IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 10

Court of Appeal / Civil Appeal No 47 of 2022

Between

Foo Kian Beng

… *Appellant*

And

OP3 International Pte Ltd
(in liquidation)

… *Respondent*

JUDGMENT

[Companies — Accounts]
[Companies — Directors — Duties]
[Companies — Shares — Dividends]
[Insolvency Law — Avoidance of transactions — Transactions at an undervalue]
[Insolvency Law — Avoidance of transactions — Unfair preferences]

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Foo Kian Beng
v
OP3 International Pte Ltd (in liquidation)

[2024] SGCA 10

Court of Appeal — Civil Appeal No 47 of 2022
Sundaresh Menon CJ, Steven Chong JCA, Belinda Ang Saw Ean JCA, Kannan Ramesh JAD and Judith Prakash SJ
30 October 2023

27 March 2024 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 A company, being an inanimate legal person, acts through its agents. The board of directors is typically the directing mind of a company. However, this can give rise to difficulties where the personal interest of a director is not aligned with the interests of the company as a whole, which would reflect the interests of others, including the shareholders who hold the primary economic interest in the company, and even those of other stakeholders such as creditors and employees. To address this, the law imposes on directors a fiduciary duty to always act in the best interests of the company. As a result, even though the separation between the "ownership" and "management" of the company's assets creates the risk that directors may pursue their private interests at the expense

of the company, the directors are always obliged to take corporate decisions with the best interests of the company in mind.

2 How then are the best interests of a company to be understood? The evaluation of a company's best interests does not admit of a single and unchanging answer. When a company is financially healthy, the interests of creditors are, in the usual course, sufficiently protected, and directors may be entitled to treat the interests of shareholders as a sufficient proxy for those of the company. On the other hand, the interests of the creditors will come to the fore when the company is insolvent because, at that point, the directors are effectively trading and running the company's business with the creditors' money (see *Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd* [2010] 4 SLR 1089 ("*Progen*") at [52]). Any outflows at that point eat into the estate that is available to meet the claims of the creditors. As the present appeal demonstrates, the difficulty lies in delineating the point in time at which the interests of creditors should assume significance and even pre-eminence in the mind of the directors. The UK Supreme Court recently set forth its views on this issue in *BTI 2014 LLC v Sequana SA and others* [2022] UKSC 25 ("*Sequana*"). We have the opportunity to do the same in this appeal.

3 Alongside this principal issue, several other legal and evidential issues arise before us. In the main, they concern the liability of the appellant, Mr Foo Kian Beng ("Mr Foo"), the sole director and shareholder of the respondent company, OP3 International Pte Ltd ("OP3"), for authorising the payment of a dividend and the repayment of a loan to himself at a time when the company was facing a suit arising from the defective design and construction of a drainage system at one of its clients' premises. In *OP3 International Pte Ltd (in liquidation) v Foo Kian Beng* [2022] SGHC 225 ("Judgment"), the company was found by the High Court judge ("Judge") to be in a financially parlous state

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at the time of the payments to Mr Foo. The Judge found that Mr Foo was obliged in these circumstances to consider the interests of OP3's creditors as part of his fiduciary duty to act in the best interests of the company at the time he authorised those payments to himself, and that he breached that duty because there was no legitimate reason for him to have paid himself in preference to the claims of other creditors. Dissatisfied, Mr Foo appeals against the Judge's findings.

4 Having considered the parties' submissions, we dismiss the appeal. We now provide our reasons and begin by recounting the salient facts. In this judgment, for convenience, we refer to the director's duty to consider the interests of creditors in certain circumstances as the "Creditor Duty" even though it is an integral part of his duty to act in the best interests of the company. We stress that there is, strictly speaking, no distinct duty that directors owe to creditors or any duty separate from the directors' fiduciary duty to act in the best interests of the company (see *Progen* at [52]).

Background

The parties

5 The appellant, Mr Foo, was at all material times the sole director and shareholder of OP3.

6 OP3 was incorporated in December 2006. Its business was in interior design, decorating consultancy and construction services. OP3 was ordered to be liquidated on 3 April 2020 arising from its failure to satisfy a judgment sum it was ordered to pay in HC/S 498/2015 ("Suit 498"). Suit 498 is distinct from and preceded the High Court suit which forms the subject of the present appeal.

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We first canvass the salient facts of Suit 498 as these provide important context to the Judge's findings and the parties' arguments on appeal.

Suit 498

7 Suit 498 arose from a contract OP3 entered into with Smile Inc Dental Surgeons Pte Ltd ("Smile Inc") on 19 July 2013 to provide fitting out works at one of Smile Inc's clinics ("Clinic") in consideration for the sum of $158,010 ("Contract"). Under the terms of the Contract, Smile Inc was obliged to pay 50% of the said sum to OP3 upon execution of the Contract, with the balance payable upon completion of the works ("Balance Sum"). The date of completion was contractually agreed to be 11 September 2013 (see *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2017] SGHC 246 ("*Smile Inc Dental Surgeons*") at [30]).

8 OP3 completed the fitting out works on or about 31 October 2013 and handed the Clinic over to Smile Inc on the same date (*Smile Inc Dental Surgeons* at [31]–[32]). This was more than a month after the contractual date of completion.

