to displace the causal link between Mr Fan's breach, the appointment of the Crest Receivers and the appointment of the Australian Receivers which led to the forced sale of the Australian properties.

267 In the alternative, the Crest entities argue that the Australian Receivers would have been appointed in any case because IHC had already defaulted on its loan covenants with Westpac, Qualitas and NAB. Again, the Crest entities sought to rely on Ms Lim's evidence as follows:[304]

> Q. And you also agree … *that there were already defaults under the financing facilities for the Australian assets.*
>
> A. I need to clarify, 'defaults' meaning payment defaults?
>
> Q. In particular, covenant defaults which the Australian banks and financiers were asking the company to rectify.
>
> A. *I am not very sure of that now. I need to refer to documents.*
>
> [emphasis added]

[303] NE, 22 August 2019, p 68 line 16 to p 70 line 8.

[304] NE, 22 August 2019, p 70 lines 9 to 19.

268 However, I do not find that Ms Lim's evidence supports their argument. In addition, Ms Lim was shown an "indicative term sheet" issued by NAB on 8 August 2016 to restructure the loans owed to it.[305] The Crest entities suggest that this document showed that sales of all three Australian properties were contemplated by IHC.[306] It is also the Crest entities' case that this document showed that the Australian properties would have been sold even if the Crest entities had not appointed the Crest Receivers over the Charged Shares. Ms Lim responded as follows:[307]

> Q. So just to sum up, and we can quickly move on from this point, the NAB term sheet was really an extension of the facility which contemplated the disposal of IHC's entire Australian portfolio of properties?
>
> A. If I have to be precise, it is really to allow the Geelong property to be sold under non-fire sale condition.
>
> Q. But it also contemplated the sale of the St Kilda properties to reduce the loan to value ratio?
>
> A. It take into account that if there was the sale of St Kilda, then the proceeds must partly be applied here, or be paid off to them.
>
> Q. And they were aware of a potential sale of the St Kilda properties because IHC had informed them, had informed NAB that the St Kilda properties were going to be sold and there was a ready buyer. Is that correct?
>
> A. I believe that is correct.

269 In my view, all that can be said from Ms Lim's evidence is that, firstly, the indicative draft term sheet for the restructuring of the NAB loan

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[305] Agreed Bundle, Vol. 8 ("8AB") at p 4089 to 4090.

[306] 1DRS at 167.

[307] NE, 22 August 2019, p 74 lines 4 to 21.

contemplated a possible sale of the Geelong property. The sale of the St Kilda properties was merely incidental to, and not a condition of the restructuring.

270 Secondly, the Crest entities' appointment of the Crest Receivers (on 15 April 2016[308]) pre-dated the issuance of the indicative term sheet (on 8 August 2016). Indeed, the indicative term sheet was issued at least a month after the notices of default in respect of the appointment of the Crest Receivers had been issued by Westpac, Qualitas and NAB. The indicative term sheet was likely intended to stave off the forced sale of the Geelong property. This also applies to the contemplated sale of the St Kilda properties. There is nothing in the indicative term sheet that leads me to conclude that the forced sale of the Australian properties was independent of the default on the Geelong Facility.

271 I accordingly find that the Australian properties would not have been sold but for Mr Fan's breach. Mr Fan is therefore liable for the losses suffered in respect of the loss of the Australian properties, with the quantum of damages to be determined separately.

Losses connected to the 20 October Court Order

272 There are two losses connected to the 20 October Court Order made in Suit 856 as follows:

(a) *Cost of the banker's guarantee*. Pursuant to the 20 October Court Order, on 3 December 2018, the Crest entities procured a banker's guarantee in favour of IHC to secure the deposit of the surplus proceeds from the sale of the Australian properties to the extent of the principal

[308] 3ACB at p 1827.

amount of the disputed Standby Facility and the disputed amount under the Geelong Facility, together with interest accrued thereon up to the determination of the present suit, in addition to all costs, fees, and expenses incurred by Crest in respect of or in connection with the receivership. The banker's guarantee was for the sum of A$16,149,065.48,[309] and the commission paid to obtain this amounted to A$423,912.97[310] This amounted to S$394,230.03 at an exchange rate of S$0.93 to A$1. Under the 20 October Court Order, this commission was to be borne by IHC.

(b) *Interest, default interest and exchange rate difference.* Under the terms of the 20 October Court Order, the Crest entities were to apply the surplus sale proceeds of the Australian properties towards the undisputed portions of the Geelong Facility. The Crest entities received the proceeds on 26 February 2018. However, they continued to charge interest and default interest on the undisputed portion of the Geelong Facility up to July 2018[311] and sought to retain this amount out of the sale proceeds.[312] Together with the exchange rate difference, the amount totalled S$1,930,423.60.[313]

273 As a starting point, I agree with the plaintiffs that the "but for" presumption is not rebutted. Mr Fan's breach of fiduciary duties led to the entry

[309] PCS at [402]; 2PB at p 756.

[310] PCS at [402]; 2PB at p 756.

[311] PCS at [343]; 2PB at p 763.

[312] 2PB at p 763.

[313] PCS at [356]; sum of S$1,463,166.94 and S$467,256.66.

into and drawdown on the Standby Facility, which led to the default on the Geelong Facility, and which then led to the disputes over the Standby Facility and the Geelong Facility. If not for Mr Fan's breach, the plaintiffs would not incur the losses. To put it another way, it does not seem to me that such losses would have been sustained by IHC even if Mr Fan had not breached his fiduciary duties.

