IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 25

Civil Appeal No 113 of 2020

Between

(1) Crest Capital Asia Pte Ltd
(2) Crest Catalyst Equity Pte Ltd
(3) The Enterprise Fund III Ltd
(4) VMF3 Ltd
(5) Value Monetization III Ltd

… *Appellants*

And

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

… *Respondents*

Civil Appeal No 132 of 2020

Between

Lim Beng Choo

… *Appellant*

And

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

Version No 1: 30 Mar 2021 (14:28 hrs)

… *Respondents*

Civil Appeal No 135 of 2020

Between

Fan Kow Hin

… *Appellant*

And

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

… *Respondents*

In the matter of Suit No 441 of 2016

Between

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

… *Plaintiffs*

And

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

Version No 1: 30 Mar 2021 (14:28 hrs)

… *Defendants*

JUDGMENT

[Tort] — [Conspiracy]
[Agency] — [Evidence of agency]
[Agency] — [Principal]
[Trusts] — [Accessory liability]
[Damages] — [Assessment]

TABLE OF CONTENTS

INTRODUCTION **1**

BACKGROUND FACTS **3**

DRAMATIS PERSONAE 3

THE SUBJECT MATTER OF THE DISPUTE 4

THE GENESIS OF THE DISPUTED FACILITIES 6

DRAWDOWNS UNDER THE STANDBY FACILITY TO ACQUIRE IHC SHARES 8

DEMANDS FOR REPAYMENT UNDER THE STANDBY FACILITY 9

THE DISPUTE AROSE 10

DECISION BELOW **12**

THE PURPOSE OF THE STANDBY FACILITY 12

WHETHER THERE WERE DRAWDOWNS ON THE STANDBY FACILITY TO PURCHASE IHC SHARES 13

MR FAN'S BREACH OF DUTIES 15

MS LIM'S BREACH OF DUTIES 16

ATTRIBUTION OF MR TAN'S STATE OF MIND TO THE CREST ENTITIES 17

DISHONEST ASSISTANCE 19

The Crest Entities *19*

Ms Lim *21*

UNLAWFUL MEANS CONSPIRACY 21

The Crest Entities and Mr Fan *21*

Ms Lim *22*

DAMAGES 23

Version No 1: 30 Mar 2021 (14:28 hrs)

Mr Fan's liability for his breach of fiduciary duties *23*

The Crest Entities' liability in dishonest assistance and unlawful means conspiracy *26*

Ms Lim's liability for her breach of duty of reasonable care *26*

MS LIM'S COUNTERCLAIM 26

ISSUES ON APPEAL 27

THE CREST ENTITIES' LIABILITY IN DISHONEST ASSISTANCE AND UNLAWFUL MEANS CONSPIRACY 28

MR TAN'S STATE OF MIND 28

Knowledge of the existence of the prohibition *28*

Knowledge of the contravention of the prohibition *34*

ATTRIBUTION OF MR TAN'S KNOWLEDGE 34

Whether the respondents pleaded attribution *35*

Whether attribution has been made out *38*

CONCLUSION ON LIABILITY FOR THE CREST ENTITIES 42

WHETHER ACTUAL KNOWLEDGE OF UNLAWFULNESS IS NECESSARY FOR A CLAIM IN UNLAWFUL MEANS CONSPIRACY 43

MR FAN'S LIABILITY FOR BREACH OF FIDUCIARY DUTIES 47

WHETHER THERE WERE DRAWDOWNS UNDER THE STANDBY FACILITY 47

WHETHER MR FAN KNEW OF THE TRUE PURPOSE OF THE STANDBY FACILITIES AND THE DRAWDOWNS MADE 49

CONCLUSION ON LIABILITY FOR MR FAN 52

MS LIM'S LIABILITY IN NEGLIGENCE 53

WHETHER MS LIM WAS NEGLIGENT 53

WHETHER MS LIM HAD ANY DEFENCES 59

Version No 1: 30 Mar 2021 (14:28 hrs)

MS LIM'S COUNTERCLAIM 61

DAMAGES 64

JOINT AND SEVERAL LIABILITY OF MS LIM 64

STANDBY SUMS 68

LOSS OF USE OF STANDBY SUMS 70

LOSSES IN DEFAULT OF THE GEELONG FACILITY 72

IHC's willingness to pay 72

IHC's ability to repay 74

LOSS OF THE AUSTRALIAN PROPERTIES 75

CONCLUSION 78

Version No 1: 30 Mar 2021 (14:28 hrs)

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Crest Capital Asia Pte Ltd and others
v
OUE Lippo Healthcare Ltd (formerly known as International Healthway Corp Ltd) and another and other appeals

[2021] SGCA 25

Court of Appeal — Civil Appeal Nos 113, 132 and 135 of 2020
Judith Prakash JCA, Steven Chong JCA and Belinda Ang Saw Ean JAD
29 January 2021

30 March 2021 Judgment reserved.

Steven Chong JCA (delivering the judgment of the court):

Introduction

1 These appeals arose from a claim which was brought following this court's decision in *The Enterprise Fund III Ltd and others v OUE Lippo Healthcare Ltd (formerly known as International Healthway Corp Ltd)* [2019] 2 SLR 524 ("*The Enterprise Fund III*") wherein we held that a transaction, comprising a loan agreement for the setup of a credit facility ("the Standby Facility"), the open market acquisitions of the first respondent ("IHC")'s shares, and a trust arrangement for those purchased shares, were void by virtue of s 76A(1A)(*a*)(i) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act"). That said, we held that the open market acquisitions of the shares were saved by s 76A(1A) Companies Act as they involved dispositions of book-entry securities. The upshot of this was that the third appellant in

CA 113/2020 ("EFIII") became the legal and beneficial owner of the IHC shares it acquired through the open market acquisitions, and consequently IHC did not incur any contractual liability under the Standby Facility.

2 However, IHC claimed that it and its various subsidiaries and related companies suffered losses beyond the liability under the Standby Facility. An action, Suit No 441 of 2016 ('the Suit"), was thereafter brought against various parties (including the present appellants) who were involved in the provision of the Standby Facility and related transactions. The claims pursued against them in the Suit were founded on *different* causes of action. Following the trial of the Suit, the various defendants including the appellants were found to be jointly and severally liable for the losses suffered by the respondents. The judge below ("the Judge") recorded her findings in her judgment issued on 9 July 2020 ("Judgment").

3 These appeals thus give rise to several interesting legal issues in the law of torts. While it is undoubtedly true that a corporate entity would deal with third parties through its representatives and/or agents, the mere fact that such representatives and agents are authorised by their principals to enter into contracts with third parties (thereby giving rise to contractual liability) does not inexorably lead to the conclusion that those principals would be similarly liable in tort for the acts or omissions of their representatives and/or agents. It remains necessary to undertake a separate factual inquiry as to whether such acts or omissions can be attributed to the principals. Equally, it is important to bear in mind that the inquiry should be separately conducted with respect to each principal as each principal's knowledge of, and/or complicity in, the conduct of the representative and/or agent is not necessarily the same. When different

Version No 1: 30 Mar 2021 (14:28 hrs)

principals are represented by the same set of lawyers there is a danger that the full extent of this critical distinction might not be adequately fleshed out.

4 Arising from the fact that different tortious claims were brought against different parties is another interesting question *viz* whether such different defendants could, *inter alia*, be jointly and severally liable and if so under what circumstances. These issues will be addressed below.

Background facts

Dramatis personae

5 These appeals feature the same two respondents, who were the plaintiffs in the suit below. IHC is a publicly listed company on the Singapore Exchange's Catalist board. IHC wholly owns the second respondent ("IHC Medical Re"). IHC and IHC Medical Re shall be referred to collectively as "the respondents".

6 IHC Medical Re in turn owns IHC Healthcare REIT ("IHC Healthcare"), which itself owns two trusts, IHC Australia First Trust (Australia) ("IHC First Trust") and IHC Australia Second Trust (Australia) ("IHC Second Trust"). IHC First Trust and IHC Second Trust shall be referred to collectively as the "Australian Trusts". The Australian Trusts own three properties in Australia ("Australian Properties"): two properties in St Kilda ("St Kilda Properties"), held by IHC First Trust; and one property in Geelong ("Geelong Property"), held by IHC Second Trust.

7 The appellants in these appeals were defendants in the suit below. In CA 113/2020, the first to fifth appellants shall be referred to as "Crest Capital", "Crest Catalyst", "EFIII", "VMF3" and "VMIII" respectively and collectively as the "Crest Entities". Crest Capital is a fund administration company and the

Version No 1: 30 Mar 2021 (14:28 hrs)

holding company of Crest Catalyst, a fund management company which manages affiliated private equity funds. EFIII, VMF3 and VMIII are three such funds administered and managed by Crest Capital and Crest Catalyst.

8 In CA 132/2020, the appellant ("Ms Lim") was the Vice-President (Investment) of IHC between January 2015 and January 2016. She was IHC's CEO and Executive Director between January 2016 and January 2017.

9 In CA 135/2020, the appellant ("Mr Fan") is a co-founder of IHC and has a substantial shareholding in the same. He was the Group CEO of IHC between May 2015 and July 2015 and was re-designated as the CEO of IHC between July 2015 and January 2016.

10 There are two other relevant players who should be mentioned, even though they are not parties to these appeals. The first is the seventh defendant in the suit below ("Mr Aathar"), who did not file an appeal. He is the other co-founder of IHC and also a substantial shareholder of the same. However, he was never formally part of IHC's management. The second is one Glendon Tan Yang Hwee ("Mr Tan"), who was the Investment Director of Crest Capital. Mr Tan was the main representative handling Crest Capital's business deals with IHC from the time of the latter's incorporation in 2013, including the deals which resulted in the facility agreements that are the subject of the dispute.

The subject matter of the dispute

11 These appeals centre around two credit facilities. The first is the Standby Facility, which was a short-term credit facility of up to $20m executed on 30 July 2015 for "general working capital". The borrower under the Standby Facility was IHC. The lenders were EFIII, VMF3 and VMIII (these three

Version No 1: 30 Mar 2021 (14:28 hrs)

entities shall be referred together as the "Standby Investors", and for the avoidance of doubt the Standby Investors, together with Crest Capital and Crest Catalyst, make up the Crest Entities). The Standby Facility provided for fixed interest (termed "standby fees") on the full sum of $20m at 3.5% per month for a minimum of five months (*ie*, $700,000 per month for five months). The Standby Facility's maturity date was 30 December 2015.

12 By way of background, the Standby Facility was executed to supersede an initial facility agreement executed on 21 July 2015 but backdated to 16 April 2015 ("Original Facility"). The Original Facility's maturity date was 15 June 2015. Under the Original Facility, the lenders were EFIII, VMIII and The Enterprise Fund II Ltd ("EFII"). Essentially, VMF3 replaced EFII as a lender under the Standby Facility. The Original Facility and Standby Facility shall be referred to collectively as the "Disputed Facilities".

13 The second facility granted on 17 June 2015 ("Geelong Facility") provided a loan of $11.5m. The borrower under the Geelong Facility was IHC Medical Re. The lenders were EFIII and VMF3.

14 The repayment of sums due under the Disputed Facilities and the Geelong Facility was secured by, amongst others, personal guarantees from Mr Fan and Mr Aathar, as well as charges granted by IHC over its shares in IHC Medical Re and two other subsidiaries ("Charged Shares"). The charges were granted by way of two Deeds of Share Charges dated 17 June 2015 ("June Charge Deed") and July 2015.

Version No 1: 30 Mar 2021 (14:28 hrs)

The genesis of the Disputed Facilities

15 The discussions on the Disputed Facilities began at a meeting between Mr Fan, Mr Aathar and Mr Tan on 3 April 2015. On the morning of 4 April 2015, Mr Aathar sent Mr Tan an email, copied to Mr Fan, with the subject stated as "Standby Facility" ("Morning Email"). The Morning Email merits being set out in full:

> Dear [Mr Tan],
>
> *We* spoke yesterday and recap the following:
>
> a. *We* noticed an unusual sale pattern on Thursday 2/4/15, particularly from one single account.
>
> *We* then analysed the transactions with industry specialist… The pattern is that of a shortist and they now have between 71-75m shares.
>
> There is a high probability that this stealth plot would lead to an imminent shorting of IHC shares this coming Monday given that they commenced activity last week. The shortist have about 75m shares ($21.3m). This is probably being carried out by a small fund given the amount they held.
>
> b. *We* look to Crest to provide a standby line of $20m *for use against this activity.*
>
> The terms could be the following:
>
> *1. Short term of 1-2 months.*
>
> *2. Interest of 3.5% per month.*
>
> *3. Shares can be bought and held by Crest directly.*
>
> c. As time is of essence, *we* look to putting facility into place as soon as possible with a very small amount available ($3-$5m) on Monday morning 9am for standby.
>
> *We* are most grateful for your support.
>
> [emphasis added]

16 On the afternoon of the same day, Mr Aathar sent another email to Mr Tan, copying Mr Fan, again with the subject stated as "Standby Facility"

Version No 1: 30 Mar 2021 (14:28 hrs)

("Afternoon Email"). Mr Aathar stated in the Afternoon Email that "[he could] give [Mr Tan] a firm undertaking from IHC that all security arrangements [would] be restored and reinstated by IHC … to the satisfaction of Crest".

17 Mr Aathar, Mr Fan and Mr Tan had further correspondence on 9 April about the "Standby Facility". The exchange now included three additional individuals: Ms Lim, Mr Chia Kwok Ping ("Mr Chia"), IHC's CEO at the time, and Mr Lim Chu Pei ("Mr CP Lim"), an Investment Analyst with Crest Capital. The correspondence on 9 April included a term sheet dated 6 April 2015 ("Term Sheet"), which was circulated to all six individuals. The Term Sheet provided that the facility provided would be secured, *inter alia*, by guarantees from Mr Aathar and Mr Fan, as well as a "[p]ledge of IHC shares purchased through Fund". The term "Fund" was not defined in the Term Sheet.

18 On 10 April 2015, the Term Sheet was signed by Mr Chia as CEO of IHC and by Mr Aathar and Mr Fan as the two personal guarantors. This signed Term Sheet (without Mr Tan's signature) was sent to Mr Tan via email. Later the same day, Mr CP Lim sent the signed Term Sheet (now with Mr Tan's signature) to Mr Chia and Ms Lim, copying Mr Tan, Mr Aathar and Mr Fan.

19 On 17 May 2015, Mr Fan was appointed Group CEO. Subsequently, he vetted a board paper prepared by Ms Lim. The board paper was dated 29 May 2015 and together with the necessary legal documents, was meant to be put before IHC's board of directors to obtain their approval for the Original Facility.