9 A few months later, on 9 January 2014, Smile Inc discovered mould growing on the walls of the Clinic (*Smile Inc Dental Surgeons* at [43]). After conducting further investigations, on 17 January 2024, Smile Inc discovered that the mould was the result of a flood in the Clinic ("First Flood") and, on the same day, notified OP3 of it. Smile Inc believed that the First Flood was caused by OP3's defective fitting out works.

10 Upon learning of the First Flood, OP3 undertook rectification works at the Clinic. OP3 assessed that water from the Clinic's sinks and spittoons was not draining properly and that, as a result, the flooding occurred at the Clinic's

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drainage sump area. OP3 therefore installed a panel near the drainage sump area to enable the staff of Smile Inc to access the area and clear any debris that might have accumulated there, as the debris was thought to contribute to the risk of flooding. OP3 separately engaged a contractor to check for any leakages from the sump and water pipes at the Clinic, and tests conducted on 20 and 21 February 2014 revealed that there were no such leaks. OP3 handed the Clinic back to Smile Inc on 8 March 2014 (*Smile Inc Dental Surgeons* at [44]).

11 On 21 July 2014, Smile Inc discovered mould growth on the walls of the Clinic for the second time (*Smile Inc Dental Surgeons* at [45]). This followed a second flood ("Second Flood") in the Clinic which again originated at the Clinic's drainage sump area. Ms Grace Chong ("Ms Chong"), Smile Inc's Managing Director, notified Mr Foo of the Second Flood on 22 July 2014.

12 On 23 July 2014, Mr Foo visited the Clinic to investigate the circumstances surrounding the Second Flood. There was little evidence of the nature and extent of the investigations that he claimed to have carried out that day. We return to the significance of this point later (see [141] below). What is clear is that Smile Inc did not permit OP3 to carry out further rectification works, and engaged a third party to resolve its water leakage issues associated with the Second Flood. Mr Foo, however, did engage a second contractor, AXN Engineering Pte Ltd, to conduct further hydrostatic tests on the Clinic's water pipes on 28 and 29 August 2014, and these tests again affirmed that there were no leaks in these pipes.

13 In the wake of the Second Flood, Smile Inc sent a letter of demand to OP3 on 22 August 2014, in which it claimed that OP3's fitting out works had been tardy and further that they had been defective and were the cause of the

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First Flood and the Second Flood ("First and Second Floods"). Smile Inc sought compensation in the sum of $676,715.68 on account of OP3 having caused it to "shut down the operation of the Clinic for an extended period" on two occasions as well as to incur ancillary costs of repair.

14 Smile Inc subsequently commenced Suit 498 against OP3, alleging, among other things, that OP3's failure to exercise a reasonable standard of care, skill, and diligence in designing and executing the fitting out works had caused it to suffer damages in the sum of $1,807,626. It served the writ of summons and statement of claim on OP3 on 25 May 2015.

15 OP3 was represented by Mr Vijai Parwani ("Mr Parwani") of Parwani Law LLC ("Parwani Law") in Suit 498. Of relevance to the present appeal is the fact that Mr Parwani had advised Mr Foo by an e-mail dated 15 December 2015 that OP3 had a strong defence to Smile Inc's claim in Suit 498 ("Parwani's E-mail"). This advice, however, significantly predated the trial of Suit 498 which commenced on 31 January 2017, and it was bereft of details.

16 In its defence, OP3 pleaded that its delay in completing the fitting out works was caused by Smile Inc having made multiple revisions to the design drawings. It also claimed that flooding had occurred at the Clinic through no fault of its own. Rather, the Clinic's operations generated debris which clogged the floor grating covering the drainage pipe for water to be discharged out of the Clinic. It further claimed that Smile Inc failed to carry out regular maintenance of the floor grating even after OP3 specifically installed an access panel allowing Smile Inc to do so after the First Flood (*Smile Inc Dental Surgeons* at [13]).

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17 To bolster its defence, OP3 engaged an independent expert, Mr Chee Yan Pong ("Mr Chee"), on 22 March 2016 to provide his opinion as to the cause of the First and Second Floods. Mr Chee prepared a report dated 21 September 2016 ("Mr Chee's Report") setting out his views on this issue. We deal with the relevant strands of his evidence where appropriate.

18 On 5 October 2017, Chan Seng Onn J (as he then was) rendered his decision on liability in Suit 498 (see *Smile Inc Dental Surgeons*). His findings were as follows:

(a) OP3 was late in completing the fitting out works and bore the responsibility for this delay. Whereas the Contract required OP3 to complete the fitting out works by 11 September 2013, OP3 only handed the Clinic over to Smile Inc on 31 October 2013. Even then, there were still some 36 incomplete and outstanding items of work (*Smile Inc Dental Surgeons* at [30]–[31]). This delay could not be attributed to Smile Inc having earlier revised certain design drawings (*Smile Inc Dental Surgeons* at [36]–[41]).

(b) OP3's fitting out works were defective and this was the principal cause of the First and Second Floods. Pertinently, OP3 positioned the discharge outlets of nine wastewater discharge pipes above a floor grating. By so doing, it turned the floor grating into a sieve for the wastewater, prevented dirt contained in the water from being discharged, and this clogged the floor grating (*Smile Inc Dental Surgeons* at [100]–[101]). Additionally, OP3 designed and constructed a raised area contained by a bund, where the outlets of the discharge pipes terminated above the floor grating, such that any water that accumulated outside the raised bund could not flow back into the bunded area to be drained away.

