IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2025] SGHC(A) 7

Appellate Division / Civil Appeal No 19 of 2024

Between

Goh Jin Hian

… *Appellant*

And

Inter-Pacific Petroleum Pte Ltd
(in liquidation)

… *Respondent*

In the matter of Suit No 953 of 2020

Between

Inter-Pacific Petroleum Pte Ltd
(in liquidation)

… *Plaintiff*

And

Goh Jin Hian

… *Defendant*

JUDGMENT

[Companies — Directors — Duties — Duty of skill, care and diligence]

[Companies — Directors — Duties — Duty to take into account interests of creditors]
[Damages — Remoteness]

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v
Inter-Pacific Petroleum Pte Ltd (in liquidation)

[2025] SGHC(A) 7

Appellate Division of the High Court — Civil Appeal No 19 of 2024
Tay Yong Kwang JCA, Woo Bih Li JAD and Kannan Ramesh JAD
21 February 2025

5 June 2025 Judgment reserved.

Kannan Ramesh JAD (delivering the judgment of the court):

Introduction

1 It is trite that a director should not be a "mere *sentinel* who … occasionally doze[s] off at his post" [emphasis in original] (*Vita Health Laboratories Pte Ltd and others v Pang Seng Meng* [2004] 4 SLR(R) 162 at [21]). Such dereliction of duty presents incipient risks to the company as it presents fertile ground for abuse, often attracting severe consequences. It is for this reason that the law creates a range of sanctions against directors who abdicate their duties by turning a blind eye to the affairs of their companies.

2 However, it does not follow that where a director has fallen asleep at the wheel, *any or all* losses occasioned to the company during the slumber should be vested on the director. Where the director has breached the duty of care, skill and diligence ("Care Duty"), the burden is on the company to prove that the

breach has caused the loss suffered by the company. Whether the company has discharged this burden is the principal issue in this appeal.

3 One other issue arises before us. In the main, the issue concerns the liability of the appellant, Dr Goh Jin Hian ("Dr Goh"), for breach of the duty to act in the best interest of the creditors ("Creditor Duty") of the respondent, Inter-Pacific Petroleum Ptd Ltd ("IPP"), at a time when IPP was either imminently likely to be unable to discharge its debts or was facing insolvency proceedings.

4 In the proceedings below, IPP claimed against Dr Goh for breach of the Care Duty and the Creditor Duty. IPP alleged that (a) Dr Goh had breached the Care Duty and Creditor Duty in relation to various drawdowns ("Cargo Drawdowns") for fraudulent cargo trades made (not by Dr Goh) on IPP's bank facilities, and (b) Dr Goh had breached the Creditor Duty in relation to various drawdowns ("Bunker Drawdowns") on IPP's bank facilities for bunker trades (not made by Dr Goh). In *Inter-Pacific Petroleum Pte Ltd (in liquidation) v Goh Jin Hian* [2024] SGHC 178 ("GD"), a Judge of the General Division of the High Court ("Judge") found that Dr Goh had breached (a) the Care Duty and Creditor Duty in relation to the Cargo Drawdowns, and (b) the Creditor Duty in relation to the Bunker Drawdowns. However, the Judge awarded IPP damages, in the sum of US$146,047,099.60, in relation to the Cargo Drawdowns only as he found that IPP did not suffer any loss in relation to the Bunker Drawdowns. Dissatisfied, Dr Goh appeals against the Judge's decision on breach of the Care Duty and Creditor Duty as regards the Cargo Drawdowns. Dr Goh has not appealed the Judge's decision on breach of the Creditor Duty as regards the Bunker Drawdowns. IPP has not cross-appealed the Judge's decision not to award damages as regards the Bunker Drawdowns.

5 Having considered the parties' submissions, we allow the appeal. We provide our reasons below and begin by recounting the salient facts.

Facts

The parties

6 IPP was incorporated in Singapore on 28 June 2011. It was placed under judicial management on 4 September 2019 and in compulsory liquidation on 25 March 2021.

7 Dr Goh was a director of IPP between 28 June 2011 and 12 August 2019, when he resigned. The other directors of IPP at the material time were Ms Cheung Lai Na ("Zoe"), Ms Cheung Lai Ming ("Sara") and Mr Pek Chong Beng. The Chief Financial Officer was Mr Wallace To ("Wallace").

IPP's business operations

8 IPP had two lines of business, namely cargo trading and bunker trading:

(a) The cargo trading business involved the back-to-back purchase and sale of fuel oil, where delivery was made directly by IPP's suppliers to its customers.

(b) The bunker trading business involved the purchase and delivery of bunker fuel by IPP ex-wharf in bulk. IPP would "break bulk" the fuel and sell parcels to its customers. As bunker trading was regulated by the Maritime Port Authority of Singapore ("MPA"), IPP's bunker trading operations depended on the company maintaining (i) a bunker supplier licence; and (ii) a bunker craft operator licence ("Bunker Craft Operator

Licence"). The latter was for the purpose of operating a fleet of vessels to receive and deliver bunker fuel.

9 IPP obtained financing facilities from Societe Generale, Singapore Branch ("SocGen" and the "SocGen Facility") and Malayan Banking Berhad ("Maybank" and the "Maybank Facility") (collectively the "Banks" and the "Facilities"). The SocGen Facility was available for both the cargo and bunker trading businesses, and the Maybank Facility was available for only the cargo trading business.

The events leading up to IPP's liquidation

10 Following an enforcement check on 13 June 2019 on bunker tankers, the MPA discovered that the mass flow meter of a bunker tanker chartered by IPP had been tampered with. As a result, on 27 June 2019, the MPA temporarily suspended IPP's Bunker Craft Operator Licence.

11 IPP sought to lift the suspension of its Bunker Craft Operator Licence. Dr Goh spearheaded the negotiations with the MPA. At the same time, he corresponded with the Banks to assuage any concerns they might have over the impact of the suspension on the bunker trading business.

12 On 12 August 2019, Dr Goh met Zoe in Hong Kong. Dr Goh was told that IPP was unable to pay its debts to its bank creditors. As a result, Zoe had decided to file an application to have IPP placed under judicial management. Dr Goh resigned as director on the same day. The application for judicial management was filed on 16 August 2019, and on 29 August 2019, IPP was placed under interim judicial management. On 4 September 2019, IPP was placed under judicial management.

13 At a meeting with the Banks on 22 August 2019, Dr Goh discovered the extent of IPP's indebtedness to the Banks. He was informed that IPP owed almost US$90m to SocGen and US$60m to Maybank for cargo trades. On the same day, Dr Goh sent an email to the Singapore Police Force, referencing the meetings with Zoe and the Banks, to report IPP's debt exposure and highlight "the possibility of fraud in some of the transactions".

14 IPP's judicial managers (the "JMs") subsequently concluded that between 21 June 2019 and 2 August 2019, IPP had made drawdowns on the Facilities in the sum of:

(a) US$146,047,099.60 for cargo trades (these were the Cargo Drawdowns); and

(b) US$10,508,238.71 for bunker trades (these were the Bunker Drawdowns).

These drawdowns were not repaid.

15 The JMs also discovered that large sums were purportedly due and owing by various customers to IPP for cargo sales. When the JMs sought to collect these sums, the putative customers denied liability on the ground that they did not enter into the trades in question. The JMs concluded that the receivables (as well as the purchase and sale transactions that apparently underpinned them) were shams.

The parties' cases below

16 We set out the parties' cases below only insofar as they relate to the issues before us.

IPP's case below

17 As stated above, IPP's case against Dr Goh below was anchored on breaches of two duties, namely the Care Duty and the Creditor Duty.

Breach of the Care Duty

18 IPP claimed that Dr Goh was an executive director of IPP and should therefore be held to a higher standard of care than a non-executive director. IPP claimed in the alternative that regardless of whether Dr Goh was an executive or non-executive director, he ought to have taken reasonable steps to place himself in a position to guide and monitor the company's affairs and management.

19 IPP's claim for breach of the Care Duty related only to the Cargo Drawdowns. IPP alleged that Dr Goh had breached the Care Duty for two main reasons: (a) Dr Goh was unaware of the cargo trading business, and/or (b) Dr Goh should have acted with reasonable skill and care in respect of three "red flags" that concerned the cargo trading business.

20 On the first reason, IPP pleaded that Dr Goh had "failed to acquire and maintain a sufficient knowledge and understanding of IPP's business, to keep himself informed about the activities and business affairs of the company, and to maintain familiarity with [its] financial status". At trial, this allegation was refined to Dr Goh not being aware of the cargo trading business as one of IPP's directors. As the cargo trading business was the source of the fraud and Dr Goh was unaware of this line of business, IPP submitted that this was *ipso facto* an egregious breach of the Care Duty.

21 On the second reason, IPP asserted that Dr Goh had failed to act with reasonable skill and care in the face of three red flags. If he had done so, he would have been put on a path of inquiry into IPP's financial position, which would have resulted in the sham cargo trades being uncovered. The red flags were:

(a) an audit confirmation request signed by Dr Goh, which had been sent on or about 7 February 2018 to Mercuria Energy Trading Pte Ltd ("Mercuria"), specifying receivables that were allegedly due and owing by Mercuria to IPP ("Mercuria ACR");

(b) the suspension of IPP's Bunker Craft Operator Licence on 27 June 2019 ("Suspension"); and

(c) three confirmations of indebtedness signed by Dr Goh on 17 July and 24 July 2019, which had been sent to Maybank shortly before IPP had applied to be placed under judicial management ("Maybank Confirmations").

22 IPP asserted that as a result of breach of the Care Duty as outlined above, Dr Goh failed to prevent IPP from making the Cargo Drawdowns. IPP consequently suffered loss, namely its liability to the Banks for the Cargo Drawdowns. Dr Goh's negligence was an effective and proximate cause of IPP's loss, and he should be liable for it. Specifically as regards the red flags, IPP's case was simply that all of the red flags should have led Dr Goh to make inquiries into the state of IPP's unpaid receivables from Mercuria, which would have led him to discover that many of the receivables were in fact for sham cargo transactions. Accordingly, but for Dr Goh's breach of the Care Duty, the fraud and loss would have been averted as any reasonable director would have stopped the Cargo Drawdowns.

Breach of the Creditor Duty

23 IPP also claimed against Dr Goh for breach of the Creditor Duty in relation to the Cargo Drawdowns and the Bunker Drawdowns. IPP asserted that the Cargo Drawdowns and Bunker Drawdowns occurred when the company was balance-sheet insolvent and/or in a parlous financial position. Dr Goh's failure in such circumstances to ensure that IPP's assets were not dissipated was a breach of the Creditor Duty. IPP thus suffered loss, namely, its liability to the Banks for the Cargo Drawdowns and Bunker Drawdowns.