20 On 29 May 2015, the board paper was circulated by email to IHC's board of directors. The covering email and the board paper stated that the Original Facility was to be "utilised for general working capital" and "[f]or

Version No 1: 30 Mar 2021 (14:28 hrs)

general working capital purpose[s]" only. Further, the covering email and the board paper only listed the Charged Shares (see [14] above) and the guarantees from Mr Aathar and Mr Fan as securities. In other words, there was *no* mention of any pledge of the IHC shares to be purchased from the funds of the Original Facility. Board approval was obtained through a two-thirds majority on 3 June. One of the directors who approved the Original Facility was Dr Jong Hee Sen ("Dr Jong"), IHC's Non-Executive Chairman at the time.

21 The Original Facility agreement was then executed on 21 July 2015, but backdated to 16 April 2015. Subsequently, upon IHC's request, the Standby Facility agreement was executed on 30 July 2015, superseding the Original Facility agreement. The Standby Facility extended the duration of the credit facility to five months after the date of execution, *ie*, 29 December 2015. Dr Jong signed the documentation for the Original Facility and Standby Facility on behalf of IHC.

Drawdowns under the Standby Facility to acquire IHC shares

22 According to the Crest Entities and the respondents, between 16 April and 24 August 2015, a total sum of approximately $17m was drawn down from the Standby Facility on fourteen separate occasions for the purchase of some 59m shares in IHC. The shares were purchased by EFIII but held in VMIII's name. Eight out of the fourteen drawdowns took place before the board paper was put to IHC's board of director for approval on 29 May. A further five drawdowns were made before the formal execution of the legal documentation for the Original Facility on 21 July. The drawdowns were made on Mr Aathar's instructions to Mr Tan.

Version No 1: 30 Mar 2021 (14:28 hrs)

23 According to Mr Aathar, Mr Fan and Ms Lim, no drawdown occurred under any of the Disputed Facilities, and certainly not to purchase IHC shares on IHC's behalf. By their account, the Crest Entities spent the $17m on their own volition for their own purchase of the IHC shares (*ie*, as a proper and ordinary investment in shares). Any communications between Mr Aathar and Mr Tan merely involved the former providing *advice* (as opposed to *instructions*) to the latter.

Demands for repayment under the Standby Facility

24 In September 2015, SGX announced that investors should exercise caution when dealing with IHC's shares because its investigations revealed some unusual trading activities of IHC shares. Subsequently, on 19 October 2015, Crest Capital demanded repayment of sums due under both the Standby and Geelong Facilities.

25 As regards the Standby Facility, Crest Capital sent a letter of demand addressed to Dr Jong, copying Mr Fan and Mr Aathar. The letter of demand requested some $2.7m for standby fees due for the period between 16 June and 15 October 2015, and stated that a drawdown was made on 16 April 2015. However, there was no mention of the principal sum due.

26 As regards the Geelong Facility, Crest Capital sent a letter of demand addressed to Ms Lim, copying Mr Fan and Mr Aathar. The letter of demand requested payment of some $11m, comprising the principal sum and the interest accruing.

27 Negotiations over repayment then took place between Mr Tan, Mr Fan and Mr Aathar. The exchange of emails between the parties referred to "market

Version No 1: 30 Mar 2021 (14:28 hrs)

shares of $17.2m or 59.3m shares" and likewise included discussions on the sum of $17m used to purchase the 59m IHC shares. No other IHC representatives appear to have been privy to these negotiations (see Judgment at [40]).

The dispute arose

28 In December 2015, IHC made two payments to the Crest Entities. The first was a sum of $3.5m which was applied towards the Geelong Facility (which IHC did not take issue with). The second was a $3.8m payment which was applied by the Crest Entities towards the Standby Facility. This second payment of $3.8m became a major area of contention between the parties, both below and on appeal. It would thus be useful to briefly explain the circumstances regarding this payment.

29 On 17 December 2015, Mr CP Lim emailed Ms Lim setting out certain "payment details" for IHC to follow-up on: IHC was to pay EFIII about $2.3m; VMIII, about $1m; and VMF3, about $500,000. In his email, Mr CP Lim did not identify which facility these sums were to be applied towards. That said, EFIII and VMFIII were lenders under both the Disputed Facilities and the Geelong Facility, while VMF3 was a lender only under the Standby Facility.

30 Later the same day, IHC's employee replied to Mr CP Lim, saying "As spoken, we will pay $3,883,950 to [EFIII]". No mention was made of VMFIII and VMF3. The following day, 18 December 2015, IHC duly made the payment of $3.8m to EFIII. The payment was recorded in IHC's internal records as a payment for "settled partial Geelong loan".

Version No 1: 30 Mar 2021 (14:28 hrs)

31 On or about the same day, Ms Lim sent the following WhatsApp message to Mr Fan:

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

32 On 23 December, Mr Peter Chan ("Mr Chan"), Crest Capital's Managing Partner, emailed Mr Fan, copying Mr Tan and Mr CP Lim. In the email, Mr Chan referred to a meeting with Mr Fan that morning, and stated that:

> … the first repayment of $3.5mil shall be for the Geelong outstanding debt and please designate the second repayment of $3.88 mil for the principal and outstanding interest for the standby facility out of which $17,278,466 IHC has drawndown [*sic*] and is now overdue.

33 On that basis, the Crest Entities applied the $3.8m payment towards the Standby Facility. IHC took issue with the Crest Entities' appropriation of the $3.8 million payment, contending that it was always meant to be applied to the Geelong Facility, and not the Standby Facility.

34 From February 2016, a flurry of correspondence took place between the finance teams of IHC and the Crest Entities. Generally, IHC denied having drawn down on the Standby Facility, and requested the Crest Entities to furnish evidence of the alleged drawdowns. In response, the Crest Entities asserted that drawdowns took place, but refused to provide particulars and instead stated that IHC should check with Mr Fan and Mr Aathar for the details.

35 In April 2016, the Crest Entities' solicitors served letters of demand on IHC and IHC Medical Re for sums due under the Standby and Geelong Facilities. The claim under the Standby Facility was resisted by IHC. IHC also stated that the Crest entities had wrongly attributed the payment of $3.8m to the

Version No 1: 30 Mar 2021 (14:28 hrs)

Standby Facility instead of the Geelong Facility, and asked the Crest Entities to rectify that error. IHC further stated that unless the Crest Entities did so, it would not be making any further repayment toward the Geelong Facility.

36 The Crest Entities subsequently appointed receivers over the Charged Shares ("Crest Receivers"), thereby gaining control over IHC Medical Re and the Australian Properties.

37 In April 2016, IHC commenced the Suit seeking to, *inter alia*, remove the Crest Receivers. In January 2017, IHC held an extraordinary general meeting in which the incumbent board (including Ms Lim) was removed. In June 2017, IHC changed its position and accepted that IHC shares were acquired for IHC on the instructions of Mr Aathar using the funds drawn down from the Standby Facility.

38 The Australian Properties were subject to senior mortgages held by three Australian financial institutions. After the Crest Receivers were appointed in April 2016, the Australian Properties were placed in receivership ("Australian Receivers") in August 2016. The Australian Receivers eventually sold the Australian Properties.

Decision below

39 The following is a comprehensive summary of the Judge's findings in the Suit.

The purpose of the Standby Facility

40 The Judge accepted Mr Tan's account that the Standby Facility came about because of Mr Aathar's request to Mr Tan for a $20m loan to combat a

Version No 1: 30 Mar 2021 (14:28 hrs)

short-selling attack on IHC's shares. To that end, the Crest Entities were to use the loan drawdowns to buy IHC shares themselves and thereafter hold the IHC shares as security (Judgment at [87]).

41 The Judge found that Mr Tan's account was consistent with the contents of the Morning and Afternoon Emails. It was clear from the language of the Morning and Afternoon Emails that Mr Aathar was making requests on behalf of IHC. His continued use of the collective pronoun "we", suggested that he was speaking on behalf of IHC rather than discussing the matter in his personal capacity. Further, the Term Sheet and the Standby Facility reflected the key terms set out in the Morning Email and the security arrangement envisioned in the Afternoon Email. Moreover, in accordance with the Morning Email, the Crest Entities did proceed to purchase IHC shares and hold them as security (Judgment at [90]).

Whether there were drawdowns on the Standby Facility to purchase IHC shares

42 The Judge accepted the Crest Entities' account that between April and August 2015, Mr Aathar instructed Mr Tan to buy IHC shares. Thus, a sum of $17m was drawn down from the Standby Facility to purchase some 59m IHC shares. The Judge relied on the following pieces of evidence (Judgment at [93]–[94]):

(a) WhatsApp exchanges between Mr Aathar and Mr Tan, which clearly showed the former activating the standby line and giving instructions to the latter to buy IHC shares.

Version No 1: 30 Mar 2021 (14:28 hrs)

(b) A spreadsheet sent from Mr Tan to Mr Fan and Mr Aathar through an email dated 8 May 2015 showing 18m IHC shares "bought on behalf" of IHC in three transactions between 16 April and 8 May.

(c) Mr Fan's approval for the payment of standby fees for the period between 16 April and 15 May by way of two cheques dated 17 June and 2 July respectively (this was before the documentation for the Original Facility was even executed). The 2 July cheque was issued around the time when Mr Tan had written to Mr Fan and Mr Aathar seeking payment of the outstanding standby fees. Subsequently, when Mr Fan refused to approve the payment of standby fees for the period between 16 May and 15 June, Mr Aathar paid the standby fees out of his own pocket.

(d) The negotiations between Mr Aathar and the Crest Entities over the repayment of the sums due under the Standby Facility consistently referred to the "market shares of $17.2m or 59.3m shares", a figure which was broadly in accordance with the drawdowns on the Standby Facility totalling $17,332,081.15 used to purchase 59,304,800 IHC shares.

43 Pertinently, the Judge rejected the argument that there was no drawdown because Mr Aathar was only a shareholder, and thus did not have authority to give the Crest Entities instructions for the drawdowns on behalf of IHC. She noted that Mr Aathar's authority was not a "relevant legal issue" for the purposes of the respondents' claim. What mattered was that Mr Aathar had given instruction to Mr Tan on the share acquisitions (Judgment at [95]).

Version No 1: 30 Mar 2021 (14:28 hrs)

Mr Fan's breach of duties

44 The Judge found that Mr Fan was not a shadow director of IHC. However, by virtue of his appointment as Group CEO and subsequently CEO of IHC, he owed fiduciary duties to IHC, including the duty to exercise due skill, care and diligence (Judgment at [116]).

45 The Judge also found that Mr Fan had breached such duties. Mr Fan was aware of the prohibition in the Companies Act against a company buying back its own shares. He must also have been aware that IHC's purchase of its own shares would *prima facie* diminish its future resources while greatly benefiting the substantial shareholders (*ie*, himself and Mr Aathar) (Judgment at [118]–[119], [122]).

46 Even with knowledge of such a prohibition, Mr Fan (along with Mr Aathar) was the key player in the negotiations with the Crest Entities. He was aware of the purpose of the Standby Facility (*ie*, for IHC to buy its own shares), and he was aware of the drawdowns that took place. Further, as Group CEO and CEO of IHC, he prepared the board paper on the Standby Facility that was presented to IHC's board of directors for their consideration. Significantly, the board paper misleadingly characterised the Standby Facility as being a loan facility for "general working capital purposes". It was likely that the board would not have approved the Standby Facility had the board known its true purpose (Judgment at [120]–[121]).

47 Therefore, Mr Fan was in breach of his duties to IHC in failing to disclose that funds had already been drawn down from the Standby Facility to acquire IHC shares (which was the Standby Facility's true purpose). His non-disclosure caused IHC to pursue a course of action inimical to its own interests,

Version No 1: 30 Mar 2021 (14:28 hrs)

incurring liabilities in the form of standby fees and drawdowns used to purchase its own shares (Judgment at [122]–[123]).

Ms Lim's breach of duties

48 The Judge proceeded on the basis that Ms Lim owed duties to IHC. She found that Ms Lim had breached her duty to take reasonable care, but not her fiduciary duties (Judgment at [124]).

49 The Judge found, on the evidence, that Ms Lim likely did not know and should not be expected to know about the Standby Facility's true purpose. Although Ms Lim had been forwarded a chain of emails including the Morning Email, the Judge accepted her testimony that she did not pay attention to the Morning Email which was at the bottom of the chain. Instead, it was not entirely surprising that Ms Lim's focus would have been on the relevant legal documents for the facility arrangements. These would arrive in a later email sent by Mr Tan. Indeed, Ms Lim's role was intended to be peripheral in nature, *ie*, the preparation of legal documents and the making of payments due under the Standby Facility. Moreover, the Judge found that Ms Lim would have been misled by the stated purpose of the Standby Facility (for "general working capital") and would not have been in a position to appreciate the significance of the particular arrangements surrounding the Standby Facility (Judgment at [129]–[131]).

50 However, the Judge found that Ms Lim should have been alerted as to the drawdowns on the Standby Facility beginning on 16 April 2015. The Judge relied on (Judgment at [132]–[134]):

Version No 1: 30 Mar 2021 (14:28 hrs)

(a) an email dated 13 May from Mr CP Lim to her, which expressly referred to a first drawdown on the Standby Facility on 16 April (albeit for unknown purposes); and

(b) the fact that she knew about the two cheque payments in June and July 2015 that were made to the Crest Entities for the payment of standby fees under the Standby Facility for the months of April and May 2015.

51 Given these circumstances, Ms Lim must have known that IHC had drawn down on the Standby Facility for *unknown purposes*, without full and proper documentation. Ms Lim should have, but failed to, make further enquiries as to the reasons for the drawdowns and to, should the reasons uncovered prove unsatisfactory, raise the matter to the board of directors before the legal documentation for the Standby Facility was executed. Accordingly, she was in breach of her duty to take reasonable care (Judgment at [135]).

Attribution of Mr Tan's state of mind to the Crest Entities

52 The Judge noted that the respondents' causes of action against the Crest Entities in dishonest assistance and unlawful means conspiracy involved a consideration of Mr Tan's state of mind and in particular whether his state of mind could be attributed to the Crest Entities.

53 The Judge answered this question in the affirmative. She held that Mr Tan was an agent of each of the Crest Entities (*ie*, Crest Capital, Crest Catalyst, EFIII, VMF3 and VMIII). This was because at all times, the Crest Entities had relied on the acts of Mr Tan and did not dispute that he had acted with authority (Judgment at [142]):

Version No 1: 30 Mar 2021 (14:28 hrs)

(a) In their Statement of Claim (Amendment No 4) ("SOC4"), at paras 2.2.4, 2.2.5 and 2.2.17(e), the respondents pleaded and relied on Mr Tan's role and involvement in the Standby Facility. Mr Tan "admitted to" such participation and involvement as the Investment Director of Crest Capital, in his affidavit filed on behalf of the Crest Entities (Judgment at [143]).

(b) In their Defence (Amendment No 6) ("D6"), the Crest Entities pleaded at para 5 that the Standby Facility investors (*ie*, EFIII, VMF3 and VMIII) were "managed in all aspects" by Crest Capital and Crest Catalyst. At paras 15A, 15B and 16, the Crest Entities did not dispute the events involving Mr Tan. None of the Crest Entities disassociated themselves from Mr Tan's acts (Judgment at [144]).