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This design conduced to frequent clogging and flooding, electrical outages, and mould growth (*Smile Inc Dental Surgeons* at [110]–[111]).

(c) OP3 successfully proved its counterclaims for payment in respect of certain variation works it had performed pursuant to the Contract and for payment of the Balance Sum (*Smile Inc Dental Surgeons* at [131]–[157]).

19 Chan J rendered his decision on damages on 11 November 2019. Accounting for OP3's successful counterclaims, Chan J found OP3 liable to Smile Inc for the sum of $534,189.19 (*Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2020] 3 SLR 1234 at [122]). OP3 did not appeal against Chan J's decision in Suit 498.

Dividends and other payments paid by OP3 to Mr Foo between 2015 and 2017

20 Between 2015 and 2017, and whilst Suit 498 was ongoing, Mr Foo caused OP3 to pay him dividends and repay him loans that he had earlier extended to the company. The details of these transactions, which we collectively refer to as the "Payments", are set out in the table below:

Declaration and payment of dividends to Mr Foo			
S/N	**Date of the director's resolution authorising the payment of the dividend**	**Date the dividend was paid to Mr Foo**	**Amount ($)**
1	10 December 2015	11 December 2015	1,200,000
2	10 December 2015	11 December 2015	700,000
3	8 July 2016	13 July 2016	400,000
4	27 December 2016	**Disputed**	500,000

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	Subtotal	2,800,000
Repayment of moneys Mr Foo had earlier loaned to OP3		
S/N	**Date of payment**	**Amount ($)**
5	11 December 2015	138,352
6	2017	682,394
	Subtotal	820,746
	Total	3,620,746

21 It is undisputed that OP3 paid Mr Foo dividends of $400,000 (S/N 3 in the table above) ("July 2016 Dividend") on 13 July 2016, but this transaction was erroneously recorded in OP3's financial statement for the year ending 31 December 2015. Pausing here, we observe that Mr Foo relies on this error to support his claim that the dividends of $500,000 OP3 recorded as having been paid to Mr Foo on 27 December 2016 (S/N 4 in the table above) ("Disputed Dividend") was, in fact, only paid to him as part of the sum of $682,394 he received from OP3 in 2017 (S/N 6 in the table above) ("Disputed Payment"). Where appropriate, we refer to the Disputed Dividend and the Disputed Payment collectively as the "Disputed Transactions".

22 We also highlight here Mr Foo's claim to have verified with Mr Wong King Kheng ("Mr Wong"), an auditor OP3 previously engaged to prepare its financial accounts, that it was permissible for Mr Foo to make the Payments before he did so.

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OP3's subsequent liquidation

23 As noted above, OP3 did not satisfy the judgment in Suit 498. On 12 March 2020, Smile Inc applied for a winding-up order against OP3. The High Court granted the order sought on 3 April 2020.

Suit 152

24 On 10 February 2021, OP3's liquidator commenced HC/S 152/2021 ("Suit 152"), an action in OP3's name against Mr Foo.

OP3's claim

25 By Suit 152, OP3 sought to recover sums equivalent to the Payments from Mr Foo on the principal basis that in authorising these Payments to himself, Mr Foo acted in breach of his director's duty to act in the best interests of the company under the common law and/or his duty to act honestly under s 157(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("CA"). Whilst OP3's claims in this regard were premised on both the director's common law duty to act in good faith in the best interests of the company and s 157(1) of the CA, we observe that nothing turns on this distinction as the duty under s 157(1) of the CA to "act honestly" enshrines in statute the director's common law duty that we have described (see *BIT Baltic Investment & Trading Pte Ltd (in compulsory liquidation) v Wee See Boon* [2023] 1 SLR 1648 at [35], citing *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 ("*Ho Yew Kong*") at [134]).

26 Central to OP3's case in Suit 152 was its claim that a director is under a duty to consider the interests of the creditors as part of his duty to act in the best interests of the company at a time when the company is "financially parlous".

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Further, OP3 contended that this describes a state of affairs that is less dire than being on "the verge of insolvency".

27 OP3 further alleged that it was insolvent or, at the very least, in a financially parlous position (as it understood the term) at the time Mr Foo authorised the Payments for the following reasons:

(a) Suit 498 gave rise to a contingent liability that was reasonably likely to materialise from the date of the First Flood. Judged objectively, OP3 was late in completing the fitting out works at the Clinic and its defective design of the works was also the root cause of the First Flood.

(b) This contingent liability ought to have been contemporaneously valued at either $1,542,206 or $534,189. OP3 derived the first figure from the sum Smile Inc sought in its statement of claim in Suit 498 ($1,807,626), and by subtracting from this a sum of $265,420 pertaining to a claim for loss of management time and effort that Smile Inc conceded was weak. As for the latter figure ($534,189), this was the quantum of damages Chan J eventually awarded to Smile Inc on 11 November 2019, rounded to the nearest dollar (see [19] above). If even the lower quantum of contingent liability had been accounted for, this would have rendered OP3 cash flow insolvent as at 31 December 2015, close to balance sheet insolvent in 2015, and balance sheet insolvent in 2016 and 2017.