274 However, I am troubled by the circumstances under which Suit 856 was brought and the 20 October 2016 Court Order was made (which I shall reiterate below at [293]). Further, two other points made by the plaintiffs were of concern. First, in relation to the costs for the banker's guarantee, the plaintiffs submit that after I had declared the Standby Facility void at first instance in OS380, on 1 August 2018, IHC had written to the Crest entities to request the release of about S$9m from the surplus sale proceeds to IHC. This was because the plaintiffs took the view that since the Standby Facility had been declared void, there was no necessity for any sums to be held on escrow under the 20 October Court Order to meet any purported liabilities under the Standby Facility.[314] However, the Crest entities did not agree to this, and proceeded to obtain the bankers' guarantee for the full sum of A$16,149,065.48 anyway. Mr Ng's evidence was that this meant that a sum of S$168,419.67 was unnecessarily incurred from 28 November 2018 to 20 May 2020.[315] This was revised down to S$145,545.93 in the closing submissions.[316]

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[314] PCS at [404].

[315] Ng's AEIC at [65]-[66].

[316] PCS at [405].

275 Second, for the interest, default interest and exchange rate difference, the plaintiffs point out that the Crest entities did not have any good reason for the delay in paying the surplus proceeds towards the undisputed portion of the Geelong Facility. The Crest entities claim that the delay was because IHC had only accepted their position on the sum payable by letter on 1 August 2018.[317] However, there was nothing in this letter that suggested that IHC had ever accepted that the Crest entities were entitled to charge interest on the undisputed portion up to July 2018.

276 In relation to these losses, as stated at [215] above, I invited further submissions from the parties on the question of whether limiting doctrines, especially intervening causes, apply to equitable compensation. In doing so, I was mindful that Mr Fan was not represented, and did not file a defence. Indeed, this matter was not raised by any party. However, it seemed to me that the conduct of IHC and the Crest entities (the evidence of which was clearly placed before me by the plaintiffs) should not be ignored in considering at whose feet liability for such losses should lie. Therefore, I sought the further views of the parties whether Mr Fan should be liable for these losses. Apart from the plaintiffs and the Crest entities, the trustees of the estate of Mr Fan (represented by PK Wong & Nair LLC for this purpose) provided further submissions.

Applicability of intervening causes to equitable compensation

277 In *Winsta* ([213] *supra*), the Court of Appeal observed that whether other common law limiting doctrines apart from causation, such as remoteness, foreseeability, intervening causes, contributory responsibility and mitigation

[317] 2PB at p 763.

ought to apply to a claim for equitable compensation had not been argued by the parties in that case (at [127]). The Court of Appeal did not determine the issue but observed that there is conflicting case law on this point.

278 Indeed, on the one hand, there is a strand of authority that advocates a strict approach to liability for equitable compensation. Under this strict approach, common law limiting factors will not allow a defaulting fiduciary to escape liability for loss which is causally linked to his breach. Another strand of authority, however, appears to endorse a more flexible approach to the issue.

279 The strict approach is justified by the need to deter breaches of fiduciary duty. In *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [2000] 2 LRC 357 at 384, Tipping J said:

> In the second kind of case, the trustee or other fiduciary has committed a breach of duty which involves an element of infidelity or disloyalty engaging the fiduciary's conscience – what might be called a true breach of fiduciary duty … [I]n such a case once the plaintiff has shown a loss arising out of a transaction to which the breach was material, the plaintiff is entitled to recover *unless the defendant fiduciary, upon whom is the onus, shows that the loss or damage would have occurred in any event, ie without any breach on the fiduciary's part.* Questions of foreseeability and remoteness do not arise in this kind of case either. *Policy dictates that fiduciaries be allowed only a narrow escape route from liability based on proof that the loss or damage would have occurred even if there had been no breach.*
>
> [emphasis added]

280 Unlike the strict approach, the flexible approach does not foreclose the applicability of the common law limiting doctrines if necessary to reach a just and fair result. In *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 ("*Canson Enterprises*"), the plaintiff (the appellant) purchased land for development, thinking that it was purchasing the land from an original vendor.

In fact, the seller was an intermediary who purchased the land from the original vendor and on-sold the land to the plaintiff at a substantial mark-up. The defendant was the plaintiff's solicitor, who also acted for the seller. The defendant failed to disclose the fact that the seller was an intermediary to the plaintiff. It was agreed that the plaintiff would not have purchased the land had the defendant informed it that the seller was an intermediary. The plaintiff then proceeded to develop the land, hiring contractors to construct a warehouse on it. However, the piles supporting the warehouse began to sink, causing the plaintiff to incur substantial losses. The plaintiff sued the contractors for breach of contract but failed to recover the full extent of its losses as the contractors were not able to pay. The plaintiff then attempted to recover the shortfall from the defendant, alleging breach of its fiduciary duties. The Supreme Court of Canada unanimously held that the defendant was not liable for the loss, but differed as to the reasoning.

281 The plaintiff based its case on the argument that the concepts of remoteness, intervening cause and foreseeability had no relevance to an action for equitable compensation for breach of a fiduciary duty, and that the defaulting fiduciary was liable to put the aggrieved principal in as good a position as he or she would have been in had the breach not occurred (at [49]). Accordingly, the solicitor was liable for the construction losses, as the shoddy construction work on the land would not have occurred but for the solicitor's breach of his fiduciary duties causing the plaintiff to purchase said land in the first place. The majority (comprising of La Forest J, with whom Sopinka, Gonthier and Cory JJ agreed) disagreed. They took the view that "it would be *wholly inappropriate* to interpret equitable doctrines so technically as to displace common law rules that achieve substantial justice *in areas of common concern*, thereby leading to

harsh and inequitable results" (emphasis added) (at [87]). Thus, equity could draw from the common law where it was just and reasonable to do so (at [85]).