24 There was a significant difference between the cargo trades and the bunker trades. While the former were sham transactions, the latter were not. Nevertheless, IPP pursued the claim for breach of the Creditor Duty in relation to the Bunker Drawdowns. IPP submitted that it suffered loss because there was no reasonable prospect that it would be able to repay the Banks, even if the bunker trades were genuine.

Dr Goh's defence

Dr Goh's defence to the Care Duty claim

25 Dr Goh asserted that he had intentionally transitioned to the role of a non-executive director of IPP from July 2015 until his resignation in August 2019. As a non-executive director, he was subject to a lower standard of care, especially in relation to the monitoring and supervision of IPP's affairs, and he was entitled to rely on the information provided to him by the other directors and IPP's employees.

26 Dr Goh denied that he was unaware of the cargo trading business. He contended that the evidence adduced by IPP with respect to this claim did not show that he was unaware of the cargo trading business.

27 Dr Goh contended that the three red flags were not sufficient to put him on a train of inquiry as alleged. He further contended that there was no assertion of the steps that he ought to have taken that would have led to the fraud being uncovered, had he discharged the Care Duty in relation to the red flags.

28 Finally, Dr Goh disputed causation. He submitted that he was not likely to have discovered the sham cargo trades and prevented the loss arising from the Cargo Drawdowns even if he had discharged the Care Duty. Any attempt to inquire or investigate into IPP's financial situation would have been stymied by the other directors and employees of IPP, who had either masterminded or helped to further the fraudulent scheme.

Dr Goh's defence to the Creditor Duty claim

29 Dr Goh raised two defences to the Creditor Duty claim:

(a) The Creditor Duty was not engaged as IPP had not demonstrated that it was insolvent or in a parlous financial position at the material time, and that he had or ought to have known of this.

(b) Even if the Creditor Duty was engaged, Dr Goh reasonably believed that the Cargo Drawdowns and the Bunker Drawdowns were in IPP's interests, as the transactions were structured to ensure that IPP would derive a trading profit from them. In any case, breach of the Creditor Duty should only be limited to the Cargo Drawdowns that he was aware of, which were the drawdowns that formed the bases for the Maybank Confirmations that Dr Goh had signed.

The decision below

30 IPP's claims against Dr Goh were substantially made out in the proceedings below. The Judge found that Dr Goh had breached the Care Duty and Creditor Duty in relation to the Cargo Drawdowns, and the Creditor Duty in relation to the Bunker Drawdowns (GD at [183] and [219]). The Judge was satisfied that loss was occasioned as a result of the breach of the Care Duty and the Creditor Duty in relation to the Cargo Drawdowns (GD at [346]–[349]). However, he found that no loss was caused by the breach of the Creditor Duty in relation to the Bunker Drawdowns (GD at [241]). We summarise the Judge's reasons for these findings briefly below insofar as they relate to the issues on appeal before us and expand upon them when we consider each issue.

The Judge's findings on breach

31 On the Care Duty, the Judge agreed with IPP that Dr Goh ought to be held to the standard of a reasonably diligent executive director (GD at [83]), as the evidence showed his high level of involvement in the management decisions for IPP (GD at [76]), although he did not possess any special skills or expertise (GD at [82]).

32 Applying this standard, the Judge found that Dr Goh had breached the Care Duty. The Judge found that Dr Goh was ignorant of the cargo trading business. The Judge relied on four pieces of evidence which are described below at [58], [68]–[71], [75] and [80] to support this conclusion (GD at [102], [120], [123] and [131]). We consider the Judge's reasons at [54]–[84] below.

33 The Judge also found that Dr Goh had failed to act reasonably in the face of the three "red flags" (see [21] above). We explain the Judge's reasons when we consider the red flags below (see [85]–[114] below).

34 The Judge found that the Creditor Duty was engaged as IPP was balance sheet insolvent at the material time (GD at [202] and [205]). Significantly, he found that the Creditor Duty had been breached notwithstanding that (a) Dr Goh was not aware of the cargo trading business or the cargo trades (GD at [212]). This was because the test for whether the Creditor Duty was breached was not purely subjective (GD at [193]–[200]).

The Judge's findings on loss

35 The Judge found that IPP had proven its loss in relation to the Cargo Drawdowns, but not in relation to the Bunker Drawdowns (GD at [224]–[226]). The Judge found that IPP had not proven its loss in relation to the Bunker Drawdowns for two reasons. First, IPP's assertion of loss was "threadbare". Second, IPP conflated the loss suffered by SocGen as creditor with the loss suffered by IPP. The latter was the relevant loss for the purpose of breach of the Creditor Duty and IPP adduced no meaningful evidence of this (GD at [225]–[227]).

36 The Judge found that loss was suffered in relation to the Cargo Drawdowns as they were shams. This meant that IPP had incurred liability to repay the Banks without receiving the benefit of the moneys that were disbursed under the Facilities. This caused an adverse change in IPP's net asset position resulting in IPP suffering a loss (GD at [242]).

The Judge's findings on causation

37 The Judge found that breach of the Care Duty caused the full extent of losses claimed by IPP in relation to the Cargo Drawdowns for two reasons:

(a) First, as "a matter of common sense", IPP's loss would not have occurred but for Dr Goh's ignorance of the cargo trading business; the

cargo trading business could not have been used as a vehicle of fraud if Dr Goh was aware of and watched over it (GD at [348]).

(b) Second, even if Dr Goh was not ignorant of the cargo trading business, he nonetheless did not act reasonably in respect of the Mercuria ACR. The Judge held that but for this breach of duty, IPP would never have made the Cargo Drawdowns (GD at [349]).

Notably, the Judge did not address the other red flags.

38 The Judge rejected Dr Goh's contention that any attempt to make inquiries into IPP's financials and investigate the fraud would have been stymied by Zoe and Wallace. It could not be assumed that Zoe and Wallace would not have revealed the truth to Dr Goh and it was speculative to conclude that they would have been able to hoodwink him on every occasion if proper inquiries had been made, given his intellect and experience (GD at [351]–[357]). Furthermore, there were other reasonable courses of action that Dr Goh could have pursued including contacting Mercuria, which would have confirmed that it had no dealings with IPP (GD at [358]–[360]).

39 Relying on the Court of Appeal's decision in *Sim Poh Ping v Winsta Holding Pte Ltd and another and other appeals* [2020] 1 SLR 1199 ("*Sim Poh Ping*"), the Judge held that breach of the Creditor Duty was a claim for equitable compensation for a non-custodial breach of fiduciary duty. Thus, once breach and the fact of loss were shown, a rebuttable presumption arose against Dr Goh that the breach of duty caused the loss. Dr Goh had the burden to rebut the presumption by showing that IPP would have suffered the loss regardless of the breach (GD at [239] and [342]). As breach and the fact of loss were established, the presumption arose, which Dr Goh had failed to rebut.

40 Accordingly, the Judge awarded damages for the Cargo Drawdowns in the sum of US$146,047,099.60 along with interest at the rates provided for in the Facilities (GD at [370]).

The parties' cases on appeal

41 We set out briefly the parties' respective cases on appeal and expand upon them when considering the issues before us.

Dr Goh's case on appeal

42 Dr Goh does not contest the Judge's finding on the standard of care to be applied as regards the Care Duty.

43 On the Care Duty, Dr Goh challenges the Judge's finding that he was not aware of the cargo trading business. He submits that the Judge construed the four pieces of evidence out of context and should not have parsed the documentary evidence word-by-word.

44 Dr Goh submits that there were no "red flags" that necessitated inquiries into IPP's financial position. Dr Goh further submits that IPP had not proven how its losses were caused by breach of the Care Duty.

45 On the Creditor Duty, Dr Goh submits that (a) IPP was not insolvent or in a parlous financial position at the material time, and (b) the Creditor Duty only applied where the director had knowledge of the company's insolvent and/or financially parlous position. In any case, Dr Goh also highlights that he did not arrange or authorise the Cargo Drawdowns, and that the burden of proof should not be reversed as the Judge had found, because breach of the Creditor Duty was not a breach of a "core duty" as stated in *Sim Poh Ping*.

IPP's case on appeal

46 On the Care Duty, IPP submits that the Judge was correct in concluding that Dr Goh was not aware of the cargo trading business. In this regard, IPP relies on the four pieces of evidence that the Judge had analysed in the GD.

47 IPP submits that the Mercuria ACR, the Suspension and the Maybank Confirmations were red flags that should have caused Dr Goh to make inquiries into IPP's financial position. This would have resulted in the fraud being uncovered and the loss prevented.

48 IPP submits that the Creditor Duty was engaged as the company was insolvent on the balance sheet and cash flow tests. It did not matter that Dr Goh did not authorise or knew of the Cargo Drawdowns. Dr Goh had breached the Creditor Duty when IPP incurred liability to the Banks for the Cargo Drawdowns in view of the fact that IPP was not in a position to discharge the debt.

49 IPP submits that breach of the Care Duty caused IPP loss and disagrees that Dr Goh would have been prevented from discovering the fraud. IPP argues that Dr Goh's lack of awareness of the cargo trading business was enough for him to be held responsible for the full extent of its loss, as "a director who fell completely asleep and did nothing while the very life of the company was being vigorously and entirely drained in his stupor must be held to be liable for the losses suffered by the company". IPP relies on the Judge's analysis that if proper inquiries had been made, the Cargo Drawdowns would have been prevented and the loss therefore averted.

50 In respect of the Creditor Duty, IPP submits that the Judge was correct to conclude that the burden of proof was reversed, as it was a core financial duty

under *Sim Poh Ping*. In the alternative, IPP submits that it had proven causation on the basis that but for breach of the Creditor Duty, the Cargo Drawdowns would not have taken place.

Issues before us

51 The following issues arise for our determination:

(a) First, whether Dr Goh had breached the Care Duty. This raises two subsidiary issues:

(i) Whether Dr Goh was ignorant of the cargo trading business; and

(ii) Whether Dr Goh had failed to act reasonably in response to the three red flags (*viz* the Mercuria ACR, the Suspension and the Maybank Confirmations);

(b) Second, whether Dr Goh had breached the Creditor Duty;

(c) Third, whether IPP had suffered loss; and

(d) Fourth, whether breach of the Care Duty and the Creditor Duty caused the loss to IPP in relation to the Cargo Drawdowns.