28 In the circumstances, it was said that Mr Foo was obliged to consider the interests of creditors as part of his duty as a director to act in the best interests of the company when he authorised the Payments. However, he failed to do so and by authorising the Payments to himself, he breached that duty, and specifically its subset, the Creditor Duty.

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Mr Foo's defence

29 Mr Foo disagreed with OP3's characterisation of the point in time at which the Creditor Duty is first engaged. To Mr Foo, a director is only obliged to consider the interests of creditors as part of his fiduciary duty to act in the best interests of the company when the company is in fact insolvent or, at least, is on the verge of insolvency, and these are financial states that are more dire than when a company may be said to be in a financially parlous position.

30 On this basis, Mr Foo submitted that OP3 was neither insolvent nor on the verge of insolvency when he authorised the Payments. Apart from the fact that OP3 was balance sheet and cash flow solvent as at 31 December 2015, Mr Foo claimed that OP3's contingent liability in Suit 498 need not have been accounted for as this liability was not one that, at least as far as Mr Foo was concerned at the material time, was reasonably likely to materialise. This was so for the following reasons:

(a) Mr Foo genuinely believed that OP3 had a strong defence to Smile Inc's claim in Suit 498 in light of Parwani's E-mail. Indeed, to underscore the probative value of Parwani's E-mail, Mr Foo adduced, in Suit 152, a letter from Mr Parwani dated 20 January 2022 ("Parwani's Letter") stating that he had advised Mr Foo on 22 August 2014 and 25 May 2015 that Smile Inc's claim in Suit 498 was unmeritorious. We observe, however, that Mr Parwani did not testify in support of Mr Foo in Suit 498 and shall return to this point later.

(b) Mr Foo considered that the First Flood had arisen from Smile Inc's failure to clear the drainage sump area of debris. In the wake of the First Flood, OP3 had installed an access panel which would have enabled Smile Inc to do so and had also impressed upon Smile Inc the

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importance of regular maintenance of its drainage system (see [10] above).

(c) OP3 conducted two sets of hydrostatic tests which confirmed that there were no defects in the drainage pipes OP3 installed at the Clinic (see [10] and [12] above).

(d) Before making the Payments to himself, Mr Foo confirmed with Mr Wong that it was proper for him to do so (see [22] above).

31 Mr Foo accordingly contended that there was no basis for him as a director to account for OP3's contingent liability in Suit 498 when assessing the company's solvency at the time the Payments were made to him. Further, on the basis of his claim that the Disputed Dividend had been paid as part of and was included in the Disputed Payment, and was not a separate payment, Mr Foo argued that OP3 was solvent at the material time, and he was thus under no duty to consider the interests of creditors when he authorised the Payments to himself.

32 As a fallback, Mr Foo submitted that even if he were obliged to consider the interests of creditors in authorising the Payments, he had complied with this duty by obtaining legal advice from Parwani Law, consulting Mr Wong on the propriety of paying dividends to himself, engaging third parties to conduct the water pressure tests at the Clinic, and retaining substantial amounts of money in OP3 before declaring and paying the dividends to himself.

33 Finally, in the further alternative, Mr Foo submitted that if he had breached the Creditor Duty, he had acted honestly and reasonably and ought therefore to be absolved of liability under s 391 of the CA.

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The Judge's decision

34 The Judge found in favour of OP3 that the Creditor Duty is first engaged when a company is "financially parlous" and that this is a state of affairs less severe than being "on the verge of insolvency" (Judgment at [28]). In her view, various strands of reasoning in *Progen*, *Parakou Investment Holdings Pte Ltd and another v Parakou Shipping Pte Ltd (in liquidation) and other appeals* [2018] 1 SLR 271 ("*Parakou Shipping (CA)*"), and *Diablo Fortune Inc v Duncan, Cameron Lindsay and another* [2018] 2 SLR 129 affirmed the relevance and materiality of the Creditor Duty once a company is in a "financially parlous" state and these further suggested that there was clear water between the meaning of the terms "parlous financial position" and the "verge of insolvency" (Judgment at [29]–[30]).

35 Notwithstanding this, the Judge observed that the two terms were ultimately "of limited utility in shedding light on when the [Creditor Duty arises]". She considered it more instructive to engage in a broad and practical assessment of the financial health of the company to determine whether the Creditor Duty had arisen and the extent to which a director was obliged to consider the interests of creditors, in line with this court's analysis of the issue in *Dynasty Line Ltd (in liquidation) v Sukamto Sia* [2014] 3 SLR 277 ("*Dynasty Line*") (Judgment at [33]–[34]).

36 On the facts of the case, the Judge found that OP3's potential liability in Suit 498 was reasonably likely to materialise when Smile Inc served the statement of claim on OP3 on 25 May 2015. Based on the facts and circumstances known to Mr Foo at this date, he could not reasonably have believed that OP3 would not face *any* liability in Suit 498. Pertinently, whilst Mr Foo claimed that the First Flood was caused by Smile Inc's failure to clear

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the drainage sump area of debris, he knew at all times that Smile Inc was unable to do so because OP3 had overlooked the need to install an access panel at the Clinic (Judgment at [55]). Mr Foo also conceded that he did not know for certain what the root cause of the Second Flood was (Judgment at [56]).