282 It appears that the majority considered the construction loss to have been more properly attributable to the shoddy work of the construction company, which was an intervening cause unrelated to the solicitor's breach of fiduciary duty (at [32]). Certainly, that was how La Forest J himself understood it in his later Supreme Court of Canada majority decision, *Hodgkinson v Simms* [1994] 3 SCR 377 ("*Hodgkinson*"), which reaffirmed the majority decision in *Canson Enterprises* (see *Hodgkinson* at [80] – [81]).

283 McLachlin J (as she then was) concurred with the result reached by the majority in *Canson Enterprises*. She appeared to observe that an analogy with tort law ought not to be readily drawn in the context of a breach of fiduciary duty, owing to differences in policy undergirding tort and breaches of fiduciary duty: at [7]. Even then, however, she did not think that defaulting fiduciaries should be responsible for *all* the consequences associated with their breach of duty without limitation. She took the view that the construction loss claimed by the plaintiff in this case was caused by the contractors, and not the defendant. At [29] – [30], she said:

> … The construction loss was caused by third parties. There is no link between the breach of fiduciary duty and this loss. The solicitor's duty had come to an end and the plaintiffs had assumed control of the property. This loss was the result, not of the solicitor's breach of duty, but of decisions made by the plaintiffs and those they chose to hire. …
>
> This result accords with common sense and policy. If fiduciaries on land transactions who breach their fiduciary duty were responsible not only for losses flowing from the fiduciary breach but for all wrongful acts associated with the property thereafter which cause loss to the plaintiff, they would not only be deterred from breach of duty, but rendered impotent … If such

> a result were necessary to protect innocent purchasers or deter misconduct, perhaps a case could be made for it. But it is not necessary as a policy of the law. The law gives a plaintiff other remedies. It is *fairer* that losses arising from construction on the property after the purchase be borne by those who assume responsibility for the construction rather than by the solicitor who acted in the purchase transaction. …
>
> [emphasis added]

284 While McLachlin J did not use the language of intervening causes, it appears to me that the operation of the doctrine would be in line with her decision. There is no doubt that factual causation could be established between the breach of the defendant's fiduciary duties (which caused the plaintiff to purchase the land) and the loss suffered by the plaintiff in respect of construction work on the land. The reason why the defendant was not found liable was because the loss was *more fairly attributed* to another cause (*ie,* the shoddy construction work of the contractors), which broke the chain of factual causation between the defendant's breach of duties and the loss.

285 It seems to me that under the flexible approach, the applicability of common law limiting doctrines to a claim for equitable compensation is qualified but not prohibited if needed to reach a just and fair result. Policy considerations, such as deterrence, could be considered in determining what a just and fair result should be. I observe that this approach is consistent with *Winsta* ([213] *supra*). Indeed, the Court of Appeal appeared to favour a balanced approach whereby all the relevant rules and principles of common law and equity were allocated an appropriate "legal space" and utilized as and when appropriate in order to achieve a just and fair result in the case at hand (at [96]). For this reason, the Court of Appeal refrained from endorsing a strict interpretation of the rule in *Brickenden v London Loan & Savings Co et al* [1934] 3 DLR 465 (under which the proof of causation in the context of

equitable compensation would be irrelevant: see [238]), in favour of a burden-shifting approach (which balanced the need to deter fiduciary breaches against the need for fairness by shifting the burden of disproving causation on the defaulting fiduciary: see [240] and [244]). This appears to point towards the desirability of adopting a *flexible* and *balanced*, rather than a strict, approach to the question of whether the common law limiting doctrines ought to apply in equity.

286 That being said, under the balanced approach, both deterrence *and* fairness must be given due regard. The Court of Appeal in *Winsta* underscored the importance of deterring breaches of fiduciary duties in the following terms at [246] – [247]:

> … the starting point in equity is the trust and confidence reposed in the wrongdoing fiduciary by the innocent principal. The relationship between the wrongdoing fiduciary and the innocent principal is not one where both occupy equal footing, but rather one of dependence by the principal on the fiduciary. The principal relies on the fiduciary to act in his or her best interests, and is especially vulnerable to the fiduciary's breach of duty. Indeed, the High Court in *Kumagai-Zenecon (HC)* … has observed that a fiduciary owes his or her principal 'the highest standard [of duty] known to the law' …
>
> In attempting to ensure that fiduciaries do not abuse the power given to them, and also to ensure that fiduciaries are not tempted or distracted from acting in the best interests of their principals, *fiduciary law has always embodied elements of deterrence and prophylaxis* … Equity intervenes not so much to recoup a loss suffered by a plaintiff as to hold the fiduciary to and vindicate the high duty owed to the plaintiff. …
>
> [emphasis added]

287 The question is how deterrence can be accommodated within a more permissive approach allowing fiduciaries to escape liability for breach of their fiduciary obligations by invoking the common law limiting doctrine of intervening causes, while ensuring a just and fair outcome for each case. One

approach is to consider whether it is necessary to serve the cause of deterrence by refusing to recognise the intervening cause of the loss in question. If not, there is legal space, in my view, to accord to the operation of the doctrine of intervening causes.

288 McLachlin J's reasoning in *Canson Enterprises* ([280] *supra*) is illustrative. She considered it fairer that losses arising from construction on the property (the purchase of which was caused by the defendant solicitor's breach of fiduciary duty) be borne by those who assume responsibility for the construction rather than the defendant solicitor because, "[w]here construction is concerned, it is their negligent conduct – not the solicitor's – which the law should seek to deter" (at [30]). She did not think that imposing liability on the solicitor was necessary to deter the misconduct in question.