Whether Dr Goh breached the Care Duty

52 While Dr Goh does not challenge the Judge's conclusion on the relevant standard of care, it would be helpful to briefly set out the relevant legal principles to contextualise the analysis on the first issue. The Care Duty finds statement in s 157(1) of the Companies Act 1967 (2020 Rev Ed) ("Companies Act"), which provides that a "director must at all times act honestly and use reasonable diligence in the discharge of the duties of his or her office". This

encapsulates a director's common law duty of care: *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 ("*Ho Yew Kong*") at [134].

53 The standard of care to be applied "will not be lowered to accommodate any inadequacies in the individual's knowledge", and will instead "be raised if he held himself out to possess or in fact possesses some special knowledge or experience": *Ho Yew Kong* at [136], citing with approval *Prima Bulkship Pte Ltd (in creditors' voluntary liquidation) and another v Lim Say Wan and another* [2017] 3 SLR 839 ("*Prima Bulkship*") at [43]–[44]. All directors, regardless of whether they are engaged in an executive or non-executive capacity, are subject to a "minimum objective standard of care which entails the obligation to take reasonable steps to place oneself in a position to guide and monitor the management of the company": *Ho Yew Kong* at [137]. With that, we turn to the first subsidiary issue.

Dr Goh's ignorance of the cargo trading business

54 As stated earlier, the Judge found that Dr Goh was not aware of the cargo trading business (GD at [89]). This is a finding of fact. Dr Goh challenges the finding on appeal.

55 Appellate intervention on findings of fact is only warranted if the assessment below was "plainly wrong or manifestly against the weight of the evidence": *Yong Kheng Leong and another v Panweld Trading Pte Ltd and another* [2013] 1 SLR 173 at [18]. In our view, there is no basis for appellate intervention on the Judge's finding. It is important in this regard that the finding is based on inferences the Judge drew from documentary evidence, namely the four pieces of evidence, and not just on the credibility of the witnesses. In relation to inferences of fact, the appellate court is entitled to engage in a *de*

novo review, as it would be as competent as the trial judge to draw the necessary inferences of fact from the objective evidence before it: *Lim Chee Seng v Phang Yew Kiat* [2024] 5 SLR 106 at [59], citing the Court of Appeal's decision in *Sandz Solutions (Singapore) Pte Ltd and others v Strategic Worldwide Assets Ltd and others* [2014] 3 SLR 562 at [37]–[41].

56 The Judge relied on four pieces of documentary evidence to arrive at the finding:

(a) an email sent by Dr Goh to the Police on 22 August 2019;

(b) the transcript of Dr Goh's interview with the JMs on 27 February 2020 (the "February 2020 Interview");

(c) a conversation over WhatsApp between Dr Goh and Wallace on 13 November 2018 (the "November 2018 Conversation"); and

(d) various communications from Dr Goh following the Suspension.

57 The question therefore is whether the inferences that the Judge drew from these pieces of evidence were plainly wrong or against the weight of the evidence. For the reasons that follow, we agree with the Judge's assessment of the evidence. In our view, a plain reading of the four pieces of evidence shows that Dr Goh was indeed not aware of the cargo trading business. Accordingly, there was nothing manifestly wrong with the Judge's conclusion.

Dr Goh's email to the Police

58 We begin with Dr Goh's email to the Police of 22 August 2019. In the email, Dr Goh reported the possibility of fraud by Zoe in the cargo trading business based on his meeting with the Banks on the same day. The salient portion of the email is reproduced below:

3. I have just met SocGen and Maybank to ask them how much the company owes. Apparently, IPP owes SocGen almost USD90M and Maybank USD69M. As these amounts cannot be explained by the bunkering business (we only turn over USD60-70M a month), I have asked the banks to tell me the nature of the bank lines, i.e. what they were given for.

4. Both banks explained that the lines were extended for cargo trading on a back-to-back basis, ie structured trades where the banks issue LCs only upon receipt of shipping documents. Apparently the counter-parties that Zoe has traded with are:

A) Citus

B) Legend Six

C) Mercuria

D) Sinochem

There may be others, but the banks told me they had issued LCs and received payments from these 4 companies at various times, ie they could be buyer or seller. The banks dealt mainly with Wallace To and Cecilia for these transactions. Trading contracts were usually signed by Zoe and Stephen.

5. I am highlighting the possibility of fraud in some of these transactions, as I cannot understand why the buyers are unable to make payments for the cargoes, if they had received them, as evidenced by the Bills of Lading provided to the banks. There is a possibility that some of these BLs were fakes.

6. I cannot speculate how the banks failed to verify the authenticity of the BLs. However, SocGen informed me that Deloitte told them that Chuangxin owes IPP USD200M plus (inter-company loan). Again, I cannot confirm this as Deloitte has not kept me in the loop. In any case, this amount cannot be explained by bunkering.

7. In terms of money flow, I therefore feel that we are barking up the wrong tree. I don't think the issue lies with the bunkering business (it's small relative to the lines extended by the banks for cargo trading). You were asking me how the company made its money. It now appears to me that Zoe has been engaging in cargo trades, some of which may now turn out to be fraudulent.

[emphasis added in bold]

59 We agree with the Judge that the portion of the email quoted above suggests quite clearly that Dr Goh had learnt about the cargo trading business for the first time from the Banks at his meeting with them. This is made plain by the fact that Dr Goh was not aware that the Facilities were used for IPP's cargo trading business until he was told by the Banks. By asking what the Facilities were used for and observing that the debt owed to the Banks could not be solely due to the bunker trading business, Dr Goh clearly showed that he was only aware of the bunker trading business. Indeed, if Dr Goh had properly applied his mind to IPP's affairs, it would have been apparent to him that the Maybank Facility was only for the cargo trading business. That he had to ask to understand is significant.

60 On appeal, Dr Goh submits that the purpose of the email was to inform Investigating Officer Tan Ruiyun ("IO Tan") that some of the cargo trades might be fraudulent (as opposed to a "compound" discovery that IPP had carried on a cargo trading business *and* that it had been employed a vehicle for fraud). Dr Goh points out that he had been corresponding with IO Tan "solely in relation to the Suspension" because IO Tan was only investigating the Suspension, and therefore IO Tan "had nothing to do with cargo transactions or other aspects of IPP's business."

61 We find Dr Goh's explanation contrived. The purpose of the email is clear. The only issue IO Tan was concerned with was the suspension of IPP's Bunker Craft Operator Licence. Discovery of the fraudulent cargo trades and the debt owed to the Banks were separate matters. By sending the email, Dr Goh was plainly intending to update IO Tan on what he had been told by the Banks, namely that IPP owed about US$159m to the Banks of which some part was for cargo trades that were fraudulent. To distance himself from these trades, Dr Goh had carefully prefaced his statements with expressions like "apparently",

"[b]oth banks explained" and "the banks told me", conveying the impression that he felt that he was not in a position to speak about the cargo trading business. This lends itself to the inference that Dr Goh was hitherto unaware of the cargo trading business.

The February 2020 Interview

62 We turn to the February 2020 Interview. On appeal, Dr Goh raises two procedural objections on the use of the February 2020 Interview.

63 First, Dr Goh asserts that the February 2020 Interview was conducted on a "without prejudice" basis. This objection was rejected by the Judge and may be disposed of briefly.

64 The issue of whether the February 2020 Interview was "without prejudice" was decided against Dr Goh in the proceedings below. Dr Goh applied in HC/SUM 2874/2021 ("SUM 2874") to strike out the February 2020 Interview exhibited at "TWC-32" of the affidavit of Mr Tan Wei Cheong ("Mr Tan"), one of the JMs and liquidators of IPP, on the ground that the interview was on a "without prejudice" basis. In dismissing the application, the court held that the parties only intended that Dr Goh "should not be bound by or held to what he said at the meeting *and would instead be entitled to correct anything he said at the meeting*". Accordingly, the February 2020 Interview was found not to be conducted on a "without prejudice" basis and it was not open to Dr Goh to challenge its admissibility at the trial or on appeal.

65 Second, Dr Goh takes issue with the fact that he never had sight of the transcript of the February 2020 Interview and therefore "had no opportunity to correct himself prior to the trial". This too is an unmeritorious point. The transcript was reproduced in TWC-32, which was filed as early as 1 June 2021,

well before the trial. Dr Goh knew that the transcript was relevant as he sought to challenge its admissibility in SUM 2874. He could and should have sought to correct any inaccuracies following the dismissal of SUM 2874. In any event, Dr Goh had more than ample time and opportunity to explain the contents of the transcript at trial. He had the opportunity to explore any inconsistencies with the JMs and offer his explanation in evidence, which he in fact did. As the Judge considered and rejected his explanation (see the GD at [116]–[119]), there is no basis for Dr Goh's complaint that the Judge "completely [ignored] Dr Goh's explanations / corrections" and unfairly held him to what he had said at the February 2020 Interview as recorded in the transcript.

66 We turn to what was set out in the transcript of the February 2020 Interview. The Judge referred to various parts of the transcript, the first of which is reproduced below:

> Mr Tan: *So when you signed those documents in relation to the Maybank, would you not be able to tell that these are cargo trades?*
>
> *Dr Goh:* *Yes, but I thought it was ex-wharf, lah. When I went – when I informed the police and the police asked me the same thing, I kept saying, "No, all these are bunker, bunker: so bunker, what cargo? We don't do cargo, we're only doing bunker." We are not like cargo, because when I went to my list co I told them "You only do cargo", and by "cargo" it means you move shipments from -- I buy from Sinopec, you know, in China, I ship to Korea, I buy from whatever …*
>
> …
>
> [emphasis added in the GD]

67 In the Judge's view, "[t]his exchange revealed Dr Goh's belief that IPP had only been involved in bunkering and not cargo trading", not least because his attention had been directed specifically to the Maybank Facility which,

again, financed the cargo trading operations exclusively (GD at [108]–[109]). In our view, the Judge was well entitled to conclude thus.