37 In the Judge's view, the legal advice that Parwani Law provided Mr Foo on the merits of Smile Inc's claim in Suit 498 did not take Mr Foo very far. Parwani's Letter was inadmissible hearsay (see [30(a)] above). Parwani's E-mail was admittedly sent to Mr Foo in 2015 but shed no light on the context in which Mr Parwani had advised Mr Foo that OP3 had a strong defence to Smile Inc's claim. Nor was it clear what the basis was for concluding that OP3 had a strong defence to the claim. In the circumstances, there was little to suggest that Mr Foo was justified in relying on the legal advice he received from Parwani Law (Judgment at [67], [75]).

38 The Judge also considered but declined to attribute weight to Mr Chee's Report and Mr Wong's advice. Mr Chee's Report pertained to the merits of Suit 498, rather than to the propriety of Mr Foo authorising the Payments to himself in the face of the said suit. As for Mr Wong's advice, this was premised on the erroneous assumption that there was no need for Mr Foo to have made any provision for OP3's potential liability in Suit 498 in OP3's accounts. Furthermore, Mr Wong was not then engaged by OP3 as its auditor and had been consulted by Mr Foo on an informal basis (Judgment at [117]).

39 The Judge next held that the value to be ascribed to Suit 498 as a contingent liability ranged between $441,000 and $514,500 (Judgment at [89]). She derived these figures by starting with the full sum Smile Inc sought in Suit 498 ($1,807,626) and deducting $265,420 (representing Smile Inc's claim for loss of management time and effort that Smile Inc accepted was without

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basis) as well as the Balance Sum from this full sum (Judgment at [85]). This resulted in a figure of $1,470,000. The Judge then considered it reasonable for Mr Foo to have applied a discount of between 60% and 65% to the working sum of $1,470,000 on account of the legal advice he received, and a further discount of about 5% in view of Smile Inc having inflated the sum it claimed from OP3 in its statement of claim compared with its letter of demand (see [13]–[14] above) (Judgment at [86]–[87]).

40 The Judge found that accounting for this quantum of contingent liability would not have caused OP3 to be insolvent or in a financially parlous state as at 31 December 2015 (Judgment at [93]–[99]). There was also insufficient evidence to show that OP3 was insolvent or in a financially parlous state in July 2016 when it paid Mr Foo the July 2016 Dividend (Judgment at [104]–[105]). The Judge therefore held that the Creditor Duty had not been engaged at these times, and there was nothing objectionable in OP3 paying Mr Foo the sums it paid him in 2015 or the July 2016 Dividend (Judgment at [114]–[115], [119]).

41 That said, OP3's contingent liability to Smile Inc in Suit 498 rendered it balance sheet insolvent as at 31 December 2016 and 31 December 2017, such that Mr Foo was obliged to consider the interests of creditors in making decisions for OP3 at these times (Judgment at [100]–[105]). The Judge found that Mr Foo failed to do so, in breach of the Creditor Duty, when he authorised the payment of the Disputed Dividend and Disputed Payment – which were distinct transactions (Judgment at [120]–[124]) – to himself in December 2016 and in 2017 respectively. In the Judge's view, this was the natural inference to be drawn from the fact that these transactions singularly benefited Mr Foo at the expense of OP3's creditors.

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42 Finally, the Judge declined to relieve Mr Foo of liability under s 391 of the CA. She considered it significant that Mr Foo had only sought legal advice on the merits of Suit 498 and not on the propriety of the Payments (Judgment at [135]–[136]). In the result, Mr Foo was found to be liable to OP3 for a sum of $1,182,394, which is the sum of the Disputed Transactions.

CA/CA 47/2022

43 In CA/CA 47/2022, Mr Foo appeals against the Judge's findings that: (a) OP3 paid him the Disputed Dividend in December 2016 as distinct from the Disputed Payment it paid him in January 2017; and (b) he had breached the Creditor Duty by authorising the payment of the Disputed Transactions to himself.

Mr Foo's case

44 On appeal, Mr Foo raises two legal arguments that he did not raise before the Judge. First, he contends that OP3 lacks standing to claim the repayment of the Disputed Dividend from him. According to Mr Foo, OP3's claim for repayment of the Disputed Dividend is in substance a claim that Mr Foo had caused OP3 to pay him a dividend when it had insufficient profits, in breach of s 403(1) of the CA. He contends that such a claim had to be brought by OP3's creditors or its liquidator suing on behalf of these creditors, but Suit 152 had been commenced by OP3's liquidator on behalf of the company.

45 Secondly, Mr Foo submits that he cannot be held liable for authorising the payment of the Disputed Transactions to himself. By its claim that Mr Foo had acted in breach of the Creditor Duty in doing so, OP3 is in substance seeking to unwind unfair preferences that OP3 had granted to an associated party. The statutory limitation period of two years for unwinding such transactions under

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the statutes in force at the time had lapsed by the time OP3 brought Suit 152. As Mr Foo put it, allowing OP3 to pursue a claim for breach of the Creditor Duty in these circumstances would undermine the statutory insolvency regime governing unfair preferences.