54 The Judge noted that the Crest Entities relied on the acts of Mr Tan throughout the negotiations, during entry into the Standby Facility, and in respect of the subsequent drawdowns on the Standby Facility. As a result, Mr Tan's actual authority as their agent was to the Judge "plain to see". The Judge held that the Crest Entities could not adopt the position that Mr Tan's acts were authorised on the one hand, and disavow his state of mind on the other hand (Judgment at [146]–[147]).

55 Having found that Mr Tan was an agent of each of the Crest Entities, the Judge held that his state of mind could therefore be attributed to each of the Crest Entities on that basis.

Version No 1: 30 Mar 2021 (14:28 hrs)

Dishonest assistance

56 The main focus of the claim in dishonest assistance concerned the issue as to whether the Crest Entities and Ms Lim had acted dishonestly (Judgment at [155]).

The Crest Entities

57 The Judge held that Mr Tan's state of mind was to be attributed to the Crest Entities. First, the Judge was prepared to conclude that Mr Tan had *actual knowledge* of the prohibition against share buyback under s 76A of the Companies Act (Judgment at [160]–[161]):

(a) Mr Tan was the Investment Director of Crest Capital, a professional fund administration company. Mr Tan was also a licence holder under the regime by the Monetary Authority of Singapore. He would be expected to know of such a legal prohibition.

(b) The legal documentation sent by Mr Tan to IHC did not mention the pledge of IHC shares as security, despite it being a term in the Term Sheet. This was a "glaring omission" which pointed to an awareness of something amiss regarding the share purchases.

(c) Between April 2015 and February 2016, the Crest Entities did not provide any confirmation of the principal drawn down from the Standby Facility to IHC, despite requesting for payment of the standby fees. The drawdowns were first confirmed only in February 2016.

(d) It was never officially communicated to IHC that the Crest Entities had purchased IHC shares on IHC's behalf using the funds from the Standby Facility. There were only two emails which suggested that

Version No 1: 30 Mar 2021 (14:28 hrs)

the Crest Entities had used funds from the Standby Facility to buy IHC shares – but neither email found its way to IHC officially.

(e) For the drawdowns, Mr Tan did not follow the mandatory procedure that was laid down in the Standby Facility agreement ("the Clause 7 Safeguards").

(f) Even after the dispute arose in February 2016, the Crest Entities did not provide IHC with information about the drawdowns under the Standby Facility.

58 In the Judge's views, the fact that the Crest Entities consistently refused to communicate or confirm these drawdowns, the fact that any such drawdowns were effected without regard to clearly stipulated procedural safeguards (*ie*, the Clause 7 Safeguards) and the fact that Mr Tan was a qualified professional in the relevant field, raised the inference that Mr Tan had actual knowledge of the prohibition (and had attempted to avoid leaving traces of any contravention of the prohibition).

59 Leaving aside the question of knowledge of the statutory prohibition, the Judge found that Mr Tan well knew about the serious irregularities in the various drawdowns of the Standby Facility (especially prior to its formalisation). However, no queries were raised, and instead the arrangement was eventually formalised. This, according to the Judge, amounted to dishonesty (Judgment at [162]).

60 Second, the Judge found that Mr Tan ought to have known that IHC's entry into and the drawing down on the Standby Facility to purchase its own shares were against IHC's interests in some way, and that he was assisting

Version No 1: 30 Mar 2021 (14:28 hrs)

Mr Fan in breaching his duties to IHC. Beyond the matters mentioned in [57], the Judge made three further observations. First, Mr Tan knew that Mr Fan and Mr Aathar were substantial shareholders of IHC, whose interests might not necessarily be aligned with IHC's. Second, there was a fairly long delay in the formal execution of the Standby Facility of slightly over three months. Third, the formal execution of the Standby Facility only happened *after* Mr Fan took over as CEO. Despite these circumstances, Mr Tan allowed the drawdowns and acquisition of shares on Mr Aathar's instructions, in contravention of the procedures clearly stipulated in the Standby Facility agreement. (Judgment at [165]).

Ms Lim

61 The Judge did not find Ms Lim to be dishonest. She accepted that Ms Lim knew that the Standby Facility was drawn down for unknown purposes but found that this unknown purpose could very well have been for working capital. Even though Ms Lim was negligent in her failure to make enquiries, she was not found to be liable for dishonest assistance (Judgment at [168]–[169]).

Unlawful means conspiracy

The Crest Entities and Mr Fan

62 The Judge was satisfied that the Crest Entities and Mr Fan (along with Mr Aathar) formed an agreement to cause IHC to enter into and draw down on the Standby Facility to purchase IHC shares. The backdrop of their agreement was a potential short-seller's attack on IHC shares, and a desire on the part of Mr Aathar and Mr Fan to stabilise IHC's share price (Judgment at [187]).

Version No 1: 30 Mar 2021 (14:28 hrs)

63 The Judge found that the requisite intention to injure could be established on their part:

> (a) The Crest Entities knew that IHC would incur substantial liabilities upon entering into the Standby Facility. Moreover, they knew that IHC would use the funds disbursed to buy its own shares, and they must have known that share buyback was *prima facie* illegal. As such, the intended injury was simply the imposition of the liability – including the standby fees – on IHC for the purchase of its own shares. That the funds were being used to buy IHC's own shares also defeated the Crest Entities' argument that the Standby Facility was a purely commercial deal (Judgment at [196]–[197]).
>
> (b) As for Mr Fan, he knew and intended that IHC would incur substantial liabilities for the prohibited purpose of purchasing its own shares. The share buyback would prop up the price of IHC's shares, to Mr Fan's benefit as a shareholder (Judgment at [199]).

64 The Judge also rejected the argument that actual knowledge of the illegal nature of the means deployed was necessary for a claim in unlawful means conspiracy, or that the ignorance of such illegality was a defence (Judgment at [174]–[185]).

Ms Lim

65 The Judge did not find that Ms Lim was part of the agreement between the Crest Entities and Mr Fan. The Judge reiterated that there was insufficient evidence to find that Ms Lim knew about the true purpose of the Standby Facility, or that there had been drawdowns for the acquisition of IHC shares.

Version No 1: 30 Mar 2021 (14:28 hrs)

Indeed, Mr Fan did not brief Ms Lim on the deal (Judgment at [188]). Further, the Judge was not satisfied that she had the requisite intention to injure IHC because there was no incentive for her to do so. Ms Lim was IHC's senior employee, and her employment security depended in part on IHC's financial health (Judgment at [200]).

Damages

Mr Fan's liability for his breach of fiduciary duties

66 The relevant heads of claims in relation to Mr Fan's breach of fiduciary duties were as follows (Judgment at [219]):

(a) Sums paid by IHC towards the Standby Facility ("Standby Sums");

(b) The interest which would not have accrued on the Geelong Facility if the Standby Sums had been applied towards the Geelong Facility until its eventual repayment on 26 February 2018 ("Loss of use of Standby Sums");

(c) Losses which could have been avoided had the Geelong Facility been satisfied before its maturity date of 28 February 2016 ("Losses in default of the Geelong Facility"), which include the loss of the Australian Properties;

Standby Sums

67 Between 17 June and 18 December 2015, IHC made three payments totalling some $4.5m to partially discharge its liability under the Standby Facility. These three payments constituted the Standby Sums. The first two

Version No 1: 30 Mar 2021 (14:28 hrs)

payments were cheque payments in June and July for standby fees amounting to a sum of about $700,000. The last payment involved a payment of about $3.8m in December, which IHC contends was intended for the Geelong Facility but was applied by the Crest Entities towards the Standby Facility instead (Judgment at [220]). IHC relied chiefly on its internal records stating that the $3.8m payment was meant for the "partially settled Geelong loan" (see [30] above).

68 The Judge found that *but for* Mr Fan's breach of duties, IHC would not have entered into the Standby Facility. It followed that IHC would not have made any of the three payments mentioned in the preceding paragraph (Judgment at [222]).

Loss of use of the Standby Sums

69 This head of claim regarded the Standby Sums as otherwise available funds that could have been applied towards the Geelong Facility, thus preventing interest from accruing thereon up until 26 February 2018 (when the Geelong Facility was fully repaid) (Judgment at [224]).

70 The Judge agreed that had the Standby Facility not been entered into in the first place, IHC would have used the $4.5m to partially satisfy the Geelong Facility. The Judge thus allowed the loss of use claim, quantified at some $4.4m (Judgment at [227] and [229]).

Losses in default of the Geelong Facility

71 By way of background, even assuming that the Standby Sums were applied towards the Geelong Facility, there would nevertheless have been a balance of $4.1m due under the Geelong Facility to be paid on its maturity date

Version No 1: 30 Mar 2021 (14:28 hrs)

of 28 February 2016. The Judge then held that the real question was whether IHC would have repaid the remaining $4.1m outstanding under the Geelong Facility by the maturity date, but for the problems with the Standby Facility (Judgment at [232], [235]).

72 The Judge found that Ms Lim's WhatsApp message to Mr Fan on or about 18 December 2015 (see [31] above) "raised a query about the Crest entities' application of the sum of [$3.8m] towards the Standby Facility, and showed clearly that some confusion had been caused". The Judge took the view that such confusion would not have arisen if the Standby Facility had not been entered into in the first place. The Judge also placed emphasis on the fact that further payments to the Crest Entities ceased after the dispute over the existence of drawdowns on the Standby Facility had arisen. On this basis, the Judge accepted the respondent's position that it was the dispute over the Standby Facility, which would not have occurred but for Mr Fan's breach, that caused it to withhold further payment under the Geelong Facility (Judgment at [237]).

73 The Judge also found that but for Mr Fan's breach, the respondents would have been able to refinance the outstanding liabilities under the Geelong Facility and paid it off upon maturity. The Judge relied on IHC's positive cash inflows from financing activities for financial years 2015 and 2016 (between $42.7m and $10.8m), and the fact that IHC was able to refinance its Japan TMK bonds (of $151.2m) in 2015 (Judgment at [247]).

74 Accordingly, the respondents were entitled to claim for losses arising out of the default of the Geelong Facility, including the loss of the Australian Properties: but for Mr Fan's breach, the Crest Receivers and the Australian Receivers would not have been appointed. Therefore, any loss suffered by the

Version No 1: 30 Mar 2021 (14:28 hrs)

respondents in this respect was to be borne by Mr Fan (Judgment at [259], [271]).

The Crest Entities' liability in dishonest assistance and unlawful means conspiracy

75 The Judge found the Crest Entities jointly and severally liable with Mr Fan for the losses that would not have been suffered by the respondents but for Mr Fan's breach (Judgment at [299]–[300]).

Ms Lim's liability for her breach of duty of reasonable care

76 The Judge found that Ms Lim was liable for the Standby Sums. But for her breach of duty, IHC would not have entered into the Standby Facility, and would not have paid the Standby Sums (Judgment at [301]).

77 However, the Judge found that Ms Lim was not liable for the other heads of claim, as they were, *inter alia*, not reasonably foreseeable (Judgment at [303]–[305]).

Ms Lim's counterclaim

78 Ms Lim sought an indemnity from IHC for her liability, either expressly under art 153 of IHC's constitution, or impliedly as a term of her employment contract with IHC. Both arguments were rejected by the Judge.

79 As regards the express indemnity, the Judge found that the indemnity would only apply *if* the judgment against which she sought to be indemnified had been issued in Ms Lim's favour. Having been found liable for breach of her duty to take reasonable care, she could not avail herself of the express indemnity (Judgment at [307]).

Version No 1: 30 Mar 2021 (14:28 hrs)

80 As regards the implied indemnity, Ms Lim argued that terms should be read into her employment contract to the effect that she would carry out all lawful and reasonable directions from IHC, and that IHC would not give her any directions that are not lawful or reasonable. She complied with the first implied term, but IHC breached the second. That entitled her to the indemnity (Judgment at [310]–[311]).

81 The Judge rejected this argument, having found it to be "a leap in logic" since Ms Lim had effectively asserted that she was entitled to an indemnity from IHC in respect of any and all liability that she might incur as a result of her compliance with instructions given by IHC. The Judge also found that there was no basis to imply such terms into Ms Lim's employment contract. Instead, the Judge took the view that it was eminently reasonable (and indeed desirable) for a company to expect their officers or employees to act with due skill, care and diligence (Judgment at [311]–[312]).

Issues on appeal

82 The appellants in these appeals seek to reverse the whole of the Judgment. In this judgment, we shall examine the following issues:

(a) Whether Mr Tan had actual knowledge of the statutory prohibition against share buyback, and actual knowledge that IHC's purchase of its own shares was in contravention of this prohibition;

(b) Whether Mr Tan's knowledge can be attributed to all or only some of the Crest Entities;

(c) Whether Mr Fan was in breach of his fiduciary duties;

Version No 1: 30 Mar 2021 (14:28 hrs)

(d) Whether Ms Lim was in breach of her duty to take reasonable care;

(e) Whether the heads of claim awarded by the Judge were correct.

The Crest Entities' liability in dishonest assistance and unlawful means conspiracy

Mr Tan's state of mind

83 At the outset, it is crucial to draw a distinction between Mr Tan's actual knowledge of the *existence* of the statutory prohibition against share buyback, and his knowledge of the *contravention* of such prohibition. The Judge focused on the former (Judgment at [160]) and found that knowledge of the *existence* of the statutory prohibition was sufficient to infer dishonesty (for the dishonest assistance claim) and an intention to injure (for the unlawful means conspiracy claim).

84 In our view, knowledge of *both* the existence and the contravention of the statutory prohibition was established on the evidence before the court.

Knowledge of the existence of the prohibition

85 On appeal, Mr Tan Chee Meng SC (counsel for Crest Capital, Crest Catalyst and EFIII) mounts two primary factual arguments in aid of the position that Mr Tan was not aware of either the prohibition or its contravention:

(a) first, that Mr Tan did not try to hide the true purpose of the Disputed Facilities (*ie*, to buy IHC shares); and

Version No 1: 30 Mar 2021 (14:28 hrs)

(b) second, that Mr Tan did not try to hide the fact that drawdowns had occurred.

86 As a preliminary point, we note that there were marked shifts in the Crest Entities' pleadings on this point. The Crest Entities had initially pleaded in their Defence that they were not aware of "Section 76 of the Companies Act or any contravention of the same". On the eve of trial, they amended their defence to plead that they were not aware of "any contravention of Section 76 of the Companies Act". To us, this was a very pointed and deliberate amendment which suggested that the Crest Entities were only contesting their knowledge of the *contravention*, but not their knowledge of the *existence*, of the statutory prohibition. This amendment implies that Mr Tan must have known of the *existence* of the statutory prohibition.