68 The Judge then referred to the following exchanges which, in his view, confirmed Dr Goh's mistaken belief that IPP had only been involved in bunker trading (GD at [111] and [114]):

> Dr Goh: … *My assumption was we are in the bunker industry. The bank lines, I signed off for bunker, so everything is purely bunker-related. Cargo, ex-wharf cargo from breaking bulk, yes.* But not cargo as in we are buying -- like I said, what I'm doing [*sic*] the other side: buying from one refinery here, shipping to a buyer somewhere else. Chuang Xin may have been doing it. To be fair, Chuang Xin may have been doing it, but like I said, I have no visibility. *My responsibility in my mind is IPP: can IPP do cargo? That's what they asked. I say, "You look around my team. Which one of these guys are cargo traders?" I said, "There's not a single cargo trader in my company." And I said, "As a bank, all of you bankers know there is no cargo trader in my company.* All your Woon Leongs, I don't [*sic*] what their names are, I have already forgotten their names.
>
> Mr Chong: Dave.
>
> Dr Goh: Dave, and then --
>
> Mr Chong: Jensen.
>
> Dr Goh: Jensen. *I said these are all bunker traders. They're not cargo traders.* I said, "The only guy who may qualify as a cargo trader is called Ken Bei. Ken Bei is working for a company called Pacific Dragon, which is not even IPP; Pacific Dragon is part of Chuang Xin. *So I said, "Why would you even tell me that I should know that IPP is a cargo trader?" I said, "There is no cargo trading I have to admit. There isn't a cargo trader in IPP." So if the banks allow the lines to be used, they knowingly allow it to be used at the Chuang Xin level.*
>
> …

Mr Tan: … So internally in a way -- you said that Zoe was the one who did most of the operations?

Dr Goh: Yes.

Mr Tan: (unclear). So on your part, how do you have oversight over what she's doing, in terms of all these trades?

Dr Goh: I have no oversight. She's mainly in Hong Kong. (unclear) She is not in Singapore … *I only have some oversight over the physical bunkering operations. That's what IPP was set up to do. IPP is a bunker company with a bunker supplier licence and a ship -- I don't know what the licence is called; the ship management whatever licence. Basically, there are two licences for bunker. …*

So, my responsibility, like I said, is purely bunkering operations for IPP. If today, you know, there are -- the banks say, "We know you are doing cargo trade", to be frank, I would say, "Look, I have no cargo traders in Singapore", which means if you allow the bank lines to be used for cargo trading, it's your own call at the bank's level. You must obviously know that the trader is in Hong Kong, because there is no trader in Singapore doing cargo. So you are dealing wholly with Zoe or Sara[] in Hong Kong, you are allowing a line that was -- the clause specifically states for bunkering to be used for other purposes, that's your own call. Maybe you want -- you think so highly of the company, you will allow variations of the line. But if you allow a variation of the bank line, you know, it's a departure from the -- what the line was meant to be used. That's your own call. You know, as a bank you make that call. I mean I didn't ask for it. That's why I keep saying, I didn't ask for it. *As far as I'm concerned, where is the expertise? I have no expertise in Singapore. How can I have the oversight? I have no clue. Because I will openly tell you there is no cargo trader sitting in the IPP office.* Right? None of these -- all of the counterparties, the last three that the police asked me to look at, they were Hong Kong companies …

[emphasis added in the GD]

69 Dr Goh submits that "the Judge's inferences were drawn based on a somewhat imprecise use [by Dr Goh] of 'cargo' and 'bunker'". There is no merit to this submission. Reading the exchanges contextually, Dr Goh drew a distinction between the bunker trading business, which he was familiar with (as evidenced by his reference to "*ex* wharf cargo from breaking bulk"), and the cargo trading business. This much was made clear when Dr Goh said:

> My assumption was we are in the bunker industry. The bank lines, I signed off for bunker, so everything is purely bunker-related. *Cargo, ex-wharf cargo from breaking bulk, yes*. But *not cargo as in we are buying -- like I said, what I'm doing [sic] the other side: buying from one refinery here, shipping to a buyer somewhere else. Chuang Xin may have been doing it.*
>
> [emphasis added]

Thus, the Judge was entitled to draw the inference which he did.

70 However, there is one part of the transcript which requires consideration:

> Maybank's line does not work that way, from what I understand. Because Maybank's line, the wording is purely back-to-back LC. A back-to-back LC, from my understanding, is you must first have a master LC from a buyer. You must first sell. So the pre-sale here is you pre-sell and you collect the LC from the buyer, all right? And then, based on the fact that you have an LC, Maybank, well that's it, okay. This LC is from an approved bank, it's a real bank and I approved the counterparty, I approved the structure of this trade. Then they will open the LC to the seller, to us.

71 Dr Goh relies on this as evidence of the fact that he *was aware* of the cargo trading business and how it functioned. He submits that he could only have given this explanation if he had been aware of the cargo trading business given that "only IPP's cargo trading operations were carried out on a back-to-back basis" and "[t]he bunker trading was not". We do not accept this submission and make four points. First, Dr Goh's explanation was not about back-to-back *sales*. Rather, it was about back-to-back *letters of credit*. As the

Judge explained at [46] of the GD, the cargo trading operations involved back-to-back sales in the sense that "each transaction was constituted by (a) a supply contract between IPP and its supplier (which was financed by the Banks); and (b) a sale contract between IPP and its customer". In the exchange above, Dr Goh conveyed his understanding that the Maybank Facility required IPP to have first pre-sold the goods and obtained a "master [letter of credit] from a buyer" before Maybank would open an import letter of credit in favour of IPP's seller. This should be contrasted with the SocGen Facility, which required IPP to present a "Bunker Delivery Note" for the opening of an import letter of credit. This is apparent from the following excerpt:

> I think the Maybank line was purely back-to-back. That's the term that's stated; it must be back-to-back. So Maybank's line is slightly different. SocGen's line is, "You give me the [Bunker Delivery Note], then I will issue the LC."

72 Second, it is important to place this response in the context of the other parts of the transcript cited above, which suggest that Dr Goh was not aware of the cargo trading business. In our view, the Judge was perfectly entitled not to assess this part of the transcript in isolation. Indeed, that would not be correct.

73 Third, just six months before the February 2020 Interview, in his email to the Police on 22 August 2019, Dr Goh had shown that he was not aware of the cargo trading business and was harbouring the misconception that the Maybank Facility was meant for cargo trading only. Indeed, as noted earlier, he tried to distance himself from those trades. If it is to be believed that Dr Goh was being truthful on both occasions, the portion of the transcript above could not have been about the cargo trading business.

74 Fourth, even assuming the part of the transcript reproduced above at [71] was about the mechanics and financing of the cargo trading operations, the fact

remains that the February 2020 Interview was some *six months after* Dr Goh had met the Banks and discovered that IPP was undertaking the cargo trading business. It is therefore questionable whether that part of the transcript is probative of the fact that Dr Goh knew and understood the cargo trading business at the material time. In this regard, it would be important to place Dr Goh's explanation in the context of the other pieces of evidence which the Judge relied upon, which were contemporaneous with Dr Goh discovering the fraud in the cargo trading business. The Judge was therefore entitled not to accept Dr Goh's explanation.

The November 2018 Conversation

75 In the November 2018 Conversation, Dr Goh asked Wallace if he had IPP's management accounts as at November 2018. Notably, when discussing IPP's profits, Dr Goh referred only to aspects of the bunker trading business such as ship repairs and upkeep. He did not refer to the cargo trading business.

76 The Judge placed weight on the fact that Dr Goh did not mention the cargo trading business in the November 2018 Conversation. He also rejected Dr Goh's explanation that the cargo trading business had not been relevant to their discussion because the Hong Kong listed company mentioned in the conversation was only interested in the bunker trading business (GD at [122]–[123]).

77 Dr Goh submits that the Judge erred for two reasons:

(a) First, Wallace would have been aware that Dr Goh oversaw the bunker trading operations only. This explains why he only provided Dr Goh with information on the "bunker profit" only and not on cargo trading.

(b) Second, the November 2018 Conversation concerned an acquisition of the bunker trading business by a Hong Kong listed company. Thus, Dr Goh's statement that "[i]f not profitable, then unlikely that IPP can be acquired by the HK listco", was in relation to the bunker trading business.

78 We agree with the Judge that the absence of any reference to the cargo trading business is significant. Dr Goh requested the "management accounts for IPP" which, as the Judge observed at [123] of the GD, could only be understood as referring to the management account of IPP's entire business. Yet, when Wallace provided Dr Goh with details on only the "bunker profit" and "chartering income", Dr Goh did not take issue with the accounts being incomplete or raise questions about the cargo trading business. Dr Goh's questions were restricted to the bunker trading business. As the Judge fairly noted, one would have expected Dr Goh to inquire into the performance of the cargo trading business specifically (had he been aware of it). Further, there was no reason for Wallace to think that Dr Goh was concerned only with bunker trading business unless he knew that Dr Goh was not aware of the cargo trading business. We are therefore of the view that the Judge did not err in concluding that the November 2018 Conversation supported the finding that Dr Goh was not aware of the cargo trading business.

Communications following the suspension of IPP's Bunker Craft Operator License

79 Finally, we address Dr Goh's communications with the Banks and Wallace following the Suspension. In brief, the Judge considered it significant that Dr Goh did not mention the cargo trading business to the Banks when "that, logically, should (assuming he knew about it) have become a focal point of IPP's strategy in tiding over the crisis in its bunkering business" (GD at [126]).

80 The Judge accorded weight to the following WhatsApp exchange between Dr Goh and Wallace:

> Dr Goh: Hi Wallace, there is a financial advisor in the IPP office. I understand the 2018 financials haven't been audited. Is there a problem?
>
> Wallace: As our license had been temporarily suspend, our auditor got a going concern issue, the auditor still waiting for the result
>
> we have extend the filing date to November, still got sufficient time to have audit
>
> we dont [*sic*] want the audit report state IPG got going concern opinion, bank never accept it

The Judge found it pertinent that despite a "going concern issue" from the Suspension, Dr Goh said nothing about the cargo trading business which formed about 50% of IPP's revenue. He observed that "any reasonable director in Dr Goh's position … would have inquired on how IPP's cargo trading business was doing amidst the suspension, as the emasculation of bunker trading business meant that the cargo trading business would have been IPP's best chance at staving off liquidation" (GD at [131]).

81 Dr Goh takes issue with the Judge's reasoning in the following terms:

(a) The Banks had full visibility on the cargo trades and required no independent reassurance on how the cargo trading business was performing.

(b) Dr Goh wrote to reassure Maybank given that "[t]he failure of one business line could have an adverse impact on the overall health of a company". Moreover, Maybank's Standard Terms and Conditions defined a "termination event" to include "an event or change [which] affects IPP's assets, affairs or financial condition and gives [Maybank]

reasonable grounds to conclude that [IPP] may not be able to perform [its] obligations".

(c) As regards the communications with Wallace, the "going concern issue" arose over the suspension of the Bunker Craft Operator License and "[i]t does not relate in any way to IPP's cargo trading business".

82 Dr Goh's submissions are logically inconsistent. If it is correct that the Banks did not need to be assured because they had the full picture on the cargo trading business, it is difficult to understand why it was necessary for Dr Goh to assure Maybank, which financed the cargo trading business. The cargo trading business was not impacted by the Suspension. Indeed, it would be more relevant to assure SocGen as it financed both the cargo and bunker trading business.