46 Apart from these two points, Mr Foo largely rehashes the submissions he raised before the Judge. He asserts that the Creditor Duty only arises when a company is insolvent or bordering on insolvency, and not any earlier. It follows that the Judge erred in finding that the Creditor Duty is engaged when a company is in a "financially parlous position, which is a state of affairs that is less severe than … being on the verge of insolvency". In support of this submission, Mr Foo relies on the UK Supreme Court's decision in *Sequana*, which was rendered after the Judge had given her decision in Suit 152 and the reasoning of which we will set out in more detail later, as appropriate.

47 Mr Foo also reiterates that: (a) the Disputed Dividend was paid to him as part of the Disputed Payment; (b) OP3 was neither insolvent nor bordering on insolvency at the time the Disputed Transactions were made because Suit 498 was not a contingent liability that was reasonably likely to materialise; (c) he was consequently under no duty to consider the interests of OP3's creditors when he authorised the Disputed Transactions; (d) he had, in any event, complied with the Creditor Duty should it be found to have been engaged at the time he authorised the Disputed Transactions; and (e) he ought to be relieved of liability under s 391 of the CA if we find that he had acted in breach of the Creditor Duty.

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OP3's case

48 In response, OP3 refutes the suggestion that it lacked standing in Suit 152. Its claim in Suit 152 rests not on s 403(1) of the CA but rather on Mr Foo's breach of the Creditor Duty.

49 On OP3's case, there is also no reason why the expiration of the statutory clawback period for unfair preferences should bar a liquidator from bringing a claim for breach of the Creditor Duty against Mr Foo. These are two distinct causes of action that can coexist harmoniously.

50 Turning to the crux of the dispute, namely whether Mr Foo had breached the Creditor Duty by authorising the payment of the Disputed Transactions to himself, OP3 broadly aligns itself with the Judge's reasoning as summarised at [36]–[42] above. It urges us to affirm the Judge's findings that: (a) the Disputed Dividend and the Disputed Payment were paid to Mr Foo as distinct transactions; (b) OP3 ought to have accounted for its liability in Suit 498 as a contingent liability on 25 May 2017; (c) this contingent liability ought to be valued at between $441,000 and $514,500; (d) OP3 was, in the result, insolvent and the Creditor Duty was engaged at the time Mr Foo authorised the Disputed Transactions; and (e) Mr Foo breached this duty by authorising those transactions.

The Independent Counsel's submissions

51 In view of the UK Supreme Court's detailed analysis of the nature and scope of the Creditor Duty in *Sequana* as well as the legal issues raised on appeal by Mr Foo (see [44]–[45] above), we appointed Mr Lee Eng Beng *SC* ("Mr Lee") as Independent Counsel to assist us in navigating these issues. We

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are deeply grateful to Mr Lee for the customary rigor of his research and analysis, and the clarity with which he put his submissions to us.

52 In the main, we invited Mr Lee to address us on: (a) the circumstances in which a director's fiduciary duty to act in the interests of the company would be understood as specifically encompassing the interests of the company's creditors; (b) the tests or factors a court should consider in determining whether the Creditor Duty has been triggered in a particular case; (c) the nature and content of the Creditor Duty; and (d) the relationship between the Creditor Duty on the one hand, and the statutory regime governing unfair preferences and s 403(1) of the CA on the other. We engage with Mr Lee's submissions in detail where appropriate and provide a brief overview of the positions he advanced at this stage.

53 In brief, Mr Lee submits that the issue of whether the Creditor Duty has arisen overlaps substantially with and is intrinsically linked to the question of breach, such that it is not meaningful to consider the two sequentially. Rather, in so far as both issues are directed at "whether the directors have failed to give proper regard to creditors' interests", the court should examine, under a single composite inquiry, "whether the creditors' interests have been exposed to risk or prejudice of a nature and extent sufficient to justify the imposition of the Creditor Duty" and whether a director has complied with this duty. The analysis should begin "with the act, decision or transaction in question", with certain transactions, such as the payment of dividends or the repayment of shareholders' loans, weighing heavily against the directors because the shareholders are the predominant, if not exclusive, beneficiaries of these transactions.

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54 Allied to this, Mr Lee suggests that the Creditor Duty should be reconceptualised as a duty which exists "regardless of the state of the solvency of the company". Mr Lee argues that "it does not seem right that directors have no duty to have proper regard to creditors' interests as long as the company is not insolvent" since "creditors' interests can quite conceivably be prejudiced by actions taken by a company prior to actual insolvency, for instance, where they are unreasonably risky, affect the overall stability or financial performance of the company or involve transactions or have effects surfacing over a period of time".

55 On the content of the Creditor Duty, Mr Lee suggests that the duty at its core requires directors "to have proper regard to creditors' interests when exercising their decision-making power over the affairs of the company". This is largely a matter of subjective commercial judgment for directors, but the weight that directors should accord to the interests of creditors must correspond to the risk or prejudice to which creditors are exposed as a result of the disputed act. Mr Lee also aligns himself with the suggestion in *Sequana* that the interests of shareholders drop out of the picture and the company's interests may be treated as equivalent to those of the creditors alone where an insolvent liquidation or administration is unavoidable.