Whether Mr Tan tried to hide the purpose of the Disputed Facilities

87 The Crest Entities' first argument pertains to the Morning and Afternoon Emails, as well as the Term Sheet, all of which expressly mentioned the pledge of IHC shares. Since Mr Tan sent these aforementioned documents to Mr Chia and Ms Lim, neither of whom was found to be co-conspirators, it cannot be said that Mr Tan was concealing the purpose of the Standby Facility. In our view, this argument is misconceived. As rightly noted by the Judge (at [160(b)] of the Judgment), the real concealment pertains to the omission to mention the pledge of IHC shares in the *legal documentation for the Standby Facility which was sent to IHC's board for approval*. The IHC board was the approving authority for the Standby Facility. The Morning and Afternoon Emails, as well as the Term Sheet, were not the critical documents insofar as IHC's board was concerned. Moreover, this argument assumes that Mr Chia and Ms Lim would have communicated the contents of the Emails and the Term Sheet to IHC's

Version No 1: 30 Mar 2021 (14:28 hrs)

board. There is no evidence supporting such an assumption. The fact that the pledge was mentioned in the Term Sheet but not in the actual documentation for the Standby Facility only serves to highlight one damaging point against Mr Tan, *ie*, that the omission was deliberate and was intended to conceal the true purpose of the Standby Facility from IHC's board.

88 The second argument relates to the omission of any reference to the pledge of IHC shares in the documentation for the Standby Facility. The Crest Entities advance two alternative explanations for the omission: either their lawyers at the time, Colin Ng & Partners ("CNP"), advised that there was no need to mention the pledge and did not raise the prohibition against share buyback, or that the omission was inadvertent because the documentation was hurriedly adapted from another loan transaction which did not concern any share purchases. There are three inherent weaknesses with these explanations:

(a) These two arguments are inconsistent. If advice was given, then any such omission by definition could not have been inadvertent.

(b) On the point of inadvertence, it is odd (to say the least) for a lender to inadvertently omit the reference to the very security for the loan, considering its vital importance. This is especially so since Mr Tan conceded in cross-examination that pending the completion of the legal documentation, drawdowns were made on the basis of the pledge of IHC shares as security.

(c) Finally, it is inaccurate to say that CNP *advised* that there was no need to mention the share pledge. There is no evidence whatsoever to suggest that CNP had expressly advised that reference to the pledge of IHC shares in the documentation for the Standby Facility was

Version No 1: 30 Mar 2021 (14:28 hrs)

> unnecessary. While Mr Tan did testify that the pledge of IHC shares was *discussed* with CNP, he decided to invoke legal professional privilege when he was asked to explain why CNP would have advised to omit the reference to the pledge. Given that the onus of showing that such advice was given lies with the Crest Entities, their insistence on relying on privilege and their failure to call the lawyer from CNP to testify, must mean that there was no acceptable explanation for the conspicuous omission of the pledge from the legal documentation.

Whether Mr Tan tried to hide the fact that drawdowns were made

89 We turn to the second argument, *ie*, that Mr Tan did not try to hide the fact that drawdowns were made. In our view, the argument is far from convincing.

90 First, the Crest Entities rely on the debit notes for the Standby Facility, which stated that standby fees were payable. According to them, since standby fees were payable only upon drawdown pursuant to cl 9.2 of the Original Facility, the debit notes for standby fees must be taken as an acknowledgement that drawdowns had occurred.

91 Even assuming the standby fees were only payable upon drawdown, and thus the sending of debit notes operated as an implicit acknowledgement that drawdowns were made, there was nevertheless no indication of the *amount* drawn down. In this regard, the Crest Entities claimed that they were following the practice followed in respect of other facilities, where debit notes only stated the principal drawn down upon maturity. Although the Standby Facility had its maturity date in end-December 2015, the Judge noted that the debit notes issued as late as January 2016 still did not state the amount of principal drawn down

Version No 1: 30 Mar 2021 (14:28 hrs)

(Judgment at [160(c)]). In other words, IHC was in fact none the wiser as to the amount of the drawdowns.

92 Second, the Crest Entities rely on an email dated 8 May 2015 sent from Mr Tan to Mr Aathar and Mr Fan, updating the latter two on the three drawdowns that had taken place as of that date. The Crest Entities argue that the email to Mr Fan and Mr Aathar should be treated as an official update to IHC, considering that Mr Fan and Mr Aathar were authorised by IHC in respect of the drawdowns. We should first point out the abject incongruity of this submission. The case against the Crest Entities is that Mr Tan, *inter alia*, conspired with Mr Fan and Mr Aathar. Viewed in this light, it is simply untenable for the Crest Entities to rely on Mr Tan's disclosure of the drawdowns to his co-conspirators to explain away the conspiracy.

93 This argument also fails because Mr Tan admitted in cross-examination that the 8 May email was meant to be a *personal* update from him to Mr Aathar and Mr Fan. The fact that it was meant to be a personal update to Mr Aathar and Mr Fan is entirely consistent with the conspiracy case theory. Moreover, as the respondents point out, this email covered only 18m IHC shares. There were drawdowns in respect of the purchase of a further 41m shares in respect of which no further updates were given.

94 Third, the Crest Entities seek to justify their reluctance to update IHC about the drawdowns when specifically queried by IHC in February 2016. They explain that they were frustrated with IHC's disingenuousness in denying that drawdowns had taken place. Further, they were entitled to direct IHC to check with Mr Aathar and Mr Fan, as the latter were authorised by IHC in respect of the drawdowns.

Version No 1: 30 Mar 2021 (14:28 hrs)

95 The easiest and most direct way for the Crest Entities to refute IHC's position (that there were no drawdowns) was to simply furnish the information in relation to the drawdowns. There was no conceivable reason for the Crest Entities to have been so tight-lipped if indeed the drawdowns were proper and legitimate.

96 Fourth, the Crest Entities' explanations for disregarding the Clause 7 Safeguards are not credible. Mr Tan's explanation was that this procedural mechanism was *waived*, because of time pressure and because of the Crest Entities' willingness to grant latitude to IHC, their long-time business partner. Further, Mr Tan explained that if there had been any lapses (*ie.* drawdowns effected without compliance with the Clause 7 Safeguards), such lapses stemmed from Crest Capital's unfamiliarity with handling loan facilities involving multiple drawdowns. Crest Capital's "usual fare" was transactions involving single drawdowns and it therefore did not possess any standard operating protocols for handling loan facilities (such as the Standby Facility) which involved multiple drawdowns. Any oversight, in other words, was attributable to unfamiliarity rather than any knowledge of the statutory prohibition.

97 These explanations suffered from a few problems. First, any "time pressure" would have subsided by the time the drawdowns were made. Any urgency would have been experienced in the time period between 2 April 2015 and 6 April 2015 (*ie*, the period where Mr Aathar expressed concerns about an "imminent" shorting attack). However, drawdowns began in April 2015 and *continued all the way till 24 August 2015*. It is thus hard to imagine what exactly was the "time pressure" that Mr Tan was responding to. Secondly, there were no waivers in the first place. Any waiver given should have been given before

Version No 1: 30 Mar 2021 (14:28 hrs)

the drawdowns were made. That was not done. In fact, by the time the Original Facility was formally executed on 21 July 2015, thirteen out of the fourteen drawdowns in question *had already taken place*. The "waivers" given were thus not waivers in the true sense of the word, but rather *retrospective ratifications* of what had been (illegitimately) done earlier. Finally, it is somewhat incongruous for the Crest Entities to claim unfamiliarity with the terms or operation of their own facility. It is unbelievable that the procedural lapses could be attributable to simple unfamiliarity with loan facilities involving multiple drawdowns. It defies belief that these lapses would have carried on for some 14 drawdowns and even the most tender-footed greenhorn would have been alerted to the serious irregularities that this represented, especially considering the large sums of money involved.

Knowledge of the contravention of the prohibition

98 While the question of prohibition and contravention are separate (see [83] above), we observe that knowledge of the prohibition coupled with knowledge of the drawdowns for the purchase of IHC's shares would inevitably constitute knowledge of the contravention. If Mr Tan knew of the statutory prohibition, he must have also known that the purchase of IHC shares would be a violation of the prohibition *unless the statutorily prescribed approval had been obtained*. It is undisputed that no such approval was ever procured. Therefore, Mr Tan must have also known that there was a contravention of the statutory prohibition.

Attribution of Mr Tan's knowledge

99 Having affirmed the finding below that Mr Tan had actual knowledge of the existence and the contravention of the statutory prohibition against share

Version No 1: 30 Mar 2021 (14:28 hrs)

buybacks, the next question is whether Mr Tan's knowledge can be attributed to each of the Crest Entities. The Judge found for the respondents on the basis that the Crest Entities had "relied" on Mr Tan's acts and thus accepted that he acted with authority (Judgment at [142]). Mr Tan's knowledge would be attributed to his principals, the Crest Entities, based on the principles of agency (Judgment at [148]).

100 On appeal, the Crest Entities make two arguments:

(a) First, that the respondents did not plead attribution, and were therefore precluded from arguing this point; and

(b) Second, even if attribution was sufficiently pleaded, there was no basis to find that Mr Tan's knowledge should be attributed to the Crest Entities.

101 We address each argument in turn.

Whether the respondents pleaded attribution

102 We turn to examine SOC4 to determine whether the issue of attribution was sufficiently pleaded. The respondents pleaded as follows:

(a) Para 2.2.4 pleaded that the Crest Entities (amongst others) intended and used the Standby Facility for IHC to engage in share buybacks in contravention of s 76 of the Companies Act. Para 2.2.4(a) pleaded the Morning Email while para 2.2.4(b) pleaded the Term Sheet. Para 2.2.4(c) pleaded that drawdowns were executed to purchase IHC shares, and that these shares were held as security for the drawdowns.

Version No 1: 30 Mar 2021 (14:28 hrs)

(b) Para 2.2.5 pleaded that the matters referred to para 2.2.4 were admitted to in Mr Tan's affidavit dated May 2016.

(c) Para 2.2.17(e) pleaded that the instruction to execute the drawdowns on the Standby Facility was given by Mr Aathar to Mr Tan, and not via the procedural mechanism provided under cl 6.1 of the Standby Facility.

103 In our view, the attribution point was sufficiently pleaded in these paragraphs in SOC4. There was no necessity to specifically plead that Mr Tan's knowledge should be attributed to the Crest Entities. Para 2.2.4 SOC4 specifically pleaded that the Crest Entities "intended" to use the Standby Facility to buy IHC shares. It must have been obvious that the state of mind of *a natural person* was to be treated as that of the Crest Entities'. The sub-paragraphs of para 2.2.4 then pleaded events involving *Mr Tan as the only relevant person who represented the Crest Entities.* Further, para 2.2.5 pleaded that the events in para 2.2.4 were admitted to by *Mr Tan*. Reading paras 2.2.4 and 2.2.5 together, it is, in our view, plain and obvious that *Mr Tan's* state of mind was to be attributed to the Crest Entities. After all, Mr Tan was the only factual witness called by the Crest Entities, and he was also the person on the Crest Entities' side who was responsible for the Disputed Facilities. The Crest Entities thus clearly understood that Mr Tan was the person whose knowledge the respondents were seeking to attribute to them. There was therefore no question of the Crest Entities being caught by surprise on the attribution point.

104 Further, the Crest Entities' reliance on this court's decision in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*") does not aid their argument. In *Sembcorp*

Version No 1: 30 Mar 2021 (14:28 hrs)

Marine, the appellant pleaded that one Mr Aurol had disclosed certain documents "in his capacity as a director of [one company called Baker]". The appellant then tried to attribute Mr Aurol's acts to the *respondent*. This court found at [133] that the appellant was precluded from doing so, and noted that "[i]f anything, Aurol's acts were attributed to Baker". Attribution was not available to the appellant in *Sembcorp Marine* because the pleadings in that case showed no nexus between Aurol and the respondent. However, the requisite nexus between Mr Tan and the Crest Entities is clearly shown in the pleadings as analysed in the preceding paragraph.

105 Further, we do not think the respondents needed to plead the *basis* on which attribution was established, *ie*, that Mr Tan was the Crest Entities' *agent*. The basis on which attribution can be established is a point of law, and therefore need not be pleaded. It suffices to plead the *material facts* on which the argument of agency can be sustained: see *MK (Project Management) v Baker Marine Energy* [1994] 3 SLR(R) 823 at [26], where this court found sufficient the plaintiff's pleadings that certain commissions were varied by the reduction of the amount initially agreed, without characterising this reduction as the *consideration* for the variation. Echoing the words of Lord Denning MR in *In re Vandervell's Trusts (No 2); White v Vandervell Trustees Ltd* [29174] Ch 269 at 321H, this court observed that "[it] is sufficient for the pleader to state the material facts. He need not state the legal result." Here, the material facts supporting the claim in agency were pleaded in paras 2.2.4 and 2.2.17(e) of SOC4, which outlined Mr Tan's involvement in executing the Disputed Facilities and how EFIII disbursed the funds through Mr Tan.

Version No 1: 30 Mar 2021 (14:28 hrs)

Whether attribution has been made out

106 In our view, the real controversy lies with the *proof* of the attribution point. The parties agree that the basis of attribution in this case is that of *agency*. A relationship of agency is premised on the conferral of *authority*. It is therefore imperative to discern the *existence* of any authority conferred on Mr Tan, and the *scope* of such authority.

107 In this connection, we note that the Crest Entities are now separately represented on appeal and their arguments on attribution now differ in important aspects. We will thus address them separately.

Crest Capital, Crest Catalyst and EFIII

108 We begin with Crest Capital, Crest Catalyst and EFIII. In our view, Mr Tan was clothed with authority to permit the drawdowns *for the purpose of purchasing IHC shares*, and his knowledge could be attributed to each of them.

109 Mr Tan was the Investment Director of Crest Capital, and also one of the two members of EFIII's Investment Committee ("IC"), EFIII's management body. More importantly, Mr Tan *negotiated and signed the Term Sheet (which expressly mentioned that the Disputed Facilities would be used to purchase IHC shares) as agent for Crest Capital*, and later *drew down on the Disputed Facilities to purchase IHC shares for EFIII*. To that extent, Crest Capital and EFIII clearly knew and authorised Mr Tan to permit the drawdowns *for the purpose of purchasing IHC shares*. It is uncontroversial that the knowledge which an agent acquires while acting within the scope of his authority is to be imputed to his principal (*Bowstead & Reynolds on Agency* (Sweet & Maxwell, 22nd Ed, 2021) ("*Bowstead*") at para 8-208). To that extent, Mr Tan's

Version No 1: 30 Mar 2021 (14:28 hrs)

knowledge of the purpose of the Disputed Facilities was rightly attributed to Crest Capital and EFIII.

110 We turn to Crest Catalyst. Mr Tan did not hold any formal position in Crest Catalyst. However, the Crest Entities pleaded in their Defence (Amendment No 6) that EFIII, VMF3 and VMIII were managed by Crest Capital and Crest Catalyst "in all aspects". Since both Crest Capital and EFIII knew and authorised Mr Tan to make drawdowns to buy IHC shares, Crest Catalyst must be taken to have known and authorised the same. We note that it was not seriously suggested that Crest Catalyst had been misled as to the true purpose of the Disputed Facilities. In our view, Mr Tan's state of mind can likewise be attributed to Crest Catalyst.