83 Dr Goh's submission on the exchange with Wallace is also not logical. When the IPP's auditor ("Auditor") raised a "going concern issue", that must be understood as referring to IPP's entire business and not just the bunker trading business which the Suspension related to. As only the bunker trading business was impacted by the Suspension, it would be reasonable for Dr Goh to have asked whether the cargo trading business would mitigate the issue given that it provided 50% of IPP's revenue. However, Dr Goh would only have asked the question *if he had been aware of that line of business*.

Conclusion on Dr Goh's ignorance of the cargo trading business

84 To conclude, we see no ground for appellate intervention in the Judge's finding that Dr Goh was ignorant of the cargo trading business. Indeed, we are of the view that the Judge's conclusion is justified on the evidence. As Dr Goh

does not challenge the Judge's finding that he would be in breach of the Care Duty if he was not aware of the cargo trading business, the finding of breach of the Care Duty therefore stands.

Dr Goh's failure to respond to the three "red flags"

85 We turn to the second sub-issue – the three "red flags".

86 The Judge found that Dr Goh had failed to act reasonably in the face of the three "red flags" (see [33] above). Each red flag should have raised alarm bells triggering an inquiry into IPP's financials. As Dr Goh failed to inquire, the Care Duty was breached. Specifically, as regards each red flag, the Judge held as follows:

(a) **The Mercuria ACR:** When Dr Goh signed the Mercuria ACR on or about 7 February 2018, Dr Goh should have made inquiries as to whether the receivables stated therein were delinquent because IPP could face a major crisis if this was so (GD at [147]–[148]). Dr Goh should not have relied on the assurances of IPP's employees that all was well with the company's finances (GD at [147] and [152]).

(b) **The Suspension:** Dr Goh should have made inquiries into IPP's financial health as the Suspension was a significant event that impacted its profitability and survival (GD at [155]–[157]).

(c) **The Maybank Confirmations:** It followed from the finding that the Suspension was a red flag that the same conclusion applied *a fortiori* to the Maybank Confirmations. Dr Goh should not have signed the Maybank Confirmations without first satisfying himself that IPP's finances were in order (GD at [164]–[166]).

87 On appeal, Dr Goh argues that there were in fact no red flags:

(a) **The Mercuria ACR:** The Mercuria ACR was "reassuring to a director that IPP had significant trades with a strong counterparty like Mercuria", and neither the Mercuria ACR nor representations from IPP's management and Auditor suggested delinquency. It was "wholly uncommercial [for a director] to be investigating the status of collections based on no more than an audit confirmation request" and Dr Goh was entitled to rely on IPP's other directors, employees and professional advisors to bring concerns about the receivables to his attention.

(b) **The Suspension:** Inquiring into IPP's financials was not the only way to assess IPP's financial health during the Suspension. Other options included communicating with existing customers, liaising with third parties to ensure the bunker trading business could continue, looking at IPP's operating account balance, checking with local staff and working to lift the Suspension.

(c) **The Maybank Confirmations:** When signing the Maybank Confirmations, there was no need to inquire into IPP's financial health. The fact that IPP was able to obtain financing from Maybank suggested that IPP was still able to continue engaging in profitable cargo trades and meet its payment obligations. The Judge should not have relied on the Suspension to rationalise the Maybank Confirmations as they were unconnected issues.

88 IPP's case on appeal was largely in line with the Judge's analysis and conclusion that Dr Goh breached the Care Duty by failing to respond reasonably to the red flags.

89 It is evident that the primary question in the present appeal is whether these purported red flags were in fact red flags on the cargo trading business that should have put Dr Goh on inquiry.

90 In this regard, the Mercuria ACR is the foundation of IPP's case on the red flags. This is perhaps because it is the only red flag that arose prior to the Cargo Drawdowns. The drawdowns were between June 2019 and August 2019. The Mercuria ACR pre-dated the drawdowns as it was signed on 7 February 2018. On the other hand, the Suspension and the Maybank Confirmations post-dated the drawdowns as the former occurred on 27 June 2019 and the latter was signed on 17 and 24 July 2019. In that sense, the Mercuria ACR was the only red flag that might have prevented the Cargo Drawdowns. Accordingly, we begin the analysis with the Mercuria ACR.

The Mercuria ACR dated 7 February 2018

91 The Mercuria ACR was an audit confirmation request to Mercuria prepared by the Auditor and signed by Dr Goh. It is therefore important to start by understanding the purpose of an audit confirmation request. An audit confirmation request is used by auditors as part of the auditing exercise to seek confirmation from a debtor that the debt stated in the books of IPP is truly due and owing. Indeed, this was the reason why the Mercuria ACR was prepared, as confirmed by the Auditor in HC/OA 399/2022 ("OA 399"). OA 399 was an action brought by IPP's liquidators to examine the Auditor. The Auditor audited IPP for the financial years ("FYs") ending on 31 December 2016 and 31 December 2017. The Auditor confirmed that the Mercuria ACR was for the purpose of verifying that there were debts owed by Mercuria to IPP for FY 2017, and the quantum of those debts.

92 However, IPP's case on the Mercuria ACR was not about verification of Mercuria's debt. Instead, it was primarily about delinquency. IPP asserts that because there was delinquency in the Mercuria account as at end 2017, Dr Goh should have asked if there were any sums overdue from Mercuria. In particular, IPP contends that Dr Goh himself should have called Mercuria to chase for payment or at least seek assurance from Mercuria that payment would be made.

93 There are three difficulties with IPP's case. First, as stated earlier, an audit confirmation request is about whether there is a debt and not about delinquency. Thus, when the Auditor presented Dr Goh the Mercuria ACR to sign, the question of delinquency would not have been pertinent. As the question of delinquency was not pertinent, the further question of whether Dr Goh should have inquired into that question would not arise, *unless there were signs of delinquency or if the question of delinquency was specifically raised*, which we address below at [96]–[105].

94 Accordingly, IPP's argument that Dr Goh could and should have followed up with Ms Estella Shi ("Ms Shi"), Mercuria's head of commodity trading, on whether the receivables would be paid is a non-starter. The fact remains that the Mercuria ACR was sent for the purpose of confirming Mercuria's debt to IPP. Mercuria did not reply to confirm liability. However, if the debt was disputed, it would be reasonable to expect that Mercuria would have responded to challenge liability given the size of the debt – US$132,336,475.39 – stated in the Mercuria ACR. But it did not. The absence of a response from Mercuria would not *per se* have suggested anything remiss about the debt stated in the Mercuria ACR.

95 IPP placed weight on Dr Goh's response in the February 2020 Interview that he "would have started chasing [Mercuria] if the exposure [under

Mercuria's account] is 20, 30 million". However, it is important to see his response in context. Dr Goh also said that "the alarming thing is not whether the number [due from a particular customer] is huge, [but] why [IPP is] not able to collect" from that customer. His emphasis was thus not on the fact that there was a sizeable debt, but rather whether the debt was delinquent. Indeed, when cross-examined, Dr Goh confirmed that he would only have been concerned about the receivables owed by Mercuria if there was delinquency. As Dr Goh said (and we accept), the fact that US$132 million was allegedly due from Mercuria was not in and of itself enough to put him on inquiry as (a) Mercuria was a big company, and (b) the size of the receivable could be explained by IPP's sizeable trading volume with Mercuria, which was about US$1 billion. Accordingly, we understand Dr Goh's evidence to be that he would have spoken to Ms Shi only if there was evidence of delinquency, either because that was evident from the documents or he had been told by IPP's employees that the Mercuria receivables were delinquent. Further, for reasons which we will come to below at [96]–[105], Dr Goh was not informed by Wallace (IPP's Chief Financial Officer), IPP's Finance Manager Ms Linda Yang or the Auditor that the Mercuria account was delinquent.

96 Second, the Mercuria ACR itself did not indicate that there was delinquency. In fact, it suggested the contrary. It stated that the receivables were within the usual 60-day credit term. This was confirmed by the Auditor in her affidavit filed in OA 399. She deposed that the invoices issued by IPP to Mercuria dated between October 2017 and December 2017 were within the credit term of 60 days.

97 Third, if there was an issue of delinquency when the Mercuria ACR was presented for execution, one would have expected the Auditor and IPP's management responsible for its financials to have raised it with Dr Goh. If they

did, the question of whether Dr Goh should have inquired into the issue might have arisen.

98 Ultimately, implicit in IPP's arguments is the assumption that there was evidence of delinquency at the material time when Dr Goh signed the Mercuria ACR. The evidence, however, suggests that that was not the case. Aside from reiterating the points above that the Mercuria ACR itself did not state that there was delinquency, and that the Auditor had not found any evidence of delinquency, we make two further points.

99 First, when the FY 2017 Accounts were eventually audited and issued after 7 February 2018, there was no question of delinquency at the end of FY 2017. Note 12 to the FY 2017 Accounts stated that no receivables were impaired as at 31 December 2017. This meant that there were no bad debts for FY 2017, which was consistent with the view taken by the Auditor that there was no delinquency. As no receivables were impaired, there was no reason to believe that any trade debtor of IPP, including Mercuria, was a credit risk, *ie*, was facing significant financial difficulties and was at risk of default.

100 Furthermore, Note 23 to the FY 2017 Accounts is also important for several statements it made. First, that there was no change to IPP's exposure to financial risks (including credit risk) or the manner in which IPP managed and measured those risks. Second, that IPP only dealt with creditworthy counterparties, had no significant concentration of credit risk of trade receivables, and had credit policies and procedures to minimise and mitigate its credit risk exposure. Third, crucially, that IPP's receivables were neither past due nor impaired and were owed by creditworthy debtors with a good payment record with the IPP. Finally, that trade debtors were of "high credit ratings and no history of default". This must have included Mercuria.

101 Taken together, the FY 2017 Accounts did not suggest that Mercuria's debts were delinquent. This is important as IPP's argument on delinquency rests on the allegation that at least US$45m of Mercuria's receivables were overdue by 31 December 2017 as reflected in Annex F of the SOC. The Judge accepted this in his analysis on why Dr Goh should have called Mercuria to press for payment (GD at [154]). This sum appears to be distilled from the company's accounting system ("Autocount"), but it is plainly contradicted by the financial statements for 2017. There was no reason for Dr Goh to examine the entries in Autocount in light of the unequivocal statements in the FY 2017 Accounts.

102 Second, when the FY 2017 Accounts were presented to Dr Goh for execution, also after 7 February 2018, he was not told by the Auditor that there were concerns over delinquency. This was despite the Auditor conceding that she was aware when the audit procedure was undertaken and the financial statements were issued in the middle of 2018 that the debt had been outstanding for more than 180 days. It is important to explain why the Auditor took this position.