56 Turning to the relationship between the Creditor Duty and s 403(1) of the CA, Mr Lee submits that the two operate symbiotically. Notably, even as s 403(1) of the CA requires dividends to be paid out of the profits of a company, the accounting definition of profits prevails in this context such that it is possible for dividends to be paid in compliance with s 403(1) of the CA even at a time when the company is, in fact, in a financially precarious position. The Creditor Duty fills this gap by requiring directors to adopt a holistic view of the company's financial position before authorising the payment of any dividends.

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57 Lastly, in Mr Lee's view, there is no inconsistency between the Creditor Duty and the unfair preference statutory provisions. Any overlap between the two regimes does not smooth over differences in their purpose, substance, and operation. Indeed, the Creditor Duty complements the unfair preference provisions by providing the company with an alternative or additional avenue of relief where the unfair preference provisions may prove ineffective or inadequate. This may be so where the person against whom relief is sought is insolvent or otherwise unable to comply with the orders made by the court under the statutory provisions governing unfair preferences.

Issues before this court

58 In the light of the parties' submissions, the following issues arise for our determination:

(a) First, when is the Creditor Duty first engaged? Although the disagreement between the parties centred on whether the Creditor Duty arises when a company is on the "verge of insolvency" or at some earlier stage, we take the opportunity to clarify more generally, the nature, scope, and content of the Creditor Duty. This seems timely in view of the UK Supreme Court's detailed consideration of these aspects of the Creditor Duty in *Sequana* and, as will be evident, the fact that local case law contains several differing descriptions of the circumstances that trigger the Creditor Duty, notwithstanding uniform acceptance of its underlying rationale.

(b) Second, whether OP3 lacks standing to claim the repayment of the Disputed Dividend from Mr Foo. This issue turns in large part on the relationship between the Creditor Duty and s 403(1) of the CA in

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circumstances where the alleged breach of the Creditor Duty arises from the payment of a dividend.

(c) Third, whether OP3 was legally prohibited from bringing a claim against Mr Foo for breach of the Creditor Duty because the Disputed Transactions were, in substance, unfair preferences and the prevailing statutory clawback period for unwinding such transactions had lapsed by the time OP3 brought Suit 152.

(d) Fourth, whether the Creditor Duty was engaged at the time Mr Foo authorised the Disputed Transactions. This involves the resolution of several evidential sub-issues, namely:

(i) Whether the Disputed Dividend was paid to Mr Foo as part of the Disputed Payment.

(ii) Whether OP3's contingent liability in Suit 498 was reasonably likely to materialise and if so, the value that should reasonably have been ascribed by Mr Foo in his capacity as a director to the contingent liability that was encompassed in Suit 498.

(e) Fifth, if the Creditor Duty was engaged at the relevant times, whether Mr Foo breached this duty by authorising the payment of the Disputed Transactions to himself.

(f) Finally, if Mr Foo breached the Creditor Duty, whether he ought to be relieved of liability under s 391 of the CA.

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The nature, scope, and content of the Creditor Duty

Preliminary observations

59 We begin with some preliminary observations on the nature of the Creditor Duty. The principles we canvass in this section are not novel, but they shed important light on the contours and operation of the duty and bear restating.

60 First, we reiterate that the Creditor Duty is a fiduciary duty that directors owe to the *company*. This duty is not one that directors owe directly to creditors (*Progen* at [52]) and creditors therefore cannot sue directors for breach of the Creditor Duty (see *Sequana* at [11], [77] and [267]). Rather, the proper plaintiff in an action for breach of the Creditor Duty is presumptively the company (see *Ascend Field Pte Ltd and others v Tee Wee Sien and another appeal* [2020] 1 SLR 771 at [35]), and any financial award resulting from a successful action for breach of the duty inures for the benefit of the company, though it may in practical terms be subsequently distributable among the company's creditors (see *Sequana* at [267], *per* Lady Arden).

61 Pausing here, we note that there has been some uncertainty surrounding the circumstances in which a company may bring a claim for breach of the Creditor Duty against a director. This arises in large part from the High Court's recent decision in *Voltas Limited v Ng Theng Swee and another* [2023] SGHC 245 ("*Voltas*"). In *Voltas*, the High Court drew upon the observations of the New South Wales Court of Appeal in *Kinsela v Russell Kinsela Pty Ltd (In Liq)* (1986) 10 ACLR 395 ("*Kinsela*") at 730 as well as some pronouncements in *Progen* to suggest that "liquidation is a condition precedent to the *relevance* of the [Creditor Duty] in an action that is premised on its breach" and "any action premised on the breach of [the Creditor Duty] is

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only relevant where the company in question has entered into liquidation." [emphasis in original] (*Voltas* at [36]–[37]).

62 The question of whether liquidation operates as a condition precedent to the bringing of an action for breach of the Creditor Duty does not squarely arise in the present case since OP3 was indisputably in liquidation proceedings at the time it commenced Suit 152 against Mr Foo (see [23]–[24] above). We are also mindful that the High Court's decision in *Voltas* is the subject of a pending appeal. That said, we consider it appropriate to express some provisional views on the correctness of the High Court's conceptualisation of the Creditor Duty in *Voltas* in view of its relevance to the present analysis of the nature of the duty. We stress that our views in this regard are provisional and that nothing that we say here about the High Court's analysis of the Creditor Duty in *Voltas* has any necessary bearing on the merits of the appeal against that decision.