VMF3 and VMIII

111 However, we agree with Mr Toby Landau QC's (counsel for VMF3 and VMIII) submission that the same conclusion does not extend to VMF3 and VMIII. The evidence was that neither VMF3's nor VMIII's management knew that the Disputed Facilities would be used to purchase IHC shares. The Investment Memoranda sent to VMF's and VMIII's management simply, and misleadingly, stated that the Disputed Facilities would be used for "working capital".

112 That VMF3 and VMIII were misled about the true purpose of the Disputed Facilities is to us critical, because it would affect the *scope* of any authority that might have been conferred by them on Mr Tan.

113 We can accept that VMF3 and VMIII conferred authority on Mr Tan to permit the drawdowns under the Disputed Facilities. VMF3 and VMIII agreed

Version No 1: 30 Mar 2021 (14:28 hrs)

to lend money under the Disputed Facilities to IHC, and they knew that Mr Tan was the individual responsible for handling the drawdowns. However, the conferral of actual authority is premised on the principal's *consent*: *Bowstead* at para 3-003. The scope of Mr Tan's authority was therefore limited to the drawdowns for *working capital,* as presented to VMF3 and VMIII in the Investment Memoranda. If VMF3 and VMIII did not know that the drawdowns were used to buy IHC shares, they could not possibly have authorised the same for that purpose.

114 In the same vein, an agent who acts against his principal's interest cannot be said to be acting within his authority: *Bowstead* at para 3-012; Tan Cheng Han *SC*, *The Law of Agency* (Academy Publishing, 2nd Ed, 2017) at para 03.043; *Parti v Al Sabah* [2007] EWHC 1869 (Ch) at [50] and *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another suit* [2009] 4 SLR(R) 788 at [46]–[48]. Mr Tan cannot be said to have been acting in VMF3's and VMIII's interests in making the drawdowns to buy IHC shares, given that it was in contravention of the prohibition against share buyback.

115 For the reasons canvassed at [113]–[114], Mr Tan was not acting within the scope of authority conferred on him by VMF3 and VMIII when he made the drawdowns *to buy IHC shares without their knowledge*. Accordingly, his knowledge of the true purpose of the Disputed Facilities cannot be attributed to VMF3 and VMIII.

116 For completeness, Mr Lee Eng Beng SC, counsel for the respondents, raised two arguments supporting the contention that VMF3 and VMIII must be

Version No 1: 30 Mar 2021 (14:28 hrs)

taken to have known, and authorised, Mr Tan to make drawdowns for the purpose of buying IHC shares:

(a) First, the Crest Entities pleaded in D6 that they were aware that drawdowns under the Disputed Facilities would be used to purchase IHC shares.

(b) Second, the trial below proceeded on the basis that the Crest Entities would stand and fall together, *ie*, Mr Tan's state of mind would be attributed either to all of them or none of them. Therefore, the respondents would be prejudiced on appeal if VMF3 and VMIII can now run a case different from that of Crest Capital, Crest Catalyst and EFIII.

117 On the first argument, we accept that D6 pleaded at para 15C that "the Crest Entities were aware that funds disbursed under the Standby Facility were used by [IHC] to acquire its own shares". However, the question remains as to *when* each of the Crest Entities came to know that the drawdowns were used for the purchase of IHC's shares. In the suit below, the *respondents* themselves accepted in their closing submissions that VMF3 and VMIII did not know the true purpose of the Disputed Facilities. By this, the respondents implicitly accepted that VMF3 and VMIII were not aware of the true purpose of the Disputed Facilities *at the time when the drawdowns were made*. The Crest Entities also did not challenge the respondent's position on VMF3's and VMIII's ignorance. Both sides understood that VMF3 and VMIII were ignorant of the true purpose of the Disputed Facilities *when the drawdowns were made*.

118 Moreover, para 15A(e) D6 pleaded that out of the three Standby Lenders, only "[EFIII] executed drawdowns on the Standby Facility on [IHC]'s instructions multiple times to purchase [IHC]'s shares". It would therefore

Version No 1: 30 Mar 2021 (14:28 hrs)

appear that only EFIII accepted that the drawdowns were made for the purchase of IHC shares. The reference to the "Crest Entities" in para 15C should thus be properly understood to relate to EFIII only.

119 We also do not think it was accurate to claim that the trial below took place on the basis that the Crest Entities would stand and fall together on the attribution point. VMF3 and VMIII did separately argue that Mr Tan's knowledge should not be attributed to them, even if Mr Tan's knowledge could be attributed to the remaining Crest Entities. This was because Mr Tan was not affiliated with them. Not only did he not *source* the deal for them, Mr Tan in fact concealed the true purpose of the Standby Facilities from them. This separate argument was made during the Crest Entities' opening statements, and in the closing submissions. Significantly, the respondents did not allege that this argument had not been pleaded, or that they were caught by surprise. In fact, the respondent addressed this argument substantively in their closing submissions: they argued that attribution was established despite VMF3's and VMIII's argument, since VMF3 and VMIII were managed by Crest Capital and Crest Catalyst "in all aspects".

120 The respondents were thus well aware that the Crest Entities did not proceed on a "all or nothing basis" as regards the attribution point, and therefore cannot now complain that they would be prejudiced.

Conclusion on liability for the Crest Entities

121 Having found that Mr Tan knew of the existence and the contravention of the statutory prohibition against share buyback, and that his knowledge was correctly attributed to Crest Capital, Crest Catalyst and EFIII, we see no reason to disturb the Judge's finding on liability in relation to these three entities. They

Version No 1: 30 Mar 2021 (14:28 hrs)

knew that the Disputed Facilities were illegal, and yet were content to allow IHC to draw down on the Disputed Facilities. That is, in our view, sufficient to establish the dishonesty and intention to injure to support the claims in dishonest assistance and unlawful means conspiracy.

122 However, in relation to VMF3 and VMIII, Mr Tan's knowledge of the true purpose of the Disputed Facilities, the share buyback prohibition and its contravention cannot be attributed to them. To that extent, VMF3 and VMIII, much like the respondents, were *victims* of the plot hatched by Mr Fan, Mr Aathar and Mr Tan. They thus cannot be said to have had the requisite dishonesty or intention to injure. We thus overturn the Judge's finding that VMF3 and VMIII are liable in dishonest assistance and unlawful means conspiracy.

Whether actual knowledge of unlawfulness is necessary for a claim in unlawful means conspiracy

123 Having established that Mr Tan had actual knowledge of the existence and contravention of the prohibition against share buyback, it is strictly speaking unnecessary to deal with this issue. However, as the parties have made substantive submissions on this point, we will briefly address this issue.

124 VMF3 and VMIII accept that under Singapore law, actual knowledge of the unlawful nature of the means deployed (referred to in shorthand form as the "knowledge requirement") is not a requirement of the tort of unlawful means conspiracy. They however seek to persuade this court to change the law.

125 VMF3 and VMIII rely on a series of English authorities, one of which is *Meretz Investments NV v ACP Ltd* [2008] 2 WLR 904 ("*Meretz*"), which

Version No 1: 30 Mar 2021 (14:28 hrs)

suggest that this knowledge requirement should be incorporated into the law of unlawful means conspiracy. The Judge analysed *Meretz* in some detail, in particular the observations by Arden and Toulson LJJ which may be interpreted to support the knowledge requirement. The Judge, however, concluded that Arden and Toulson LJJ's observations, properly interpreted, concern the requirement of intention to injure (Judgment at [184]).

126 We agree with the Judge's reading of *Meretz*. Nevertheless, there are subsequent English cases which rely on *Meretz*, amongst others, as authority for the proposition that knowledge of the unlawfulness of the means deployed is a requirement for claims in unlawful means conspiracy. However, the current position under English law in relation to the knowledge requirement is not settled. To put it simply, there are conflicting English authorities – at both the High Court and the Court of Appeal levels – on whether there should be such a knowledge requirement.

(a) At the English Court of Appeal level, the case of *British Industrial Plastics Ltd v Ferguson* [1938] 4 All ER 504 supports the knowledge requirement, as well as Arden and Toulson LJJ's *obiter* remarks in *Meretz*. On the other hand, the *case* of *Belmont Finance Corporation v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 stands for the contrary proposition.

(b) There is similarly a divergence of views in the English High Court. In *Stobart Group Ltd v Tinkler* [2019] EWHC 258 (Comm), it was held that there is no knowledge requirement while the subsequent decision in *The Racing Partnership Ltd & Ors v Done Brothers (Cash Betting) Ltd & Ors* [2019] EWHC 1156 (Ch) ("*The Racing Partnership (HC)*"), held otherwise.

Version No 1: 30 Mar 2021 (14:28 hrs)

(c) *The Racing Partnership (HC)* went on appeal, and the English Court of Appeal in *The Racing Partnership Ltd & Ors v Sports Information Services Limited* [2020] EWCA Civ 1300 ("*The Racing Partnership (CA)*") reversed the lower holding by a 2-1 majority. *The Racing Partnership (CA)* thus represents the latest word on this issue under English law.

127 We note that these English authorities do not go so far as to support VMF3's and VMIII's position. These English authorities make a distinction between cases where the unlawful means concern violations of *private rights*, and cases where the unlawful means concern the commission of *statutory offences*. The authorities which support the knowledge requirement concern *private right* cases, and not *statutory offence* cases. In fact, Lewinson LJ, who dissented in *The Racing Partnership (CA)*, only went as far as saying that knowledge is necessary where the unlawful means consist of a violation of "some private right" (at [265]). Given that this case concerns a *statutory offence* situation (*ie*, a contravention of s 76A Companies Act), VMF3's and VMIII's reliance on the English cases does not advance their argument.

128 Having considered the parties' submissions, we remain of the view that knowledge of unlawfulness is not a necessary element for *both* private right and statutory offence cases:

(a) The *raison d'etre* for unlawful means conspiracy is the defendants' *combination, accompanied by the intention to injure* (*EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 ("*EFT*") at [96]). In fact, the requirement of intention is the device which limits excessive liability and ensures the

Version No 1: 30 Mar 2021 (14:28 hrs)

promotion of healthy competition in the marketplace (*EFT* at [100]). There is therefore no need for the requirement of knowledge of unlawfulness to act as a further valve to limit liability.

(b) The lack of any knowledge requirement for the tort of unlawful means conspiracy would not render the tort of inducing breach of contract otiose. Contrary to VMF3's and VMIII's argument, it is not easy to reframe a claim in inducement of breach of contract as a claim in unlawful means conspiracy, as the latter tort has distinct elements such as intention to injure and a conspiracy pursuant to which unlawful means were deployed. In any event, the two torts are conceptually distinct (*The Racing Partnership (CA)* at [142]), and there is no principled reason that just because the tort of inducing breach of contract requires knowledge of unlawfulness, the same requirement should likewise be imported for the tort of unlawful means conspiracy.

(c) The need for a high level of blameworthiness on the part of the conspirators in unlawful means conspiracy is fulfilled by the requirement of intention to injure. There is no necessity to graft on a further requirement of knowledge of unlawfulness.

(d) We affirm the longstanding principle that ignorance of the law is no defence in the realm of tortious liability. On that basis, we accept that knowledge of the lawfulness of the means deployed would be irrelevant in assessing liability for the purposes of unlawful means conspiracy. This principle remains unshaken by developments in the common law which now permit relief where a party paid monies under a mistake of law. Those developments are a matter for the law of unjust enrichment, which is not premised on wrongdoing on the part of the defendant, and

Version No 1: 30 Mar 2021 (14:28 hrs)

> has in our view little to do conceptually with the law of tort. In any event, ignorance of the law is usually not an excuse either in criminal law or in private law (*The Racing Partnership* at [141]).

129 For the above reasons, we remain of the view, at least provisionally, that knowledge of the unlawfulness of the means deployed should not be a requirement for the tort of unlawful means conspiracy.

Mr Fan's liability for breach of fiduciary duties

130 Mr Fan contended that he did not breach his fiduciary duties to IHC. He based this on two grounds. First, he argued that there was no drawdown under the Standby Facility. Second, he did not know of the Standby Facility's true purpose, or of the drawdowns made under it. We agree with the Judge that both arguments are completely against the weight of the evidence.

Whether there were drawdowns under the Standby Facility

131 Mr Fan maintains that there were no drawdowns on the Standby Facility because Mr Aathar had no authority to request drawdowns on behalf of IHC, given that the drawdowns did not comply with the procedural mechanism under the Standby Facility, and that the Standby Facility was for working capital purposes only. Mr Fan then argues that since the Judge's decision was premised on the factual finding that there were drawdowns on the Standby Facility, the decision must be overturned if there were in fact no drawdowns. We reject these arguments.

132 First, whether drawdowns were made is a separate and *independent* inquiry from whether Mr Aathar had authority to request those drawdowns. There could very well be drawdowns which are unauthorised, and authorisation

Version No 1: 30 Mar 2021 (14:28 hrs)

but no attendant drawdowns. To say that one is premised on the other is to muddle two logically separate inquiries. In that regard, we fully accept the Judge's findings (see [42] above) that there were drawdowns and similarly agree that Mr Aathar's authority was "not a relevant legal issue", at least for the purposes of ascertaining whether drawdowns had been made (see [43] above).

133 Secondly, we do not think it lies in Mr Fan's mouth to now argue that no drawdowns were made because the contractual requirements laid down under the Standby Facility were not strictly complied with. The Judge found (at [94] of the Judgment) that Mr Fan, Mr Aathar and Mr Tan well understood that the drawdowns were being made *pursuant to the Standby Facility*. The drawdowns were not made in compliance with the contractual requirements *precisely* because they knew the drawdowns were made for an illegitimate purpose (that is, to purchase IHC shares – see [136]–[146] below), and thus wanted to *conceal* the drawdowns. Mr Fan cannot now rely on his own wrongdoing to avoid liability.

134 Thirdly, the losses claimed by IHC in this appeal do not turn on whether the drawdowns made *were compliant with the contractual requirements under the Standby Facility*. This court held in *The Enterprise Fund III* that the Standby Facility was void. IHC is thus not looking to sue *in contract, under the Standby Facility*. IHC's claims against the appellants are grounded in *tort* and *equity*. As such, whether the drawdowns made were compliant with the *contractual* requirements stipulated by the Standby Facility is irrelevant to IHC's claims in tort and equity.

135 Finally, even if we were to accept that no drawdowns were made, Mr Fan's breach of fiduciary duties would not turn solely on whether there were

Version No 1: 30 Mar 2021 (14:28 hrs)

drawdowns under the Standby Facility. The Judge found that Mr Fan breached his duty in *misleading IHC's board* because the board paper which he vetted did not mention the true purpose of the Standby Facility. This caused IHC to enter into the Standby Facility and incur substantial liabilities in the form of standby fees and legal liability under s 76A Companies Act. Therefore, we agree with the Judge's finding (at [120] and [123] of the Judgment) that Mr Fan's breach lies in his involvement in the *preparation of the misleading board paper*, which is independent from whether drawdowns were made.