289 *Canson Enterprises* can be contrasted with *Hodgkinson* ([282] *supra*). In the latter case, the plaintiff was a stockbroker who was inexperienced in tax planning. He hired the defendant, an accountant, to advise him on minimizing his exposure to income tax while acquiring stable long-term investments. The relationship between the parties was such that the plaintiff did not ask many questions regarding the investment advice given by the defendant. The defendant advised him to make substantial investments in certain Multi-Unit Residential Buildings ("MURBs"). Unknown to the plaintiff, however, the defendant was under a financial arrangement with the developers of the MURBs, whereby the fees he reaped from them would increase the more units in the MURBs he sold to his clients. Eventually, the real estate market crashed and the plaintiff's investments lost virtually all their value. The plaintiff sued the defendant for the loss, alleging breach of fiduciary duty on the defendant's part.

290 The majority in *Hodgkinson* found that the defendant had indeed breached his fiduciary duty to the plaintiff and was liable for the loss claimed by the plaintiff, even though, strictly speaking, it was the crash in the real estate market that directly occasioned the plaintiff's loss. They distinguished *Canson Enterprises* on the grounds that, in *Hodgkinson*, the duty breached by the defendant was *directly related to the risk* (of adverse market movements in the real estate market) *that materialised* and which in fact caused the plaintiff's loss. The defendant had been retained specifically to recommend suitable investments for the plaintiff and could choose which risks the plaintiff would be exposed to. In *Canson Enterprises*, on the other hand, the defendant solicitor did not exercise any control over the risks that eventually materialized into a loss for the plaintiff (*Hodgkinson* at [82]). The majority also noted the need to (at [93]):

> … [P]ut special pressure on those in positions of trust and power over others in situations of vulnerability … Likeminded fiduciaries in the position of the respondent would not be deterred from abusing their power by a remedy that simply requires them, if discovered, to disgorge their secret profit, with the beneficiary bearing all the market risk. If anything, this would encourage people in his position to in effect gamble with other people's money, knowing that if they are discovered they will be no worse off than when they started…

291 In other words, the cause of deterrence would be served by disregarding the supervening cause of the plaintiff's loss and holding the defaulting fiduciary liable for the same, because the duty breached by the defendant was directly related to the risk that materialised which caused the loss. Indeed, the defendant introduced the risk which caused the plaintiff's loss in the first place.

292 In my view, the principles set out at [287] and [291] would be sufficient to dispose of the issues in the present case, and I do not say anything further on

whether a just and fair outcome would be achieved in cases where the various other common law limiting doctrines were to be disregarded entirely or applied in attenuated form in the interests of deterrence. I now apply these principles to the losses claimed.

Application to the facts

293 Turning to the facts, it bears reminding that on 8 August 2016, the Crest entities brought Suit 856 in respect of an alleged attempt by IHC's then management to transfer IHC Medical Re's sole unit in the company holding the Australian business away to another subsidiary so as to deprive the Crest entities of the value of their security under the Geelong Facility. On the same day, the Crest entities obtained injunctive relief to prevent IHC from interfering in the Crest entities' security. I should add that the purported transfer took place on 28 April 2016 – the day that the present proceedings were commenced by IHC. On 16 August 2016, the asset was transferred back to IHC Medical Re. Then, on 17 August 2016, IHC applied to set aside the injunction. Arising from that application, the 20 October Court Order was made in relation to the sale proceeds of the Australian properties. The commission for the banker's guarantee was ordered to be paid by IHC.

294 In my view, the need for the banker's guarantee was directly and primarily attributable to the plaintiffs' own conduct in attempting to prevent the Crest entities from realising their security under the Geelong Facility by putting the assets of IHC Medical Re out of their reach. That was an intervening act which broke the causal link between Mr Fan's breach and the loss, *ie,* the cost of the banker's guarantee. Mr Fan's breach of fiduciary duty (which concerned IHC's entry into the Standby Facility) could not be said to be related to, or to have introduced the risk of the plaintiffs' own conduct in this regard (which

concerned how the plaintiffs dealt with the security under the Geelong Facility). The cause of deterrence would be adequately served without disregarding the intervening cause for the loss and holding Mr Fan liable for the same. I also note the plaintiffs' position that the Crest entities have incurred unnecessary expenses of S$145,545.93 by obtaining the banker's guarantee for the full amount: see [274] above. This appeared to be yet another supervening event (albeit for a portion of the loss). Holding Mr Fan liable may have the opposite effect, as it would encourage additional wrongdoing and unreasonable conduct by other parties as long as there is a defaulting fiduciary who could be held responsible for any loss.

295 The same reasoning applies to the interest, default interest and exchange rate difference. Even by the plaintiffs' own case, the loss was directly caused by the Crest entities' unjustified charging of interest and default interest on the undisputed portion of the Geelong Facility up to July 2018, when they had the means to satisfy that debt when they received the surplus sale proceeds of the Australian properties on 26 February 2018. Again, there is no basis for me to conclude that Mr Fan's breach of fiduciary duty was related to this risk of the Crest entities' unjustified conduct. There is nothing to suggest that the cause of deterrence would not be served unless Mr Fan is held liable for this loss by ignoring its intervening cause. I note, however, that the Crest entities dispute that they were at fault, and allege that IHC was the party to cause the delay.[318]

296 I therefore do not find Mr Fan liable for the interest, default interest and exchange rate difference, or for the cost of the banker's guarantee.

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[318] The Crest entities' further submissions on intervening causes dated 22 June 2020 ("1DFS") at [33] to [42].

Conclusion

297 To summarise, I find that Mr Fan is liable for the following:

(a) in respect of the Standby Facility:

(i) the sum of S$4,538,800, being payments towards the Standby Facility;

(ii) the sum of S$4,440,780.77 for loss of use of payments under the Standby Facility;

(b) in respect of the default of the Geelong Facility:

(i) the sum of S$3,615,066.07, as post-maturity interest and default interest; and

(ii) loss of IHC's Australian business, the quantification of which will be determined in separate proceedings.