103 While there were receivables owed by Mercuria that were outstanding for more than 180 days at the time of the audit, the Auditor was nonetheless satisfied that the receivables were not delinquent. She confirmed that the receivables were not delinquent through alternative testing steps taken in accordance with the Singapore Standard on Auditing and the ISCA Audit Programme (dated June 2016): she enquired and confirmed with Wallace and Mr Tay Jee Guan (IPP's accountant) that (a) it was for Mercuria to decide which of IPP's invoices it wanted to pay, as they had an ongoing and continuing commercial relationship, and (b) the finance department was unaware of any dispute raised by Mercuria in respect of IPP's invoices and audit confirmation letters. The representation was that there was no delinquency.

104 Further, IPP's finance manager, Ms Linda Yang, also assured Dr Goh that "there was nothing to be concerned about and that there were no significant bad debts", which Dr Goh understood as being consistent with "his own observation that it was business as usual".

105 Therefore, we find that there was no evidence of delinquency to trigger Dr Goh to inquire further. Seen in the round, we therefore find that the Mercuria ACR was not a red flag.

106 Before we conclude the analysis on the Mercuria ACR, we make a final observation. As noted above, Mercuria did not respond to the Mercuria ACR. Accordingly, as stated above at [103], the Auditor used alternative testing procedures to verify whether Mercuria was indeed a debtor. The Auditor had carried out various reconciliation steps to assess that the underlying transactions were genuine in light of the fact that Mercuria did not respond to the Mercuria ACR. Furthermore, the Auditor had deposed that she took steps to verify with IPP's management that there were receivables outstanding from Mercuria. These steps satisfied the Auditor that the FY 2017 Accounts were free from misstatements and the receivables owed by Mercuria were not in any way doubtful. In short, the Auditor did not uncover fraud in the cargo trading business and there was no such qualification or suggestion in the FY 2017 Accounts.

107 While we recognise that the purpose of an audit is not the same as an investigation into a fraud, it is important to remember that IPP's case is not that Dr Goh should have undertaken a forensic investigation in order to uncover the fraud. IPP's case is that the Mercuria ACR was a red flag on delinquency which should have prompted an inquiry into IPP's financials, resulting in the fraud in the cargo trading business being uncovered. There is no valid reason to say that

Dr Goh should have taken more steps than the Auditor as outlined above or that he would have received a different response if he had taken similar steps as the Auditor did, before he signed the Mercuria ACR. The latter is relevant to causation which we address later. Therefore, since the Auditor did not detect fraud during the audit, there is no valid reason to infer that Dr Goh would have done better.

108 For these reasons, we do not regard the Mercuria ACR as a red flag.

The Suspension on 27 June 2019

109 In our judgment, the Suspension is not a red flag. To appreciate why, it is important to place the Suspension in its proper context. The Suspension related to the bunker trading business. Dr Goh's focus was on negotiating with the MPA to lift the Suspension, given the adverse impact that the Suspension had on the bunker trading business, which as far as Dr Goh was concerned, was the only line of business that IPP had.

110 Dr Goh's perception was that the Suspension threatened IPP's survival *because it compromised the bunker trading business*. Dr Goh's communications with the MPA suggested that he saw the Suspension as putting IPP at risk of liquidation:

(a) In his email to the MPA dated 28 June 2019, Dr Goh asserted that the Suspension had the effect of "inadvertently destroy[ing]" IPP.

(b) In his email to the MPA and the Police dated 3 July 2019, Dr Goh asserted that the Suspension "affect[ed] the company's cash flow and ability to function".

(c) In his email to the MPA dated 4 July 2019, Dr Goh appealed to the MPA to lift the Suspension because IPP was under "tremendous financial strain" as a result of the Suspension.

(d) In his email to the MPA dated 24 July 2019, Dr Goh once again appealed, asserting that the Suspension would end up "destroying an innocent company", and "destroy the confidence that banks, customers and traders have in the bunker industry in Singapore". He also suggested that "IPP … [could go] into liquidation" as it was unable to continue the bunker trading business.

111 IPP asserts that Dr Goh should have made inquiries to ascertain its financial health and its true asset and liability position. However, given that Dr Goh's focus was on lifting the Suspension, we do not think it was reasonable to expect Dr Goh to embark on a comprehensive review of IPP's financial position. In Dr Goh's mind, lifting the Suspension would resolve the issue completely. Furthermore, even if Dr Goh had made the inquiries that IPP argues he should have done, it is unclear if he would have uncovered fraud in the cargo trading business even if he would have learned that IPP was carrying on such business. In this regard, IPP does not assert that the cargo trading business *per se* was not legitimate and if Dr Goh had known about it, he should and would have stopped it. Rather, the assertion is that some of the trades – the Cargo Drawdowns – were fraudulent.

112 For these reasons, we are not persuaded that the Suspension was a red flag.

The three Maybank Confirmations dated 17 and 24 July 2019

113 In our view, the Maybank Confirmations are not red flags. IPP's argument rests on the basis that when presented with the Maybank Confirmations, Dr Goh should have asked why IPP was incurring debts when the bunker trading business had been brought to a standstill by the Suspension and IPP would not be carrying on any other business. Notably, there is no assertion that it was apparent from the Maybank Confirmations that the debts were for cargo trades. However, if Dr Goh had asked, he might have found out that IPP was undertaking the cargo trading business. That would not, in and of itself, have raised a red flag for the reasons stated in paragraph [111] above.

114 To conclude, the three red flags were not in fact red flags that would have put Dr Goh on a train of inquiry leading to the fraud in the cargo trading business being uncovered and the loss thereby averted. We are therefore of the view that Dr Goh did not breach the Care Duty by reason of his conduct in relation to the red flags.

Conclusion on the Care Duty

115 In the round, we agree with the Judge to the extent that Dr Goh breached the Care Duty because he was not aware of the cargo trading business. However, we depart from the Judge's finding that Dr Goh breached the Care Duty as regards the red flags.

Whether Dr Goh breached the Creditor Duty as director of IPP

116 We turn to the second issue of whether Dr Goh had breached the Creditor Duty as regards the Cargo Drawdowns. The central inquiry is whether the Creditor Duty is engaged in circumstances where Dr Goh was not aware of the Cargo Drawdowns. The Judge found that Dr Goh did not know about the

Cargo Drawdowns (GD at [212]). This followed from the fact that Dr Goh was not aware of the cargo trading business. The Judge, however, found that knowledge on the part of Dr Goh was not a pre-requisite for the Creditor Duty to be engaged. With respect, the Judge erred in so concluding.

Applicable legal principles

117 The Creditor Duty was recently considered by the Court of Appeal in *Foo Kian Beng v OP3 International Pte Ltd (in liquidation)* [2024] 1 SLR 361 ("*Foo Kian Beng*"), which was decided after the Judge handed down his decision. However, the Judge contended that *Foo Kian Beng* did not result inany substantial change in the law that was cited to him by the parties in closing submissions.

118 Whether the Creditor Duty is breached depends on a two-stage analysis of (a) whether the Creditor Duty has arisen, (b) if it has, whether it has been breached (*Foo Kian Beng* at [90]–[93]).

119 In the first stage, the court should *objectively* determine which one of the three financial stages the company was in at the time the transaction was entered into or was likely to arise as a result of the company entering into the transaction (*Foo Kian Beng* at [103] and [105]):

(a) **Category one:** Where all things, including the contemplated transaction, having been considered, the company is solvent and able to discharge its debts.

(b) **Category two:** Where a company is imminently likely to be unable to discharge its debts. This category encompasses cases where a director ought reasonably to apprehend that the contemplated

transaction is going to render it imminently likely that the company will not be able to discharge its debts. It is, in other words, no excuse for a director to claim that he did not appreciate how dire the company's financial state was if he ought reasonably to have done so.

(c) **Category three:** Where insolvency proceedings are inevitable.

120 In the second stage, the court examines the subjective intentions of the director and determines whether he acted in what he considered to be the best interests of the company. Having regard to the first stage, the financial state of the company provides the analytical yardstick against which the subjective *bona fides* of the director may be tested (*Foo Kian Beng* at [106]):

(a) **Category one:** Where a company is, all things considered, financially solvent and able to discharge its debts, a director typically does not need to do anything more than act in the best interests of the shareholders to comply with his fiduciary duty to act in the best interests of the company. The Creditor Duty does not arise as a discrete consideration in such circumstances.

(b) **Category two:** In this intermediate zone, the court will scrutinise the subjective *bona fides* of the director with reference to the potential benefits and risks that the relevant transaction might bring to the company.

(c) **Category three:** Where insolvency proceedings are inevitable, there is a clear shift in the economic interests of the company (from the shareholders to the creditors as the main economic stakeholders of the company) because the assets of the company at this stage would be insufficient to satisfy the claims of creditors. The Creditor Duty operates

> during this interval to prohibit directors from authorising corporate transactions that have the exclusive effect of benefitting shareholders or themselves at the expense of the company's creditors.

121 If the court finds that a director has breached the Creditor Duty, it should consider whether it is appropriate to relieve him of liability under s 391 of the Companies Act. The court retains the discretion to so relieve a director on the cumulative account of him having acted honestly and reasonably, insofar as it is fair for the court to excuse him for his default (*Foo Kian Beng* at [107]). This question does not arise in this case in view of our conclusion that Dr Goh did not breach the Creditor Duty.

Dr Goh could not have breached the Creditor Duty

122 The touchstone for whether there is a breach of the Creditor Duty is the subjective state of mind of the director when the transaction in question was entered into. As *Foo Kian Beng* explains at [74], the "relevant question is whether the director exercised his discretion in good faith in what *he* considered (and not what the court considers) to be in the best interests of the company, as understood with reference to the financial state of the company prevailing at the material time" [emphasis in original].

123 The Creditor Duty therefore relates to the subjective intention of a director in *procuring* the company to enter into the transaction in question. The subjective intention is one of good faith in what the director considers to be the best interests of the company. In determining whether the director's assertion of good faith is tenable, the court will assess the claim objectively by asking whether the view the director claims to have formed was reasonably open to him or her based on the available information. In other words, the objective test is a touchstone for the subjective view that the director claims to hold. However,

the inquiry always remains the subjective intention of the director, which is fundamentally a question of *bona fides*.

124 As such, the Creditor Duty is only engaged if the director has authorised the relevant transaction (*Foo Kian Beng* at [77], [93] and [106]). It is for this reason that the director's state of mind is assessed as at the time of the transaction (*Foo Kian Beng* at [103]).