Whether Mr Fan knew of the true purpose of the Standby Facilities and the drawdowns made

136 We agree with the Judge's finding (at [118] of the Judgment) that at all material times, Mr Fan was aware of the Standby Facility's true purpose, *ie*, to buy IHC shares.

137 Mr Fan claims that the purpose of the Standby Facility changed. Though initially prompted by fears of a short-selling attack on 6 April 2015 (as illustrated by the Morning and Afternoon Emails), the Standby Facility transformed into an opportunity for the Crest Entities to "come in on the 6th April 2015 to increase [their] stakeholding [in IHC]" when the anticipated shorting activity did not come to pass.

138 This, as the respondents point out, was plainly not true. There had indeed been drawdowns on a loan facility and those drawdowns had been used to purchase shares in IHC, not for the Crest Entities' investment purposes but to allow IHC to purchase its own shares. This much was clear from the Term Sheet which treated the purchased shares as belonging to *IHC* rather than the Crest Entities. That is why the Term Sheet contemplated IHC offering security

Version No 1: 30 Mar 2021 (14:28 hrs)

in the form of a pledge of the IHC shares which were purchased from the drawdowns.

139 Mr Fan also relies on the absence of any reference to the pledge of IHC shares in the Standby Facility to argue that the purpose of the Standby Facility must have changed. However, we agree with the Judge (at [160(b)] of the Judgment), that the omission does not mean that there was any change in the purpose of the Standby Facility. Instead it was evidence of *concealment* of such purpose. Further, Mr Aathar's instructions to Mr Tan via WhatsApp for the purchase of IHC shares before formal execution of the Standby Facility (see [42(a)] above]) contradicts any alleged change in purpose.

140 Third, he contends that Mr Tan's 8 May 2015 email addressed to him and Mr Aathar, which mentioned "[s]hares bought on behalf" (see [42(b)] above), should not be given much weight. This is a fallacious argument. The email was addressed to *him* and *Mr Aathar*, less than a month after the discussions on the Term Sheet. There is no reason why the email should not be found to have meant what it says *ie*, that IHC shares were bought on behalf of IHC (at Mr Fan's and Mr Aathar's request).

141 We turn next to the question of whether Mr Fan knew of the drawdowns. He raised several additional arguments, all of which we find to be devoid of any merit.

142 First, he claims that he did not know of Mr Aathar's instructions to Mr Tan via WhatsApp for the purchase of the IHC shares. The Judge therefore erred in relying on these instructions as evidence of *his* knowledge of the drawdowns. This argument misinterprets the Judge's reasoning. The Judge

Version No 1: 30 Mar 2021 (14:28 hrs)

relied on these WhatsApp communications, *among other evidence*, to make a broad conclusion that Mr Aathar *and* Mr Fan knew of the drawdowns (Judgment at [94]–[95]). She did not single out these WhatsApp communications as evidence of Mr Fan's knowledge specifically. Therefore, it is probable that the Judge interpreted these WhatsApp communications as evidence of *Mr Aathar's* knowledge, but not necessarily Mr Fan's. Moreover, there is more incriminating evidence of Mr Fan's knowledge of the drawdowns as highlighted by the Judge (see [94] of the Judgment), which he was not able to satisfactorily address (see [143]–[146] below).

143 Second, he claims that the Judge erred in inferring his knowledge of the drawdowns from his approval of the payment of the standby fees for the Standby Facility for the period between April and May 2015 via the two cheques dated June and July 2015 (see [42(c)] above). Mr Fan claims that he approved these standby fees in error, as he did not realise that standby fees were only payable upon drawdowns being made. In support of this argument, he relies on his subsequent refusal to pay standby fees for the period of June 2015.

144 As the respondents pointed out, if the standby fees were approved by Mr Fan erroneously, then it was bizarre that he did not try to recover them. More importantly, Mr Fan fails to address Mr Tan's email to him and Mr Aathar dated 2 July 2015, where *Mr Tan was chasing him and Mr Aathar* for payment. Significantly, the email header was "EF3 - IHC (shrs) & VMF outstanding interest". Mr Fan then followed up with Mr Aathar on this email on 3 July, one day after he approved the standby fees. The inexorable inference must be that Mr Fan knew about the drawdowns, and that they were for the purchase of IHC shares.

Version No 1: 30 Mar 2021 (14:28 hrs)

145 Third, he claims that the Judge erred in inferring his knowledge of the drawdowns based on his involvement in the negotiations for repayment of the Standby and Geelong Facilities from October 2015 onwards. In particular, the Judge should not have relied on Mr Aathar's email to the Crest Entities (*copying Mr Fan*) proposing to restructure the "market shares of S$17.2m or 59.3m shares" (see [42(d)] above). Mr Fan insists that the correspondence between Mr Aathar and the Crest Entities (with him only as a passive bystander) never once made express reference to any drawdown under the Standby Facility. Further, his position after October 2015 was also that there was no drawdown.

146 As pointed out by the respondents, Mr Fan has cherry-picked the correspondence after October 2015 to suit his version of events, and neglected to address the following correspondence:

(a) The draft deed of forbearance sent to Mr Fan and Mr Aathar, which expressly referred to the $17m million drawn down under the Standby Facility.

(b) An email from Mr Chan (see [32] above) dated 23 December 2015 to Mr Fan, referring to a meeting that morning, where they discussed "the second repayment of $3.88 mil for the principal and outstanding interest for the standby facility out of which $17,278,466 has [*sic*] *drawn down* and is now overdue [emphasis added]".

Conclusion on liability for Mr Fan

147 In sum, the clear inference from the evidence is that Mr Fan knew that the purpose of the Standby Facility was to purchase IHC shares, and that there were drawdowns for that purpose. Mr Fan was well aware of the true purpose

Version No 1: 30 Mar 2021 (14:28 hrs)

of the Standby Facility and the drawdowns *prior* to his vetting of the board paper. In the circumstances, his omission to inform IHC's board of the real purpose of the Standby Facility and of the drawdowns made thereunder, *which were meant to benefit him and Mr Aathar*, amounted to a clear breach of his fiduciary duties.

Ms Lim's liability in negligence

148 To recap, the Judge found that Ms Lim did not know, or should not have been expected to know, the true purpose of the Standby Facility. However, the Judge found (at [135] of the Judgment) that Ms Lim knew, or must have known, that drawdowns were made under the Standby Facility for unknown purposes, and without proper documentation. Ms Lim's negligence lies in her failure to inquire as to the purpose of the drawdowns, and her failure to pursue the necessary inquiries with the board.

Whether Ms Lim was negligent

149 Ms Lim's counsel, Mr Goh Kok Leong, raised a number of arguments on appeal:

(a) She did not know the true purpose of the Standby Facility. To her knowledge, the Standby Facility was provided simply for "general working capital", as indicated in the board paper prepared by her and vetted by Mr Chia, Dr Jong and Mr Fan.

(b) The emails from Mr CP Lim (see [50(a)] above) did not give her any reason to believe that IHC shares were being purchased from the drawdowns.

Version No 1: 30 Mar 2021 (14:28 hrs)

(c) The investigations by IHC's then lawyers, Shook Lin & Bok, indicated that the drawdowns made, if any, did not contractually qualify as drawdowns under the Standby Facility. In the same vein, IHC's books at all material times did not reflect any drawdown under the Standby Facility, *ie*, that there was no outstanding debt owed by IHC to the Crest Entities under the Standby Facility.

(d) Mr Aathar had no authority to make requests for drawdowns on behalf of IHC.

150 To our understanding, these arguments seek to establish three broad points:

(a) First, that Ms Lim was simply following the instructions of her superiors, *ie*, Dr Jong and Mr Fan. If Dr Jong and Mr Fan vetted the board paper stating that the Standby Facility was for "general working capital", there was no reason for her to believe otherwise.

(b) Second, that there were no drawdowns, as there was no authorisation for any such drawdown, there was procedural irregularities in the purported drawdowns and there were no records of any drawdown having been made.

(c) Third, even if there were drawdowns, she was not aware of them.

151 In our view, all these points do not assist Ms Lim. We begin with the first point, that Ms Lim was simply following the instructions of her superiors. It is true that both Mr Fan and Dr Jong approved the board paper prepared by Ms Lim, which stated that the Standby Facility was to be used for "general working capital". However, this does not get Ms Lim off the hook. At best, this

Version No 1: 30 Mar 2021 (14:28 hrs)

shows that she did not know of the true purpose of the Standby Facility. This was also what the Judge found, and it was precisely for this reason that Ms Lim was not found liable in dishonest assistance and unlawful means conspiracy. The Judge's finding of negligence against Ms Lim was not premised on the Standby Facility itself, but rather the *drawdowns* made thereunder. That the Standby Facility might have been made for a proper purpose does not mean in or of itself that the *drawdowns* would likewise be made for a proper purpose. That is a separate inquiry which entails an examination of the evidence in relation to the drawdowns.

152 This brings us to Ms Lim's second argument that no drawdowns were made under the Standby Facility. This argument is, in essence, the same as that mounted by Mr Fan (see [131] above), and we likewise reject this argument (see [132], [134]–[135] above). While we accept that the drawdowns did not comply with the strict contractual requirements under the Standby Facility, and were not reflected on IHC's books, this does not mean that *factually speaking* there were no drawdowns and/or that she was not aware of the drawdowns.

153 The focus thus lies with her third argument, that she did not know that there were drawdowns. She argues that the drawdowns were *concealed from her*, and thus she could not have been expected to know of them:

(a) No drawdown requests as required under the Standby Facility were issued by IHC for the drawdowns;

(b) The Crest Entities gave no updates to IHC of the drawdowns made, or of the purchase of IHC shares;

Version No 1: 30 Mar 2021 (14:28 hrs)

(c) There was no transfer of funds from the Crest Entities directly to IHC's bank accounts;

(d) IHC's books did not reflect any sum outstanding under the Standby Facility, especially for financial year 2015 when the drawdowns were made;

(e) The Statements of Account and Debit Notes issued by the Crest Entities did not show any principal drawn down under the Standby Facility until January 2016;

(f) Internal investigations conducted by IHC's then-auditors, PricewaterhouseCoopers and then-lawyers, Shook Lin & Bok, concluded that there were no drawdowns under the Standby Facility.

154 It is clear from Ms Lim's submissions that key to her defence is in establishing that she was in fact unaware of the drawdowns. We can accept that there were attempts to conceal the drawdowns from her. However, that alone does not mean that she was therefore unaware of the drawdowns. In fact, as we will explain below, the concealment actually works against her. Specifically, Ms Lim was not able to offer any convincing explanation as regards two crucial pieces of evidence which demonstrated that she was in fact aware of the drawdowns notwithstanding the concealment. First, there was Mr CP Lim's email to her dated 13 May 2015 titled "IHC standby facility – Debit Note" in which he stated:

> Hi [Ms Lim],
>
> Attached is the debit note on the S$20m facility for your attention.

Version No 1: 30 Mar 2021 (14:28 hrs)

> As *our first drawdown date is 16 Apr 2015*, I would like to highlight that the full interest and principal repayment shall be 15 June 2015.
>
> [emphasis added]

155 Mr CP Lim's reference to "our first drawdown date [on] 16 Apr 2015" must have alerted Ms Lim to the fact that a drawdown was made *by IHC*. She attempted to explain away this email by asserting that the drawdown referred to was Crest entities' own drawdown from their own investors, and not a drawdown by IHC. The Judge did not accept her explanation (Judgment at [132]) and we see no reason to disturb that finding. After all, the email referred to "*our* first drawdown" and there was also no conceivable reason for Mr CP Lim to inform her of drawdowns by the Crest Entities' investors.

156 Second, Mr Fan had approved the payment of standby fees for the Standby Facility in June and July 2015 (see [42(c)] above). Ms Lim accepted in her affidavit of evidence-in-chief ("AEIC") that standby fees were only payable upon drawdown. She explained that she and Mr Fan wrongly thought that a minimum sum of two months' standby fees had to be paid to the Crest Entities for the Standby Facility, and that it was payable from 16 April 2015, *ie*, when the Standby Facility was put in place. However, we agree with the Judge that this explanation just did not add up (Judgment at [134]) as there was no attempt by Ms Lim to recover the purportedly mistaken payments (see [144] above).

157 In the circumstances, from these two pieces of evidence, the following facts were objectively clear to Ms Lim. First, she was aware that IHC had secured the Standby Facility for general working capital purposes. Second, she was aware that drawdowns under the Standby Facility must have taken place, *ie*, IHC had incurred a liability under the Standby Facility. Third, she would have been aware from the reasons she set out at [153] above that the drawdowns

Version No 1: 30 Mar 2021 (14:28 hrs)

were concealed from her and IHC. Fourth, she therefore did not know what the drawdowns were in fact used for despite the Standby Facility having been obtained for IHC's general working capital. It was the confluence of such circumstances that should have caused Ms Lim to realise that there were some irregularities or improprieties in relation to the drawdowns. The fact that she knew that the drawdowns had been concealed from her and IHC should, in our view, have *heightened* her concern and caused her to alert the board. We therefore agree with the Judge that Ms Lim should have known that *drawdowns were made*, albeit for an unknown purpose and, significantly, without proper documentation. It was in such circumstances that her failure or omission to act constituted a breach of her duty to IHC.

158 It is also material to bear in mind Ms Lim's role in IHC at the material time. At the time the alleged negligent omission occurred (*ie*, between May and July 2015 before the execution of the documentation of the Disputed Facilities), Ms Lim was the Vice-President (Investment) of IHC (Judgment at [10]). As explained by Ms Lim in her AEIC, at the material time she was assisting Dr Jong with loan reviews and *cash flow management* at IHC. More significantly, she accepted under cross-examination that if there were drawdowns, she would have known of money being deposited in IHC's account. She also admitted that if the Crest Entities alleged that there were drawdowns, she would have immediately alerted the board since *there were not supposed to be any drawdowns*. In this context, the irregularities in relation to the drawdowns should have aroused her suspicions even more. She was aware of the fact that drawdowns had taken place, yet *no money ever found its way to IHC's coffers*. And yet, she failed to make any query in relation to these irregularities. To that end, we agree that the Judge's finding of negligence on the part of Ms Lim was eminently justified.

Version No 1: 30 Mar 2021 (14:28 hrs)

Whether Ms Lim had any defences

159 For completeness, Ms Lim raised two defences to the claim in negligence. Both are without merit.

160 First, she claims that it would not be conducive to good industrial relations for IHC to maintain its negligence claim against her, citing the case of *Morris v Ford Motor Co Ltd* [1973] 1 QB 792 ("*Morris*").