298 While I find Mr Fan liable for the costs and expenses from the receivership, a declaration of non-liability to the Crest entities in favour of the plaintiffs is the more appropriate consequential relief.

Accessory liability for dishonest assistance

299 From the legal principles discussed at [217] above, it follows that the Crest entities and Mr Aathar, as dishonest accessories to Mr Fan's breach, are jointly and severally liable for the losses that would not have been suffered by the plaintiffs but for Mr Fan's breach. For completeness, I should add that in his evidence, Mr Aathar did not challenge the amounts claimed by the plaintiffs.

Liability for unlawful means conspiracy

300 The extent of the liability of the Crest entities, Mr Fan and Mr Aathar for the tort of unlawful means conspiracy is only in issue to the extent that it covers additional losses for which they have not already been found jointly and severally liable, *ie*, the losses connected with the 20 October Court Order. The question is whether these losses were caused by the Crest entities, Mr Fan and Mr Aathar conspiring to cause IHC to enter into and incur substantial liabilities under the Standby Facility. In my view, the plaintiffs have not proven that the losses are caused by the unlawful means conspiracy. In any event, these losses are directly linked to the parties' conduct in the course of the dispute over the Geelong Facility. Thus, I do not think that this is the rightful basis to claim for the losses against the Crest entities, Mr Fan and Mr Aathar.

Ms Lim's liability for breach of her duty of skill and care

Payments towards the Standby Facility

301 I have set out the applicable legal principles above at [216] onwards. In my view, it was entirely foreseeable that upon entry into the Standby Facility, IHC would make payments towards it (which it should not have been liable for). Accordingly, this type of loss was foreseeable and not remote: *Fong Maun Yee v Yoong Weng Ho Robert* [1997] 1 SLR(R) 751 at [57] (in the context of the tort of negligence, which is closely related to the breach of a duty of skill and care in this case). The requirement of causation is also, in my view, made out. If Ms Lim had exercised due skill, care and diligence in recognising that the Standby Facility had been drawn down even before IHC had formally entered into it, and made further inquiries, she would have been alive to the risk that the Standby Facility was drawn down in an irregular manner. Having known this, it was

incumbent on her to exercise due skill, care and diligence in escalating the matter to the IHC board of directors, and if she had done so, it is unlikely that approval would have been given. Mr Siew, who cast the deciding vote, did so *only* on the basis that the Standby Facility was essential for IHC's operations. In other words, IHC would not have entered into the Standby Facility, and would not have been held liable for any sum arising under the Standby Facility.

302 I accordingly find that Ms Lim is jointly and severally liable (together with the Crest entities, Mr Fan and Mr Aathar) for the sum of S$4,538,800.

Loss of use of payments towards the Standby Facility

303 I do not think that the interest which accrued on the Geelong Facility as a result of the application of the payments totalling S$4,538,800 towards the Standby Facility would be a foreseeable consequence of Ms Lim's negligent failure to identify the true nature of the Standby Facility. Specifically, Ms Lim could not have foreseen that this would have led to a failure to pay the same amounts towards the Geelong Facility. Since Ms Lim's knowledge of such consequences is not proved, I do not find her liable for this loss.

Losses in default of the Geelong Facility

304 I am also unable to agree that the default on the Geelong Facility was a foreseeable consequence of Ms Lim's breach. The default was attributable to a combination of factors. A major factor was the confusion caused by the Crest entities' application of the sum of S$3,883,950 towards the Standby Facility instead of the Geelong Facility. This was not foreseeable by Ms Lim.[319] I

[319] 3ACB at pp 1815 to 1818.

therefore do not find Ms Lim liable for any of the losses sustained by IHC's default on the Geelong Facility.

Losses connected to the 20 October Court Order

305 Finally, I am also unable to find Ms Lim liable for the losses connected to the 20 October Court Order. As I observed at [300], these were the result of the conduct of IHC and the Crest entities, and cannot be said to have been foreseeable by Ms Lim. With that, I proceed to consider whether Ms Lim is entitled to an indemnity for the losses for which I have found her liable.

Ms Lim's counterclaim

Article 153 of the articles of association

306 In the main, Ms Lim's counterclaim against IHC is for an indemnity pursuant to Art 153 of IHC's Articles of Association, which reads:[320]

> **Indemnity**
>
> 153. Subject to the provisions of and so far as may be permitted by the Statutes, every Director, Auditor, Secretary or other officer of the Company shall be entitled to be indemnified by the Company against all costs, charges, losses, expenses and liabilities *incurred by him in the execution and discharge of his duties or in relation thereto including any liability by him in defending any proceedings, civil or criminal, which relate to anything done or omitted or alleged to have been done or omitted by him as an officer or employee of the Company and in which judgment is given in his favour (or the proceedings otherwise disposed of without any finding or admission of any material breach of duty on his part)* or in which he is acquitted or in connection with any application under any statute for relief from liability in respect of any such act or omission in which relief is granted to him by the court. …

[320] 1AB at p 446.

[emphasis added]

307 Plainly, even if Ms Lim fell within the ambit of Article 153, it cannot assist her in her claim for an indemnity in any way. In order to be indemnified for any liability attaching to her in respect of civil proceedings, judgment must have been given in Ms Lim's favour, or the proceedings otherwise disposed of without any finding or admission of any material breach of duty on her part. This is not the case here, as I have found that Ms Lim was in breach of her duty of due skill, care and diligence. She, therefore, cannot not avail herself of the indemnity under Art 153.

Implied indemnity

308 Alternatively, Ms Lim seeks an implied indemnity under the terms of her employment contract.

309 In *Loh Siok Wah v American International Assurance Co Ltd* [1998] 2 SLR(R) 245 at [29]–[34], Chan Seng Onn JC (as he then was) modified the test for implication of contractual terms laid down by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1978) 52 AJLR 20. Under Chan JC's modified test, for a term to be implied, the following conditions must be fulfilled:

(a) the term must be reasonable and equitable;

(b) it must be necessary to give business efficacy to the contract, or it must have been so plain and obvious to the parties that "it goes without saying";

(c) it must be capable of clear expression; and

(d) it must not contradict any express term of the contract.