125 With respect, we therefore disagree with the Judge's finding that Dr Goh had breached the Creditor Duty. Dr Goh could not have breached the Creditor Duty if he did not exercise any discretion in relation to the Cargo Drawdowns. In our view, the Judge fell into error by taking the view that *Foo Kian Beng* did not foreclose the possibility of the Creditor Duty applying to a director who failed to act with due care. It is clear from *Foo Kian Beng* that the Creditor Duty only applies to a director who had exercised his discretion to transact.

126 For completeness, while this does not arise from our finding that the Creditor Duty does not apply to Dr Goh, we respectfully disagree with the Judge that IPP fell under "Category two" of the *Foo Kian Beng* framework (GD at [202]). In our view, this was a "Category three" situation as the insolvency of IPP was inevitable although Dr Goh was not aware of this before he met Zoe in Hong Kong on 11 August 2019. With the Cargo Drawdowns from June to August 2019, there were debts of around US$149m that could never be repaid by IPP, as there were no underlying transactions which would have generated positive cashflow to enable IPP to make payment to the Banks; the bunker trading business would not have been able to generate enough revenue to fill this gap. That insolvency was inevitable is confirmed by the fact that when Dr Goh met Zoe in Hong Kong on 11 August 2019, soon after the Cargo

Drawdowns, she said that IPP would apply to be placed under judicial management as it was unable to pay its debts to the Banks.

Whether IPP had suffered loss

127 We deal with IPP's arguments on causation shortly. But before that, we briefly address the question of whether IPP had suffered loss. We agree with the Judge's finding that IPP had suffered loss by virtue of the Cargo Drawdowns (see above at [36]). This is the correct conclusion as the Cargo Drawdowns were predicated on sham transactions: with every succeeding drawdown, IPP did not reap the benefit of a legitimate transaction which would have reintroduced funds into the company. Instead, IPP incurred liabilities to the Banks which it had no means of repaying, except by borrowing even more money from the Banks to cover up the fraud, thereby hollowing out IPP's financials even more.

Whether Dr Goh's breach of duty caused loss to IPP

128 Finally, we turn to the issue of causation. The issue arises with regard to Dr Goh's breach of the Care Duty by reason of his ignorance of the cargo trading business. The relevant losses are therefore the Cargo Drawdowns. The Judge concluded that once breach of the Care Duty was shown, causation and loss would follow. We respectfully depart from the Judge's finding on *causation* in this regard. The Judge's approach to causation was incorrect in our view. The correct approach is to consider whether the loss in question would have been

avoided *if Dr Goh had discharged the Care Duty*. This is a burden which IPP has to discharge. We find that IPP has failed to do so. We explain.

Applicable legal principles

IPP bears the legal burden of proving loss caused by Dr Goh

129 IPP bears the legal burden of establishing causation arising from breach of the Care Duty. In discharging the burden, IPP has to establish the counterfactual, namely that if Dr Goh had been aware of the cargo trading business, the Cargo Drawdowns would not have occurred.

130 The question of the reversal of the burden of proof based on *Sim Poh Ping* does not arise in relation to breach of the Care Duty. This was common ground between the parties. As acknowledged by the Judge, the question of reversal does not arise with regard to breach of the Care Duty. He had held that it was relevant only to breach of the Creditor Duty (GD at [342]). However, in view of our conclusion that Dr Goh did not breach the Creditor Duty, it is not necessary for us to consider whether the Judge was right on the reversal of the burden of proof. We therefore leave that issue for consideration in an appropriate case in the future. With that, we start with the law on proving causation where there has been breach of the Care Duty.

The law on proving loss through a counterfactual

131 Whether loss was suffered as a result of breach of the Care Duty is subject to the common law rules on causation, *ie*, the "but for" test, remoteness of damages and foreseeability: *Prima Bulkship* at [57].

132 To establish causation under the "but for" test, IPP must prove on a balance of probabilities that but for Dr Goh's breach of duty, it would not have

suffered loss. It follows therefore that the "but for" test requires the claimant to show what would have occurred where the duty had been discharged. This would require establishing the counterfactual – that the loss would not have been suffered if the duty had been discharged. It is a settled position that the claimant bears the burden of proving causation on a balance of probabilities: *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 at [71] ("*Sunny Metal*"). While not always referred to explicitly as a "counterfactual", courts have consistently considered whether the evidence showed that loss would not have been occasioned, but for the breach – in other words, whether the breach caused the loss in question.

133 For instance, in *Sunny Metal*, the issue was whether the appellant company's claims against the respondent (who was the project architect for a building project developed by the appellant) for breach of contract and in tort would have independently failed because of a failure to prove causation. The Court of Appeal emphasised that the "universal" test for determining whether a defendant's wrongful conduct is a cause *in fact* of the damage to a claimant is the "but for" test (*Sunny Metal* at [64] and [71]).

134 Having concluded that the "but for" test was the relevant test, the Court of Appeal went on to consider whether causation was made out based on the company's submitted counterfactual, *ie*, whether the evidence showed that, if there was no breach of contract or tort, loss would not have been suffered by the appellant (*Sunny Metal* at [86]). Following a review of the documentary evidence, including the relevant correspondence between the appellant and its

contractors, it was found that the respondent's alleged breaches did not cause the appellant's losses (*Sunny Metal* at [80]–[86]).

135 *Towa Corp v ASM Technology Singapore Pte Ltd and another* [2023] 5 SLR 870 ("*Towa Corp*") is an example of the steps that a claimant should take to prove causation by way of a counterfactual.

136 *Towa Corp* was a dispute concerning the calculation of damages arising from infringement of the claimant's patent by the respondent which sold a competing product that infringed the appellant's patent. Causation had to be proven based on a hypothetical but-for counterfactual (*Towa Corp* at [35]). In other words, the claimant had to show in the counterfactual that but for the patent infringement, it would have sold the same number of products as the respondent did, *ie*, that the number sold by the respondent would instead be sold by the claimant.

137 *Towa Corp* held that this was the correct approach (*Towa Corp* at [31]) and that the burden of proving loss was on the claimant (*Towa Corp* at [32]). This point was upheld on appeal in *TOWA Corp v ASMPT Singapore Pte Ltd and another appeal* [2024] 2 SLR 580 at [5]. How the claimant established the counterfactual is illustrative of the manner in which the burden should be discharged. The claimant adduced evidence on how many machines were sold by the respondent, whether its own machines were a direct replacement for the respondent's machines, the claimant's capacity to manufacture and sell the additional machines, whether the claimant would have lowered its prices to be competitive, and the relevant market share that would have been captured by the claimant in the but-for scenario. It is crucial that the claimant had taken pains

to demonstrate each step of the counterfactual for the purpose of proving causation.

138 Two points arise from the foregoing analysis. First, it cannot be disputed that the legal burden to prove loss is on the claimant (*Sunny Metal* at [71]). This burden does not shift simply because a counterfactual has been proposed (*Tembusu Growth Fund Ltd v ACTAtek, Inc and others* [2018] 4 SLR 1213 at [108]). Accordingly, the *legal* burden is on IPP to prove that the breach caused the loss.

139 In discharging this burden, IPP must prove the counterfactual, *ie*, that had Dr Goh discharged his duty, the Cargo Drawdowns would have been averted and the loss avoided. Once IPP discharges this burden on a *prima facie* basis, the evidential burden would shift to Dr Goh to demonstrate that IPP would have suffered the loss regardless of the breach. It is here that the arguments he has made that Zoe and Wallace would have prevented him from discovering the fraud would be pertinent.

140 Second, IPP must prove each step of the counterfactual. It cannot simply rely on bare assertions or common sense. In establishing the counterfactual, IPP must assert (a) the steps that Dr Goh would have taken if he had discharged the Care Duty, and (b) how those steps would have resulted in the fraud being detected and the loss averted. This is the "hypothetical edifice" that the court is required to construct in order to determine what would have happened if Dr Goh's duties had been performed, specifically whether in that event, the loss

would have been prevented: *Lexi Holdings v Luqman* [2008] 2 BCLC 725 ("*Lexi Holdings*") at [28].

141 *Lexi Holdings* also concerned the question of whether breach of a director's duty had caused loss to a company. In brief, the underlying facts of *Lexi Holdings* were that the sum of £59,607,498 was misappropriated by one Shaid, the managing director of Lexi Holdings plc, over a period of four years, resulting in the company applying for administration. The administrators commenced proceedings against Shaid, as well as two other non-executive directors who had also received some of the misappropriated funds, to recover the misappropriated sum.

142 Briggs J (as he then was) held that having established the non-executive directors' breach of duty, it *was necessary* for the court to construct "a necessarily hypothetical edifice so as to ascertain what would probably have happened if the relevant duties had been performed" (*Lexi Holdings* at [28]). While a total failure of duty might establish a director's unfitness, there was no presumption that a director's total failure of duty had caused the entire loss; the measure of loss caused by the breach depended on the difference between the company's actual financial position and its hypothetical financial position had the director performed his duty. This approach was confirmed by Morritt C (as he then was) on appeal in *Lexi Holdings v Luqman* [2009] BCC 716 at [38].

143 *Lexi Holdings* was cited with approval by the English Court of Appeal in *Weavering Capital (UK) Ltd & Ors v Dabhia & Anor* [2013] EWCA Civ 71 ("*Weavering Capital*") [2013] EWCA Civ 71. *Weavering Capital* is helpful in illustrating the application of the counterfactual.

144 The appellants in *Weavering Capital* were directors of Weavering Capital (UK) Ltd ("WCUK"), a company incorporated in England and Wales. WCUK managed a hedge fund operation in the Cayman Islands, known as Weaving Macro Fixed Income Fund Limited ("Macro"). WCUK was the investment adviser to and manager of Macro. Macro was initially presented as a high liquidity fund invested principally in global fixed income and money markets in the United Kingdom and the rest of Europe, the United States of America and Japan. Macro collapsed in 2009. It turned out that it was making losses since 2003, but its principal director, Mr Peterson, had sought to cover up the losses by sham transactions and misrepresentations to the investors. By the time it collapsed, Macro had US$260m in unpaid redemptions that it could not satisfy.

145 WCUK and its liquidators commenced proceedings against the appellants for breach of duty as directors. WCUK also claimed that the appellants should be liable to account for payments received by them in breach of duty. In particular, the claims against Mr Dabhia, one of the appellants, mirrored the claims in the present appeal. The claims against him were premised *inter alia* on breach of the Care Duty as he had failed to acquire or maintain sufficient knowledge of the true nature of Macro's business. Furthermore, WCUK alleged that had Mr Dabhia kept abreast of Macro's affairs, he would have been able to put a stop to the sham transactions that had caused its collapse.