161 In *Morris,* the plaintiff worked for a cleaning firm at the defendant's factory. One of the defendant's employees, Roberts, negligently injured the plaintiff. In the contract between the cleaning firm and the defendant, the cleaning firm agreed to indemnify the defendant against the negligence of either party's servants and agreed to provide for insurance. The plaintiff sued the defendant, who in turn claimed an indemnity from the cleaning firm. The cleaning firm then argued that it should be subrogated to the defendant's claim against Roberts. The English Court of Appeal found that it would not be "conducive to good industrial relations" for the cleaning firm to be subrogated to the defendant's claim against Roberts. For one, the defendant would "never, for a moment, have dreamt of suing their own servant" (at 798C). Moreover, the court recognised a general expectation that in situations such as these, "the damages are expected to be borne by the insurers" (at 798F). After all, the risks attendant on the work assigned by the master (there, the defendant) were to be borne by the master (through adequate insurance coverage) – "the master takes the benefit and should bear the burden". Allowing the cleaning firm to sue the employee (*via* subrogation) would have flown in the face of these common and well understood sensibilities. That is why the defendant objected to the cleaning firm taking advantage of a cause of action that the defendants themselves would never have pursued: *Morris* at 799D. As the court in *Morris* put it (at 798C),

Version No 1: 30 Mar 2021 (14:28 hrs)

"all the men would have come out on strike" and such an action "would imperil good industrial relations".

162 These concerns simply do not feature in the present case. For one, the plaintiffs are completely different. Unlike the situation in *Morris*, the plaintiff here (*ie,* IHC) is the very firm which the defendant (*ie*, Ms Lim) worked for. IHC is suing Ms Lim for the damage that *it* suffered at her hands and is not taking the benefit of anyone else's claim against Ms Lim. Moreover, the power dynamics are completely different as well. In *Morris*, Roberts was a fork-lift operator who worked for the defendant as an ordinary employee. That explained the expectation that should Roberts incur some sort of workplace liability, such liability would be borne and handled by his employer, presumably through adequate insurance coverage. But Ms Lim was in a qualitatively different position *vis-a-vis* IHC. She was in a position of senior leadership, well-placed to affect and (as in the case here) damage IHC's legal position. When that damage arose, IHC was perfectly entitled to pursue a claim against her. That is exactly what happened here.

163 It is thus obvious that *Morris* does not stand for any broader proposition that an employer cannot claim against an employee in negligence. Any suggestion to the contrary would, with respect, be untenable.

164 Second, Ms Lim claims that IHC should be precluded from suing her, having committed an illegal act by entering into the Standby Facility in contravention of s 76 Companies Act, by virtue of the doctrine of *ex turpi causa non oritur actio*.

Version No 1: 30 Mar 2021 (14:28 hrs)

165 We note that Ms Lim did not plead this doctrine. Nor was this argument raised below. Nevertheless, as the doctrine rests on public policy, a court is required to act in any case to which this doctrine applies, if necessary of its own motion: *ANC Holdings Pte Ltd v Bina Puri Holdings Bhd* [2013] 3 SLR 666 at [84]; *Ong Bee Chew v Ong Shu Lin* [2019] 3 SLR 132 ("*Ong Bee Chew*") at [130]. Even then, Ms Lim's reliance on the doctrine is misguided. The doctrine requires that there be some sort of *turpitude* on the part of the claimant, which he *relies* upon for his cause of action (*Ong Bee Chew* at [132]). As the respondents rightly pointed out, when a company engages in share buyback in contravention of s 76 Companies Act, the *company* itself is not guilty of any offence by virtue of s 76(5). As IHC was not itself guilty of any offence, there is no turpitude on IHC's part to speak of. Ms Lim's reliance on the doctrine is therefore a non-starter.

Ms Lim's counterclaim

166 We also briefly address Ms Lim's counterclaim for an indemnity against IHC.

167 We begin with the express indemnity found in Art 153 of IHC's Articles of Association. The Judge found (at [307] of the Judgment) that Ms Lim could only rely on this express indemnity if "judgment" was given in *her* favour, or the proceedings otherwise disposed of without any finding of breach of duty on *her* part. Since Ms Lim was in breach of her duty of due skill, care and diligence, she could not avail herself of the express indemnity.

168 On appeal, Ms Lim argues that the term "judgment" means judgment in relation to a particular cause of action. Since there were three causes of action against her out of which only one succeeded, it meant that Ms Lim could avail

Version No 1: 30 Mar 2021 (14:28 hrs)

herself of the indemnity in relation to the claims in conspiracy and dishonest assistance.

169 We find this argument untenable. We agree with the Judge (at [307] of the Judgement) that the plain words of the indemnity do not support Ms Lim's argument. For convenience, we set out the full text of the indemnity here:

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

170 Plainly construed, the indemnity has three parts. First, it outlines the *situations* in which it would arise ("in the execution and discharge of his duties or in relation [to] defending any proceedings, civil or criminal, which relate to anything done or omitted or alleged to have been done or omitted by him as an officer or employee of the Company"). Second it makes clear *what* the employee may claim ("all costs, charges, losses, expenses and liabilities incurred"). Third, it carves out a clear (and in this case, fatal) caveat that extinguishes the indemnity should there be "any finding or admission of any material breach of duty on his part". That caveat undoubtedly operates here. We

Version No 1: 30 Mar 2021 (14:28 hrs)

do not therefore see how Ms Lim may avail herself of the express indemnity at all.

171 Moreover, Ms Lim does not proffer any authority in support of her interpretation of the word "judgment". To our understanding, a "judgment" is defined simply as a decision from a court of law regarding the rights and liabilities of the parties. Significantly, in a suit, multiple causes of action can be pleaded by a plaintiff. Therefore, a "judgment" must be defined in relation to the totality of the causes of action. Further, her interpretation is not very practicable. It is difficult, if not impossible, to precisely quantify the costs and expenses incurred by her in relation to the claims in dishonest assistance and conspiracy.

172 We turn to the implied indemnity. Ms Lim argues that under her employment contract with IHC, there should be terms implied to the effect that her employer (*ie*, IHC) shall not cause her to carry out unlawful or unreasonable instructions. IHC has breached this term, and this entitles her to a claim in indemnity against IHC.

173 In our view, there is no basis to imply such terms. Ms Lim's liability lies in her failure to exercise due skill, care and diligence. We agree with the Judge's holding at [312] of the Judgment, that there is no basis to imply an indemnity in respect of negligent breaches of duty on the part of an employee. It is desirable for a company to be able to rely on its employees to act with reasonable care and entirely reasonable for companies to commence proceedings against such employees for failing to do the same.

Version No 1: 30 Mar 2021 (14:28 hrs)

Damages

174 To recap, the following heads of claim are relevant to the present appeal:

(a) Sums paid by IHC towards the Standby Facility, *ie*, Standby Sums;

(b) The interest which accrued on the Geelong Facility, but which would not have so accrued if the Standby Sums had been applied towards the Geelong Facility until its eventual repayment on 26 February 2018, *ie*, loss of use of Standby Sums;

(c) Losses which could have been avoided had the Geelong Facility been satisfied before its maturity date of 28 February 2016, *ie,* losses arising from the default in payment of the Geelong Facility. This includes the loss of the Australian Properties.

175 As we have found that VMF3 and VMIII are not liable in dishonest assistance and unlawful means conspiracy, these heads of claim would thus concern only Crest Capital, Crest Catalyst, EFIII, Mr Fan and Ms Lim. As such, the references to the "Crest Entities" in this section concern only Crest Capital, Crest Catalyst and EFIII.

Joint and several liability of Ms Lim

176 Before addressing the heads of claim, we make some observations on the Judge's decision to hold Ms Lim jointly and severally liable with the Crest Entities and Mr Fan for the Standby Sums (Judgment at [336(a)]). At first glance, the Judge's decision might appear to be somewhat unusual, as Ms Lim was found liable for a *different cause of action* (*ie*, negligence) than those on

Version No 1: 30 Mar 2021 (14:28 hrs)

which the liability of the Crest Entities (*ie*, dishonest assistance and unlawful means conspiracy) and Mr Fan (*ie*, breach of fiduciary duties and unlawful means conspiracy) was based.

177 However, the Judge's decision on this score is correct. There is no doubt that Ms Lim on one hand, and the Crest Entities and Mr Fan on the other hand, are several wrongdoers since they each committed different wrongs. However, several wrongdoers may nonetheless be held jointly and severally liable if their separate wrongs resulted in the same indivisible loss.

178 The law of torts draws a distinction between several tortfeasors who cause *divisible damage*, and those who cause *indivisible damage*. Broadly speaking, an injury is said to be divisible where it is possible to contribute different parts of the injury to different causes. Where such a breakdown is not possible, the injury is said to be indivisible. This distinction is clearly laid out in the leading treatises on tort law: J Goudkamp and D Nolan, *Winfield and Jolowicz on Tort* (Sweet & Maxwell, 20th Ed, 2020) ("*Winfield*") at paras 22-001–22-003 and 22-005; *Clerk & Lindsell on Torts* (Michael A Jones gen ed) (Sweet & Maxwell, 22nd Ed, 2018) at para 4-02. In the former situation, liability is several. In the latter situation, if several tortfeasors cause indivisible damage to the claimant *ie*, several concurrent tortfeasors, the liability of these several concurrent tortfeasors would be *joint and several*: see Glanville Williams, *Joint Torts and Contributory Negligence* (Wm Gaunt & Sons, 1998 Reprint) ("*Joint Torts*") at pp 3–4.

179 Several concurrent tortfeasors include those who are liable for the same tort (for example, negligence): *Winfield* at 22-003. Several concurrent

Version No 1: 30 Mar 2021 (14:28 hrs)

tortfeasors also include those who are liable *for different torts*: *Joint Torts* at p 18, where it was stated that:

> Two are concurrent tortfeasors although the one commits a tort of negligence and the other commits a breach of strict duty, provided that the *damnum* flowing from the torts is single.

180 Further, those who are liable in different causes of action (for example, tort, breach of contract and breach of fiduciary duties) are also jointly and severally liable if they cause the *same damage*: see *Joint Torts* at p 2, where it is stated that:

> where the tort of a several wrongdoer is concurrent with the breach of contract or breach of trust of another, the two may be referred to as *mixed concurrent wrongdoers*. … the law applicable to such mixed concurrent wrongdoers appears to be the same as that applicable to several concurrent tortfeasors.
>
> [emphasis added]

181 The position in *Joint Torts* is also reflected by the local case law. In *Chuang Uming (Pte) Ltd v Setron Ltd and another appeal* [1999] 3 SLR(R) 771, this court observed (at [51]) that:

> In cases, such as this, where the damage or injury was occasioned by more than one party, the question whether there should be a joint judgment or separate judgments depends essentially on the facts and in particular on the damage caused. Where the damage caused can be so identified and isolated as to be attributable to the *negligent act or the breach of contract of each party*, then a separate judgment in respect of that damage can be entered against each of the parties. Where, however, the damage caused by the parties cannot be so identified and isolated, and in reality forms indivisible parts of the entire damage, we do not see how separate judgments can be entered against them separately.
>
> [emphasis added]

Version No 1: 30 Mar 2021 (14:28 hrs)

In that case, this court accepted that two wrongdoers, one liable in negligence and one liable in breach of contract (*ie*, mixed concurrent wrongdoers) can nevertheless be held jointly and severally liable.

182 In doing so, this court (at [45]) quoted with approval the decision of *Nowlan et al v Brunswick Construction Ltd* (1973) 34 DLR (3d) 422 at 425–426 ("*Nowlan*"):

> Where there are concurrent torts, concurrent breaches of contract or *a breach of contract and a concurrent tort both contributing to the same damage*, whether or not the damage would have occurred in the absence of either cause, the liability is a joint and several liability and either party causing or contributing to the damage is liable for the whole damage to the person aggrieved …
>
> [emphasis added]

This same extract was relied on by the High Court in *Chuang Uming (Pte) Ltd v Setron Limited (Lee Sian Teck Chartered Architects, Third Party)* [1999] SGHC 54 at [202]–[204] and the High Court's reliance on *Nowlan* was not disturbed on appeal. The case of *Nowlan* thus in our view remains good law, and *Nowlan* also states that two wrongdoers, one liable in negligence and one liable in breach of contract (*ie*, mixed concurrent wrongdoers) can nevertheless be held jointly and severally liable.

183 The real focus thus would be on the *damage* caused. If several concurrent tortfeasors, or mixed concurrent wrongdoers, cause the same and indivisible damage, they can be held jointly and severally liable. It seems to us immaterial that the judgment against each of them is based on different causes of action.

Version No 1: 30 Mar 2021 (14:28 hrs)

184 Therefore, insofar that Ms Lim's negligence caused the *same indivisible damage* as the Crest Entities' dishonest assistance and unlawful means conspiracy, and Mr Fan's breach of fiduciary duties and unlawful means conspiracy, Ms Lim would be jointly and severally liable for that damage with the Crest Entities and Mr Fan.

Standby Sums

185 Crest Capital, Crest Catalyst and EFIII accept that they are liable for the Standby Sums. Mr Lok Vi Ming SC, counsel for Mr Fan, accepts that Mr Fan is liable for the first two cheque payments in June and July 2015, but argues that he should not be liable for the $3.8m paid in December 2015. This is because the Crest Entities acted unreasonably in applying the $3.8m paid by IHC in December 2015 towards the Standby Facility instead of towards the Geelong Facility as intended.

186 Mr Lok relies on the Crest Entities' unilateral decision in applying the $3.8m towards the Standby Facility as an intervening cause. However, assuming that the doctrine of *novus actus interveniens* is applicable in the context of a breach of fiduciary duty, it is only engaged if the intervening cause is *unrelated* to the fiduciary's breach of duty. Such was the position taken by the majority in the Supreme Court of Canada in *Hodgkinson v Simms* [1994] 3 SCR 377 at [78]–[82] ("*Hodgkinson*"). There, an accountant had advised his client to enter into certain property-related investments which, by conventional wisdom, were regarded as safe and conservative. However, the accountant failed to disclose that he had been acting for the developers involved in the properties that formed the subject of the investment. Later on, there was a general economic recession and the client subsequently suffered heavy losses. The client sued the accountant for breaches of fiduciary duties upon finding out about the non-

Version No 1: 30 Mar 2021 (14:28 hrs)

disclosures, while the accountant claimed that the general economic recession had been an intervening act which broke the chain of causation. The majority did not accept the accountant's argument. It found that there was a "nexus between the wrong complained of and the fiduciary relationship", and that the duty breached by the accountant "was directly related to the risk that materialized and in fact caused the appellant's loss". The accountant, in inducing the client into the investments by concealing his own financial interests, had exposed the client to all the risks associated with these investments (including the risks of losses arising from the general economic recession): *Hodgkinson* at [79]. In that regard, it was no defence for the accountant to point to the general economic recession as an exculpatory excuse when the risks associated with such a recession were *precisely* the sort that he had been expected to bear in mind in the proper discharge of his fiduciary duties.