310 Relying on the above, Ms Lim argues that the following terms should be implied into the contract:

(a) that Ms Lim would obey and co-operate with IHC to carry out all lawful and reasonable directions given by IHC; and

(b) that IHC would not cause Ms Lim to carry out any order, instruction or direction other than lawful or reasonable ones.

311 On the basis that such terms could be implied into Ms Lim's employment contract, Ms Lim then argues that she had merely acted on the instructions of Mr Chia or Dr Jong in relation to the Standby Facility, hence complying with the first implied term. IHC had, in instructing her to assist in preparing the documentation for what turned out to be an illegal arrangement, breached the second implied term. Ms Lim then made a leap of logic by asserting that this somehow entitled her to an implied indemnity from IHC in respect of any and all liability she might incur as a result of her compliance with such instructions.

312 However, as I have found, Ms Lim's liability rested on her failure to exercise due skill, care and diligence in not recognising that the Standby Facility had been drawn down irregularly and thus failing to escalate the matter to the board of directors. It was not good enough for her to claim that she had acted under instructions. In any event, I do not think that an indemnity in respect of such negligent breaches of duty can be implied into the terms of Ms Lim's employment with IHC. It is eminently reasonable, indeed desirable, for a

company to expect their officers or employees to act with due skill, care and diligence.

Conclusion

313 For completeness, I note that in the closing and reply submissions, Ms Lim makes no mention of her other pleaded counterclaim. Based on s 391(1) and s 391(3) read with s 76A(13) of the Companies Act, Ms Lim seeks to be excused for her negligence as she acted reasonably having regard to all the circumstances of the case. Given there are no arguments on this, I take it that she has implicitly abandoned the claim. In any event, it is devoid of merit. Based on my findings, she did not act reasonably in dealing with the Standby Facility. Accordingly, I dismiss the counterclaim.

The Crest entities' counterclaims

Unjust enrichment

314 The Crest entities counterclaim against IHC for the amount drawn down by IHC under the Standby Facility, amounting to S$17,332,081.15, on the ground that IHC had been unjustly enriched. They argue that the four elements of an unjust enrichment claim, as set out in *MSP4AGE Asia Pte Ltd and another v MSP Global Pte Ltd and others* [2019] 3 SLR 1348 at [139], are satisfied on the facts because: (1) IHC had been enriched; (2) at the expense of the Crest entities; (3) the circumstances made the enrichment unjust; and (4) that there are no defences.[321]

[321] 1DCS at [328].

315 IHC briefly argues that the first three elements had not been made out.[322] I am inclined to agree with IHC that on the unique facts of this case, IHC had not been enriched at all. The outcome of *The Enterprise Fund III* ([5] *supra*) is that the Standby Facility investors are the legal and beneficial owners of the 59,304,800 IHC shares which they bought and held using the sum of S$17,332,081.15 drawn down from the Standby Facility. On this basis alone, I am of the view that the claim fails. However, the parties' focus was on the defence premised on illegality and public policy, and I turn to the question whether the court should allow the unjust enrichment claim brought to recover monies paid pursuant to the illegal Standby Facility.

The defence of illegality and public policy

316 In *Ochroid Trading Ltd and another v Chua Siok Lui* [2018] 1 SLR 363 ("*Ochroid*") at [132], the Court of Appeal stated categorically and emphatically that under Singapore law, "*there could be no recovery whatsoever pursuant to the illegal contract*" (emphasis in original). However, restitution of sums paid under the illegal contract on the grounds of unjust enrichment could be permitted provided that the ordinary requirements of unjust enrichment could be made out notwithstanding the illegality of the underlying contract, and *subject to the defence of illegality and public policy*: at [139].

317 The Court of Appeal grounded the defence of illegality and public policy on the concept of *stultification.* Citing Professor Peter Birks in *Peter Birks, "Recovering Value Transferred Under an Illegal Contract"* (2000) 1 Theoretical Inquiries in Law 155 ("*Birks*") at 160, the Court of Appeal

[322] PCS at [419]-[427].

explained that "[t]o stultify" is to "make nonsense of". An unjust enrichment claim should not "make nonsense of the law's condemnation of the illegal contract in question and of its refusal to enforce the illegal contract". Therefore, a claim in unjust enrichment is precluded if to do so would undermine the fundamental policy that rendered the underlying contract void and unenforceable in the first place: at [147]–[148].

318 In this connection, the Court of Appeal endorsed (at [158]) Professor Birks' identification of two relevant factors which the court would take into account to determine whether allowing such recovery would stultify the policy that rendered the underlying agreement illegal. Firstly, allowing such recovery might provide a lever which future claimants in similar cases can use for the purpose of getting the other to perform the contract (the "lever argument"). Secondly, this might also stretch out a safety-net below all those minded either to engage in similar illegality or to abstain from diligently inquiring whether their proposed course of conduct would run afoul of the statutory provision or rule of law rendering the transaction illegal (the "safety-net argument"): see *Birks* at 162.