146 WCUK argued that the appellants had caused its loss, namely the US$260m in unpaid redemptions, as WCUK had to indemnify Macro for those redemptions. At first instance, the appellants were found liable for the loss.

147 The English Court of Appeal was of the view that where the claimant's case depended on establishing loss arising out of a breach of duty as director

(be it the Care Duty, a contractual obligation or a fiduciary duty), it was necessary for the court to construct "a necessarily hypothetical edifice so as to ascertain what would probably have happened if the relevant duties had been performed" (*Weavering Capital* at [50]–[53], citing with approval *Lexi Holdings* at [28]). It was "incumbent upon [the party bringing the claim for breach of duty] to plead his case and to give evidence of the explanation that would have satisfied the reasonable director" (*Weavering Capital* at [53]).

148 Although the judge in the proceedings below had not provided any express analysis of causation, the English Court of Appeal found that it was implicit in the judge's findings that the breaches had caused the loss that was suffered by WCUK on a "but for" basis (*Weavering Capital* at [53] and [55]). In this regard, it bears noting that in *Weavering Capital*, WCUK had succeeded on proving the "hypothetical edifice", and the burden was on the appellants to rebut the counterfactual (*Weavering Capital* at [51]–[55]).

149 We agree with the views expressed in *Weavering Capital*. Ultimately, in a case where the claim for loss arises from a director's breach of duty, the burden is on the party alleging the breach to prove causation and loss on a *prima facie* basis by establishing the counterfactual. The evidential burden shifts to the director to refute causation and loss only if that burden has been discharged (*Weavering Capital* at [49]).

150 Though the Judge applied the "but for" analysis (GD at [348]), he failed to approach causation and loss through the prism of the counterfactual. He held that it was a matter of common sense that but for Dr Goh's ignorance of the cargo trading business, the losses would not have materialised. With respect, this is an incorrect approach as *Lexi Holdings* and *Weavering Capital* illustrate. The conclusion assumes the very fact that IPP has to prove on a *prima facie*

basis in order to shift the evidential burden to Dr Goh, *ie*, that Dr Goh's breach had caused the loss in question (see [139] above). It is a leap in logic to suggest that if Dr Goh was aware of the cargo trading business, the fraud would have been averted as the causal link between the "but for" and the loss has not been established. The conclusion has no context, which would not be the case if the counterfactual was pleaded and established. Further, we have reservations with the Judge's approach for another reason. This is a case of a deep-seated fraud. It does not follow that if Dr Goh had been aware of the cargo trading business, he would have discovered the fraud and thereby put a stop to it. This makes it all the more important for IPP to specifically plead and prove what steps would have been taken (if the Care Duty was discharged) and how that would have uncovered the fraud and averted the loss. We make this observation not as a finding of fact, but as an illustration of the complexity inherent to the causal analysis in this case. With that, we turn to consider whether IPP has discharged its burden on causation.

IPP has not discharged its burden

IPP's counterfactual in respect of Dr Goh's knowledge of its cargo trading business

151 We find that IPP has failed to discharge its burden of proving that the fraud would have been detected and the loss averted if Dr Goh had known that IPP was undertaking the cargo trading business.

152 As observed above, it is important to note that it is not IPP's case that Dr Goh would have put a stop to the cargo trading business had he come to know about it. Had that been the allegation, the question might arise as to whether the fraudulent drawdowns would have been averted by stopping the cargo trading business. We say no more.

153 IPP therefore has to prove the counterfactual, namely the specific steps that Dr Goh would have taken if he was aware of the cargo trading business that would have prevented the fraudulent cargo trades and averted the loss. However, the steps Dr Goh should have taken were not pleaded and no evidence was adduced in this regard by IPP. Instead, IPP relied on bare assertions to suggest that Dr Goh would have found out about the fraud and prevented the Cargo Drawdowns if he was aware of the cargo trading business or acted reasonably in respect of the three red flags.

154 We illustrate this point by reference to IPP's pleadings. IPP had pleaded its allegation on causation broadly without any specificity as to the steps that Dr Goh would have taken if he had discharged the Care Duty and how that would have resulted in the fraud being uncovered and the Cargo Drawdowns averted.

155 At its most general level, IPP had pleaded that in consequence of Dr Goh's breaches of duty, he "ought to have prevented, but failed to prevent, [IPP] from applying to SocGen and/or Maybank for, and procuring, drawdowns on the Facilities from the end of the last quarter of 2017 when the alleged receivables owed by Mercuria to [IPP] started to exceed US$100 million or, at the latest, shortly thereafter in January to March 2018", and that "had he done that, there would not have been the subsequent Cargo … Drawdowns". There was therefore plainly no explanation as to how if Dr Goh had been aware of the cargo trading business he would have discovered the fraudulent cargo trades and prevented the loss.

156 In its closing submissions below, IPP's argument was that *any* exercise of due diligence to keep abreast of the company's finances would have *inevitably* led to the discovery that there were sham cargo trades occurring in IPP, and that armed with that knowledge, any reasonable director would have

prevented further drawdowns on the Facilities. Why discovery of the sham transactions was inevitable was not explained. It is important in this regard that IPP's analysis on causation was primarily based on inquiries that Dr Goh would have made because of the red flags which we have earlier rejected. Nothing was mentioned on how Dr Goh would have discovered the sham cargo transactions and prevented the Cargo Drawdowns had he known about the cargo trading business. This perhaps explains the Judge's somewhat broad-brush analysis on the point of causation, as IPP had not gone through the exercise of elaborating on the steps that Dr Goh ought to have taken in the exercise of his duty as director.

157 On appeal, IPP's case on causation *viz* Dr Goh's unawareness of the cargo trading business was that Dr Goh's "complete dereliction of duty was systemic, fundamental and egregious", such that "Dr Goh was not equipped to even make the requisite enquiries that a director is under a duty to make; he did not know what to ask, and could not act as a sentinel because he did not even know what he was guarding". With respect, this argument suffers from the same problem we have identified – it assumes the very fact that IPP has to prove *via* causation.

158 IPP's case on causation therefore fails. We make two further points. First, it cannot be part of a director's duty of supervision and oversight to pick up fraud unless there are tell-tale or warning signs. A director may be a sentinel, but he is not a forensics investigator or a sleuth, unless there are signs that would put him on inquiry. There is no suggestion by IPP there were any, apart from the "red flags", which we have concluded were not in fact red flags. Further, there was no allegation that the Auditor and IPP's financial manager alerted Dr Goh of any issues with the accounts, or that the monthly management accounts and financial statements suggested anything untoward. Thus, there is nothing to

the point that if Dr Goh had been aware of the cargo trading business, he would have exercised oversight in a manner which would have picked up the fraud and averted the loss.

159 Second, and relatedly, if Dr Goh had known about the cargo trading business, it is fair to infer that his attitude to oversight would have been similar to the bunker trading business. His starting position would have been that the cargo trading business was conducted legitimately like the bunker trading business. Any governance framework would have been calibrated with this in mind.

160 As we have found that IPP has not proven the counterfactual, it is not necessary to consider Dr Goh's arguments on rebutting the counterfactual. However, we do so for completeness. One argument Dr Goh made was that Zoe and/or Wallace would have stymied his efforts to look further into the fraud, had he been aware of the cargo trading business and/or was spurred by the red flags to inquire into IPP's financials.

161 This argument was rejected by the Judge (GD at [354]–[357]). The Judge held that it was at the very least not a foregone conclusion that Zoe would not have confessed the fraud and would have continued to lie to Dr Goh to the bitter end, in view of her confession of the fraud to SocGen. The Judge therefore found it "speculative that Zoe or Wallace would necessarily have been able to hoodwink him on every occasion if he had made all the inquiries that he should have throughout his time as a director" (GD at [355]). The Judge also considered that Dr Goh was an intelligent person with substantial experience helming companies, which made it inherently unlikely that Zoe and Wallace would have been able to put up a flawless *façade* that perfectly averted his suspicion every time it was raised (GD at [357]).

162 However, we have reservations with the Judge's finding that Zoe and Wallace would have revealed the truth to Dr Goh if he had investigated. We make three points. First, it is important to note that by the time Zoe confessed to SocGen, the fraud had been discovered. Zoe had initiated the call with SocGen to confess the fraud on 27 August 2019, which was (a) after Dr Goh had reported the sham transactions to the Police on 22 August 2019, and (b) one week before IPP was placed under judicial management on 4 September 2019. In her own words, she was coming forward to confess to SocGen because she had "lost control [of] the company's trading and operations" and that the "group is actually suffering losses".

163 Second, the September 2018 accounts that Wallace had prepared for a third party demonstrated how easy it was to shield the truth from Dr Goh. The September 2018 accounts did not show that there was any impropriety or fraud with regard to the cargo trading business. This is an example of how it was relatively easy for a paper trail to be prepared by those who were involved in the fraud in the cargo trading business to stave off any inquiries. Indeed, the fact that the Auditor was unable to discover any fraud when carrying out the audit reconciliation process shows this to be true. The reality is that a paper trail of documents could be easily constructed to create a *façade* that these transactions were legitimate.

164 Third, it bears repeating that with regard to the Mercuria ACR, the Auditor had made inquiry and did not uncover any fraud. There is no valid reason to infer that if Dr Goh had made inquiry arising from the Mercuria ACR, he would have uncovered fraud.

165 We therefore depart from the Judge's conclusion that IPP has proven causation as regards breach of the Care Duty. In our view, IPP has failed to

discharge its burden of proving that Dr Goh's ignorance of the cargo trading business was the proximate cause of the loss in question, namely the Cargo Drawdowns.

Conclusion

166 For these reasons, we allow the appeal in part and set aside the judgment below. While we agree with the Judge that Dr Goh had breached the Care Duty by reason of his ignorance of the cargo trading business, IPP has failed to show causation, *ie*, that the breach caused the loss in question. Also, we disagree with the Judge that the Care Duty was breached as regards the purported red flags. Finally, we find that Dr Goh did not breach the Creditor Duty in relation to the Cargo Drawdowns.

167 Turning to the question of costs, unless the parties can come to an agreement on costs, they are to file written submissions limited to seven pages, within 14 days of the date of this judgment, on the appropriate costs orders that should be made on the costs for the appeal and below. The usual consequential orders apply.

Tay Yong Kwang
Justice of the Court of Appeal

Woo Bih Li
Judge of the Appellate Division

Kannan Ramesh
Judge of the Appellate Division

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