187 In the present case, Mr Fan's breach of his fiduciary duties to IHC was not just *related* to the Crest Entities' unilateral application of the $3.8m towards the Standby Facility. Mr Fan's breach was *responsible* for creating this entire state of affairs. Mr Fan's breach of fiduciary duties arose from his failure to inform IHC's board of the true nature of the Standby Facility, and of the drawdowns made thereunder. His breach thus had a direct nexus with the creation and provision of the Standby Facility. Without the Standby Facility, IHC would only have been liable to repay the Geelong Facility. There would have also been no possibility of the Crest Entities applying the $3.8m paid by IHC in December 2015 (see [30] above) towards the Standby Facility. In other words, Mr Fan's breach had a direct nexus not just with the Standby Facility, but also with the dispute or the "confusion" over the $3.8m payment in December 2015 that subsequently ensued.

Version No 1: 30 Mar 2021 (14:28 hrs)

Loss of use of Standby Sums

188 The Crest Entities make a broader argument on the claim for the loss of use of the Standby Sums:

(a) When the cheque payments were made, there was no outstanding liability on the Geelong Facility. It was thus illogical to conclude that the cheque payments would have been applied towards the Geelong Facility.

(b) Further, there was no evidence that the funds used for the cheque payments would have been available for the Geelong Facility. IHC was facing a capital crunch. IHC was expecting to face a deficit of over $23m by April 2015. In June 2015, IHC had to borrow $6.5m for its operations.

(c) Moreover, there was no evidence that even if the funds which had been used for the cheque payments were available, IHC would have applied them towards the Geelong Facility. Given IHC's capital crunch, it would have raised funds to meet its capital needs instead of applying the funds meant for the cheque payments. After all, the plans for fund-raising were afoot even *prior* to the cheque payments.

189 In our view, each of the arguments fails.

(a) It did not matter that the cheque payments were made before the liability under the Geelong Facility became due. What matters is that the money that went to the cheque payment could have been used *subsequently* for payment under the Geelong Facility.

Version No 1: 30 Mar 2021 (14:28 hrs)

(b) It is also irrelevant that IHC was facing a capital crunch. The cheque payments were made in June and July 2015. On the Crest Entities' own case, the capital crunch began as early as April 2015. If IHC was able to make the cheque payments when it was already facing a capital crunch, there is no reason why IHC would not have used the same funds towards the Geelong Facility instead.

(c) Finally, the fact that IHC already had plans to raise funds prior to the cheque payments is irrelevant. What matters is *how much* IHC had planned to raise. If there was money available to be applied towards the Geelong Facility, it would follow that IHC would simply need to raise *less* money.

190 The Crest Entities also argue that they are not liable for the loss of use of the $3.8m payment in December 2015, for mostly the same reasons as those set out in the preceding paragraph. They add two further points:

(a) As at December 2015, IHC was still facing a capital crunch.

(b) The $3.8m could not have been intended for the Geelong Facility, but was instead intended to be used for the Standby Facility.

191 The additional reasons proffered by the Crest Entities specific to the $3.8m are no more persuasive:

(a) It does not matter that IHC faced a capital crunch in December 2015. That clearly did not prevent IHC from making the $3.8m payment.

(b) It is equally immaterial whether the $3.8m was intended for the Geelong or Standby Facility. But for Mr Fan's breach of duty, there

Version No 1: 30 Mar 2021 (14:28 hrs)

> would have been no Standby Facility to begin with, and thus the dispute over the appropriation of the $3.8m payment towards the Standby Facility would not have arisen.

192 As for Mr Fan, he again relies on the doctrine of intervening cause. The intervening cause is, again, the Crest Entities' unilateral decision to apply the $3.8m towards the Standby Facility as opposed to the Geelong Facility. We reject his argument for the reasons canvassed at [187] above.

Losses in default of the Geelong Facility

193 To recap, the Judge found that even assuming that the $3.8m payment in December 2015 was channelled towards the Geelong Facility, there would still have been a further *undisputed outstanding sum* of $4.1m. However, the Judge found that but for Mr Fan's breach of fiduciary duties, IHC would have been *willing* and *able* to repay this outstanding sum.

194 We begin with Mr Fan's argument. Mr Fan again relies on the doctrine of intervening cause. He contends that the intervening cause is IHC's unreasonable refusal to pay up the undisputed outstanding amount. We need only refer to our analysis at [187] above to reject this argument.

195 We turn to the Crest Entities' argument. They dispute the Judge's findings, both as to IHC's *willingness* and its *ability* to pay the undisputed outstanding amount. We reject all their arguments.

IHC's willingness to pay

196 The Crest Entities emphasise that IHC *knew* that there were *undisputed outstanding sums* owing on the Geelong Facility, which they claim amounted

Version No 1: 30 Mar 2021 (14:28 hrs)

to $5.7m as at April 2016. They argue that the confusion over the $3.8m payment did nothing to affect these outstanding sums. Therefore, IHC's refusal to pay must be taken to mean that they were *unwilling* to pay the outstanding sums.

197 However, as pointed out by the respondents, they were clearly aware of the undisputed outstanding sums owing under the Geelong Facility. However, their concern was that any further payments from them to *satisfy the Geelong Facility* could be *unilaterally diverted by the Crest Entities towards the Standby Facility instead*. In other words, the concern that IHC had was not over how much was due, but rather over whether further payments would discharge the sums due under the Geelong Facility.

198 The Crest Entities insist that if IHC had intended to make payments towards the Geelong Facility, IHC could simply have taken steps to ensure that any monies paid were properly applied towards the Geelong Facility. However, as long as there existed an *undisclosed* liability under the Standby Facility, IHC would have had good reason to fear that the Crest Entities would insist on applying further payments, *no matter how clearly marked*, towards the Standby Facility. In this regard, this fear or concern on IHC's part might have been addressed, had the Crest Entities simply informed IHC how much was in fact drawn down under the Standby Facility. Instead, the Crest Entities inexplicably refused to provide information on the drawdowns.

199 More importantly, as the Judge noted, Mr Fan's breach of his fiduciary duties caused IHC to enter into the Standby Facility. As the Judge rightly found, if there was no Standby Facility, there would have been no dispute over the $3.8m payment (Judgment at [237]).

Version No 1: 30 Mar 2021 (14:28 hrs)

IHC's ability to repay

200 The Crest Entities also argue that IHC lacked the ability to refinance the Geelong Facility before the maturity date. They first point to IHC's $9.5m deficit as at December 2015. They then insist that the Judge erred in relying on IHC's successful refinancing of the Japan TMK bonds (see [73] above) in April 2016 as an indication that IHC would have likewise been able to refinance the Geelong Facility.

201 Neither point assists the Crest Entities in our view. On the point about the deficit, it is precisely because there was a deficit that IHC needed refinancing. Otherwise, the question of refinancing would not even have arisen. On the point about the Judge's reliance on the refinancing of the Japan TMK bonds, while the Japan TMK bonds were clearly different from the Geelong Facility, the amount due under the Japan TMK bonds was also much larger than the Geelong Facility ($150m versus some $11m). In the circumstances, the Judge was in our view entitled to rely on IHC's successful refinancing of the Japan TMK bonds in finding that IHC would have been able to refinance the Geelong Facility.

202 In any event, even if we accept the Crest Entities' argument that the Japan TMK bonds were inappropriate comparators, it would at best suggest that there is a *lack* of evidence on whether IHC would be able to refinance the Geelong Facility. However, as the respondents point out, IHC enjoys the *presumption of causation*. In other words, it is *presumed* that Mr Fan's breach of fiduciary duties caused the IHC's losses, including the losses in default of the Geelong Facility. The onus lies on *the Crest Entities* to adduce evidence showing that IHC would *not* have been able to refinance the Geelong Facility. If there is a *lack* of evidence on whether IHC would have been able to refinance

Version No 1: 30 Mar 2021 (14:28 hrs)

the Geelong Facility, the presumption of causation remains unrebutted, and ultimately operates in IHC's favour.

Loss of the Australian Properties

203 Since we have established that the losses arising from the default in payment of the Geelong Facility are recoverable, it should follow that the loss of the Australian Properties should likewise be recoverable as both losses arise from the *same* default relating to the Geelong Facility. However, the Crest Entities argue that the loss of the Australian Properties is, properly analysed, *IHC Medical Re's* loss and not IHC's.

204 This argument necessitates an examination of how IHC has characterised its loss in relation to the Australian Properties.

205 IHC pleaded as follows in relation to the loss of the Australian Properties (at paras 4.1 and 4.1.2A):

> The Plaintiffs [*ie, IHC and IHC Medical Re*] have suffered [the following losses] …
>
> …
>
> Losses arising from the termination and sale of the Australian business (i.e. the fair market value of the Australian business (as at the date of appointment of the Australian receivers) less the net proceeds realised from the sale of the Australian business).

206 It can be observed that the losses suffered in relation to the Australian Properties can potentially be construed either as being IHC's loss or IHC Medical Re's loss or one shared by IHC and IHC Medical Re.

207 IHC's position in its Closing Submissions (at paras 375–376) was no more specific than that in its pleadings:

Version No 1: 30 Mar 2021 (14:28 hrs)

> As mentioned above, the Australian receivers sold the Australian properties for a total of A$135.25 million (St Kilda – A$117.75 and Geelong – A$17.5 million) in November 2016 and March 2017. Although the combined sale price of the Australian Properties were higher than their combined valuation A$114.5 million by Savills as at 31 December 2015, it should be pointed out that there were significant costs and expenses incurred in the receivership and in the works done for the leasing of the St Kilda properties to Monash University. Further, the Geelong property was sold at A$10 million less than the valuation of A$27.5 million by Savills.
>
> IHC therefore suffered loss and damages from the appointment of the Australian receivers and the forced sale of its Australian business. These losses have been bifurcated, and IHC will call upon expert witness [*sic*] to provide quantification of such losses accordingly.

208 IHC's position in its Reply Submissions (at para 79) remained similarly general in nature:

> … the Geelong property was sold at A$10 million less than its 2015 valuation of A$27.5 million. The net return/surplus sale proceeds from the forced sale of these properties was therefore reduced … The quantification of such loss has been bifurcated, and will be addressed in a separate tranche.

209 It thus can be observed from IHC's pleadings and submissions that the losses in relation to the Australian Properties were couched in *purely economic terms*. IHC did not clarify whether such losses were claimed as its own loss, or that of IHC Medical Re. Further, IHC did not specifically identify the *legal basis* upon which it was claiming these losses.

210 However, what is clear is that IHC *did not* state, either below or on appeal, that it was claiming *IHC Medical Re's* losses. The losses in relation to the Australian Properties, as pleaded, can be construed as IHC Medical Re's loss. But it can also be claimed as *IHC*'s own loss: either as a diminution in the value of IHC's shares in IHC Medical Re, or as IHC's loss of *control* over its shares in IHC Medical Re, which were the subject of a receivership order.

Version No 1: 30 Mar 2021 (14:28 hrs)

Therefore, it remains open to IHC to argue, at the assessment hearing, that the loss of the Australian Properties is, legally speaking, its own loss. Further, we note that the quantification of this head of loss was ordered to be bifurcated by the Judge: Judgment at [258]. Accordingly, in fairness to the respondents, we think that this head of loss should be allowed at this juncture. The specifics as to whether IHC is entitled to claim *any* damages arising and the quantum of such damages, if any, will have to be properly assessed and canvassed by the parties at the bifurcated hearing on quantum.

211 We accept that the loss of the Australian Properties is a form of special damage, being a type of loss which is not the natural or probable consequence of the various wrongs committed (see *The "Shravan"* [1999] 2 SLR(R) 713 at [77]), and thus must be specifically pleaded. However, it is clear that only *material facts* need be pleaded: O 18 r 7 Rules of Court (Cap 322, R 5, 2014 Rev Ed). The material facts supporting the claim for the loss of the Australian Properties have been pleaded. The *legal* basis for such loss, being a matter of law, need not be pleaded: O 18 r 11 Rules of Court. Therefore, it remains open for the respondents to establish, at the assessment hearing, the legal basis on which the loss of the Australian Properties can be treated as IHC's own loss.

212 We pause to observe that the Crest Entities' argument before the Judge on this head of loss was entirely focused on causation, *ie*, that the Australian Properties would have been sold at an undervalue in any event. The question of whether the loss of the Australian Properties can be said to be IHC Medical Re's loss instead of IHC's own loss did not feature at all in the court below. There was therefore no occasion for the respondents to explain the legal basis of their claim in respect of the loss of the Australian Properties. In other words, in the court below, the question of whether the loss of the Australian Properties was

Version No 1: 30 Mar 2021 (14:28 hrs)

in truth the loss of IHC Medical Re and not IHC's simply did not arise. It seems to us to be unfair to IHC to treat the loss of the Australian Properties as a loss of IHC Medical Re when the point was not taken below and will instead be examined at the bifurcated hearing for the assessment of damages.

Conclusion

213 In conclusion, we partially allow CA 113/2020 and reverse the Judge's finding only insofar as VMF3 and VMIII were held liable to the respondents for damages and costs. The appeal by Crest Capital, Crest Catalyst and EFIII in CA 113/2020 is accordingly dismissed together with Ms Lim's and Mr Fan's appeals in CAs 132/2020 and 135/2020 respectively.

214 As for costs, they should follow the event insofar as Crest Capital, Crest Catalyst, EFIII, Mr Fan and Ms Lim are concerned, given our dismissal of their respective appeals. Taking into account the parties' respective costs schedules, we fix the costs payable by these parties to the respondents as follows:

(a) Crest Capital, Crest Catalyst and EFIII in the aggregate sum of $80,000 inclusive of disbursements.

(b) Mr Fan in the sum of $60,000 inclusive of disbursements.

(c) Ms Lim in the sum of $50,000 inclusive of disbursements.

215 However, as regards costs in relation to VMF3 and VMIII, the respondents and VMF3 and VMIII are to file written submissions on the appropriate costs order and quantum to be made here and below in light of our findings herein and the conduct of VMF3's and VMIII's defence below. Such

Version No 1: 30 Mar 2021 (14:28 hrs)

submissions shall be limited to fifteen pages each and be filed within fourteen working days of the issuance of this judgment.

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Belinda Ang Saw Ean
Judge of the Appellate Division

Tan Chee Meng *SC*, Chng Zi Zhao Joel, Leo Zhen Wei Lionel, Wong Zheng Hui, Daryl and Li Yiling Eden (WongPartnership LLP) for the first to third appellants in CA 113/2020;
Toby Landau *QC* (instructed), Tham Lijing and Rachel Low Tze-Lynn (Tham Lijing LLC) for the fourth and fifth appellants in CA 113/2020;
Goh Kok Leong, Daniel Tan An Ye and Dillion Chua Hong Bin (Ang & Partners) for the appellant in CA 132/2020;
Lok Vi Ming *SC*, Lee Sien Liang Joseph, Chan Junhao, Justin and Lee Ying Hui (LVM Law Chambers LLC) for the appellant in CA 135/2020;
Lee Eng Beng *SC*, Cheng Wai Yuen, Mark, Chow Chao Wu Jansen, Sasha Anselm Gonsalves and Dawn Seow (Rajah & Tann Singapore LLP) for the respondents in CAs 113, 132 and 135/2020.

Version No 1: 30 Mar 2021 (14:28 hrs)