Application to the facts

319 As highlighted by the plaintiffs, in *The Enterprise Fund III* ([5] *supra*) at [53], the Court of Appeal explained that the rationale for the statutory prohibition within s 76 of the Companies Act comprises two core strands: first, the historical origins in maintaining a company's share capital, and second, the wider concern of protecting the assets of the company. To allow the Crest entities to recover even the principal sum of S$17,332,081.15 would reduce IHC's capital and assets, to the prejudice of the innocent shareholders and

creditors. The plaintiffs argue that such a claim stultifies the fundamental policy of the statutory prohibition.[323]

320 The Crest entities accept that the underlying policy of the statutory prohibition is to prevent the depletion of the company's financial resources, including its future resources, in acquiring its own shares: *Lew Syn Pau* ([119] *supra*) at [126].[324] However, s 76A(4) of the Companies Act expressly permits a claimant to seek just and equitable relief against the company in the event that the contract was declared void under s 76A(1) for breaching the s 76 prohibition. This, argue the Crest entities, suggested that allowing a claim for restitution in respect of sums paid out to a company to purchase its own shares does not stultify the policy underlying s 76 because Parliament clearly intended that restitution be available against the company.[325] Also, the lever argument and the safety net arguments should be ruled in favour of the Crest entities.

321 As I observed at [223], s 76A(4) of the Companies Act merely allows the court to grant just and equitable relief against a company. While it does not expressly preclude a claim against a company in respect of the sums paid out to the company to purchase its own shares, in the exercise of its discretion whether and what relief to grant, the underlying policy of the prohibition would certainly be considered by the court. What is clear to me is that statutory relief does not mean that stultification is rendered otiose (as suggested by the Crest entities). I turn to consider whether if allowed, the Crest entities' claim for restitution would provide a lever for parties to enforce a contract which is illegal by virtue

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[323] PCS at [434]-[435].

[324] 1DCS at [386].

[325] 1DRS at [172].

of s 76 of the Companies Act, or would provide a safety-net for parties neglecting to do their due diligence in determining whether the transaction is one that would run afoul of s 76 of the Companies Act.

322 The Crest entities' case is that these two considerations did not arise. Firstly, they argue that allowing their unjust enrichment claim would not create a lever for future parties to a transaction illegal by s 76 of the Companies Act to enforce that illegal agreement, because it was not pleaded in such a manner as to recover the fullest extent of what they were entitled to under the Standby Facility, had it not been void.[326]

323 I am not sure I follow this argument. The Crest entities' claim is for the full principal sum of S$17,332,081.15. It seems to me clear that allowing the unjust enrichment claim would create a lever for future parties (to a transaction illegal by virtue of s 76 of the Companies Act) to enforce that illegal agreement. This is the precise effect of allowing such a claim. It seems to me that a claimant seeking statutory relief within s 76A(4) of the Companies Act would also have to strive to overcome the same obstacle *ie,* that relief may actually undermine the underlying policy of the statutory prohibition.

324 Secondly, the Crest entities argue that their claim would not create a "safety-net" for other financiers in similar situations because IHC had provided representations and warranties as to the legality of the transaction, on the faith of which the Crest entities had entered into the Standby Facility. Also, allowing recovery in this specific case would not set a precedent which removed the disincentives against future financiers entering into such agreements by simply

[326] 1DRS at [174].

relying on general representations and warranties without conducting further due diligence, as the Court of Appeal's finding in *The Enterprise Fund III* ([5] *supra*) would govern future conduct.[327]

325 The Crest entities' position on the safety-net argument is, in my view, unsatisfactory. The argument is essentially premised on the assumption that the sole source of the Crest entities' responsibility for the breach of s 76 of the Companies Act was its failure to do due diligence. Even if I were to accept the argument, the illegal transaction did not only consist of the parties' entry into the Standby Facility. It also included the drawdowns on the Standby Facility to acquire IHC shares and the holding of the IHC shares by Crest as security for repayment: *The Enterprise Fund III* ([5] *supra*) at [134]. The Crest entities had effected the drawdowns on Mr Aathar's instructions to purchase IHC shares directly. This completely bypassed the contractual safeguards in the Standby Facility agreement that would have prevented unauthorized drawdowns. As such, I take the view that allowing the unjust enrichment claim would indeed stretch out a safety-net to absolve the Crest entities and other similar claimants in its position from the consequences of its risky conduct. It is eminently desirable that parties do the requisite due diligence in both entering into as well as executing any arrangement involving a company's direct or indirect acquisition of its own shares.

326 Accordingly, I do not allow the Crest entities' counterclaim in unjust enrichment.

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[327] 1DRS at [175].

Rectification of the default interest clause in the Geelong Facility

327 The Crest entities also sought to rectify cl 9.3, the default interest clause in the Geelong Facility, on the ground that it was erroneously expressed as 3% *per annum* above the contractual interest rate instead of 3% *per month* above the contractual interest rate.[328]

328 Rectification is an equitable remedy. In *Kok Lee Kuen and another v Choon Fook Realty Pte Ltd and others and another application* [1996] 1 SLR(R) 688 at [38]–[39], Lai Siu Chiu J (as she then was) held that to rectify the terms of a contract based on a common mistake, it is necessary to show that the parties were in complete agreement on the terms in question, but by an error wrote them down wrongly. This is ascertained on an objective basis, by looking at "their outward acts, that is, at what they said or wrote to one another in coming to their agreement, and then comparing it with the document which they have signed." Where a party relies on a unilateral mistake, he must show that he believed that the agreement contained all the correct terms, and that the other party being aware of the mistake, did nothing to draw it to his attention.

329 I do not think that the Crest entities have proven either a common mistake and/or a unilateral mistake which the plaintiffs did nothing to correct. There was nothing produced before me, by way of correspondence, documents or evidence of any discussion, to show that the parties specifically agreed for default interest to be charged on a per month basis. The Crest entities seek to rely on the surrounding circumstances, *ie,* that the previous facilities provided for default interest on a per month basis, that the default interest on a per annum

[328] 1DCS at [389].

basis is but a negligible increase over the contractual interest rate which does not reflect the potential losses of the Crest entities, and that IHC never raised any dispute as to the default interest payable indicated in the statements of account sent to them after they had defaulted on the Geelong Facility agreement (which was calculated on a per month basis).[329] However, these matters far fall short of proving an agreement of the parties in relation to the default interest for the Geelong Facility. There is also no evidence that IHC Medical Re knew that it was the intention of the Crest entities to charge default interest on a per month basis, or that it knew that there was a mistake in the document but did not point it out. Again, the surrounding circumstances simply do not support this.

330 Accordingly, I dismiss the claim for rectification.

Costs on an indemnity basis

331 On the claim for an indemnity under cl 10.1 of the Geelong Facility, the Crest entities seem to have abandoned its claim for other losses and expenses under the Standby Facility and/or the Geelong Facility as originally pleaded.[330] There was no substantive submission at all on such matters.

332 Instead, the Crest entities ask the court to exercise its discretion to award costs on an indemnity basis. Presumably, this is the costs of the action. I begin with cl 10.1 of the Geelong Facility, which states:[331]

> The Warrantors [including IHC, IHC Medical Re, Mr Fan and Mr Aathar] undertake to each [of the Crest entities] for itself and

[329] 1DCS at [393].

[330] 1DCS at [403].

[331] 1ACB at p 171.

> for [the Crest entities'] officers, employees and agents (each, together with [the Crest Entities], an 'Indemnified Person') to fully indemnify and keep fully indemnified on demand each Indemnified Person from and against any and all liabilities, losses, Claims, costs, charges and expenses of any nature whatsoever (including without limitation legal expenses on a full indemnity basis) which any Indemnified Person may incur or sustain or be subject to in consequence of any misrepresentation or alleged misrepresentation or any of the Warranties contained herein not being correct in any material respect at the time that they were made or repeated or for any breach of any term and condition herein. Such indemnity shall extend to include all charges and expenses which any of the Indemnified Persons may pay or incur in investigating, disputing or defending any Claim in respect of which the Warrantors are or may be liable to indemnify under this Clause 100 [*sic*] …

333 As a general rule, costs are in the discretion of the court and should follow the event unless it appears to the court that in the circumstances of the case some other order should be made: *Tullio Planeta v Maoro Andrea G* [1994] 2 SLR(R) 501 at [24]. The court will, however, tend to depart from this rule and exercise its statutory discretion to award costs in such a manner as to uphold the contractual bargain entered into by the parties (*eg*, a contractual indemnity for costs) unless it would be manifestly unjust to do so: *Telemedia Pacific Group Ltd v Credit Agricole (Suisse) SA (Yeh Mao-Yuan, third party)* [2015] 4 SLR 1019 at [29]; *Abani Trading Pte Ltd v BNP Paribas and another appeal* [2014] 3 SLR 909 at [93].

334 As I have not heard the parties on costs, I will deal with this together with all costs matters after the delivery of this judgment.

Conclusion

335 From the above, I summarise my findings on liability as follows:

(a) Mr Fan acted in breach of his core fiduciary duties to IHC.

(b) Ms Lim acted in breach of her duty to IHC to act with skill, care and diligence.

(c) The Crest entities and Mr Aathar dishonestly assisted Mr Fan in his breach of duties to IHC. Ms Lim is not liable for this cause of action.

(d) The Crest entities, Mr Fan and Mr Aathar engaged in an unlawful means conspiracy to injure IHC. Again, Ms Lim is not liable for this cause of action.

336 In terms of remedies and reliefs, I grant judgment as follows:

(a) Against the Crest entities, Mr Fan and Ms Lim, jointly and severally, for the sums paid by IHC towards the Standby Facility, totalling $4,538,800 to IHC.

(b) Against the Crest entities and Mr Fan, jointly and severally, for interest representing loss of use of the S$4,538,800, amounting to S$4,440,780.77 to IHC.

(c) Against the Crest entities and Mr Fan, jointly and severally, on the basis that the plaintiffs would have paid off the outstanding Geelong Facility liability on its maturity date of 28 February 2016, in favour of the plaintiffs:

(i) the sum of S$3,615,066.07, as post-maturity interest and default interest; and

(ii) loss of the Australian business, the quantification of which will be determined in separate proceedings.

337 In addition, I make an order that the Crest entities are not to charge the plaintiffs for any costs, expenses or fee relating to the Crest receivership, or to deduct any such costs, expenses or fees from the monies held in the escrow account pursuant to the 20 October Court Order and/or the order of court dated 1 July 2019 in these proceedings.

338 I do not, however, award damages for two losses connected to the 20 October Court Order *ie,* the cost of the banker's guarantee and the interest, default interest and exchange rate difference. I also do not award damages for a claim of overcharged default interest amounting to S$90,816 (as a form of loss of use of payments made towards the Standby Facility).

339 While I am of the view that Mr Aathar is liable, jointly and severally with the Crest entities and Mr Fan, for the above amounts, I am not in the position to grant judgment against him. The plaintiffs are at liberty to take any necessary action against Mr Aathar.

340 I dismiss the Crest entities' counterclaims, as well as Ms Lim's counterclaims.

341 Parties are to provide their costs submissions, and apply for other consequential orders (if any), within two weeks of this judgment.

Hoo Sheau Peng
Judge

Lee Eng Beng SC, Cheng Wai Yuen Mark, Chow Chao Wu Jansen, Danitza Hon Cai Xia and Sasha Gonsalves (Rajah & Tann Singapore LLP) for the plaintiffs;
Manoj Pillay Sandrasegara, Chng Zi Zhao Joel, Tan Kai Yun and Wong Zheng Hui Daryl (WongPartnership LLP) for the first to fifth defendants;
The sixth defendant unrepresented;
Goh Kok Leong, Ng Weiting and Daniel Tan An Ye (Ang & Partners) for the eighth defendant.