63 In our view, *Voltas* correctly recognises the practical reality that a company does not commonly bring a claim for breach of the Creditor Duty against a director when it has yet to enter into liquidation proceedings. During this period, the directors who are subsequently accused of having acted in breach of the Creditor Duty will usually have remained in charge of taking decisions for the company and will have had no incentive to authorise legal action being taken for breaches of the Creditor Duty against themselves.

64 However, we are not presently convinced that *only* a company in liquidation may bring a claim against a director for breach of the Creditor Duty. Whilst the High Court in *Voltas* substantiated its view on the relevance of liquidation as a condition precedent to a claim for breach of the Creditor Duty by reference to certain extracts from *Kinsela* and *Progen*, which we reproduce below, we are hesitant to read as much into these pronouncements:

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> ***Kinsela* at 401:**
>
> But where a company is insolvent the interests of the creditors intrude. *They become prospectively entitled, through the mechanism of liquidation*, to displace the power of the shareholders and directors to deal with the company's assets.
>
> [emphasis added in *Voltas*]
>
> ***Progen* at [52]:**
>
> … individual creditors cannot, *without the assistance of liquidators*, directly recover from the directors for such breaches of duty …
>
> [emphasis added in *Voltas*]

65 *Kinsela* and *Progen* both concerned companies in liquidation (see *Kinsela* at 396 and 398; *Progen* at [1]). Hence, the question of whether and how a claim for breach of the Creditor Duty could be mounted if the company was not in liquidation simply did *not* arise in either case. *Kinsela* was principally concerned with whether a company had the power or capacity to enter into certain transactions and whether the shareholders of a company had the power to absolve the directors from liability for acting in breach of the Creditor Duty (see *Kinsela* at 399–404). Similarly, the dispute in *Progen* centred on whether certain transactions constituted unfair preferences, and this court drew upon certain breaches of the Creditor Duty committed by the relevant directors in support of its conclusion that the statutory presumption of the desire to prefer had not been rebutted (*Progen* at [47] and [53]).

66 In line with this, a close reading of *Kinsela* and *Progen* suggests that the respective courts did *not* hold that any action for breach of the Creditor Duty could only be brought when the company is in liquidation. At 402–403 of *Kinsela*, Street CJ endorsed Cooke J's remarks in *Nicholson v Permakraft (NZ) Ltd (in liq)* [1985] 3 ACLC 453 at 457–460 that "creditors are entitled to consideration … if the company is insolvent, or near insolvent, or of doubtful

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solvency, or if a contemplated payment or other course of action would jeopardize its solvency" and that these principles "relate[d] to actions by the company against the director, *whether or not in truth brought by the liquidator*." [emphasis added]. Read in this light, it appears to us that at 401 of *Kinsela*, Street CJ was merely recognising that, as a practical matter, it will ordinarily be through the liquidation process that claims for breach of the Creditor Duty are vindicated. As for *Progen*, the extract that the High Court in *Voltas* had placed weight on, when read in the broader context of [52] of that decision, seems to us to have emphasised that creditors do not have standing to directly bring a claim against directors for breach of the Creditor Duty.

67 We also note that the UK Supreme Court in *Sequana* did not adopt such a narrow conception of the circumstances in which an action for breach of the Creditor Duty may be brought against a director. Lord Reed held at [101] that whereas the UK statutory provisions on unfair preferences can only provide a remedy if there are insolvency proceedings, no such limitation applies to the Creditor Duty. Lady Arden similarly observed at [269] of *Sequana* that the Creditor Duty is enforceable at all times prior to liquidation of the company and by shareholders if necessary, by way of a derivative action, with such shareholder action being said to provide a clear line of corporate responsibility and accountability during what may be a critical period for the company.

68 All that said, we leave open the question of the precise circumstances in which a claim for breach of the Creditor Duty may be brought against a director for consideration on a future occasion, where it is necessary to resolve that question.

69 Second, and flowing from the fact that the Creditor Duty is a duty that directors owe to the *company*, the Creditor Duty is best understood in terms that

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in certain circumstances, that duty modifies how the *company's interests* ought to be understood when a director considers his duty to act in the best interests of the company. The Creditor Duty essentially underscores the fact that the interests of creditors acquire discrete significance and require separate consideration at a certain stage in a company's life cycle, for reasons that we shall turn to shortly.

70 We emphasise that it is *not* the case that the interests of creditors only become relevant when the Creditor Duty is engaged or that those interests are otherwise immaterial. The predicate duty is a duty to act in the best interests of the company, and this enjoins directors to have regard to the interests of different stakeholders, including creditors, at all times. It is simply that when the company is financially healthy, directors would be justified in treating the interests of shareholders as a proxy for the interests of the company and in according commensurately less or even no discrete weight to the interests of creditors. This is so for several reasons. A solvent company, by definition, has sufficient assets to pay off its creditors. Some creditors may also have obtained additional rights against the company that they have contracted for, such as security or guarantees for their debt, and are likely to have factored the risks of extending credit into the terms on which this was done. It must also not be overlooked that creditors indirectly benefit from directors according principal regard to the interests of shareholders in taking decisions for a solvent company. As Lord Reed explained at [26] (and see also at [47]) of *Sequana*, it is in the shareholders' interests, and therefore the company's interests, to pay the company's debts as they fall due in order that it may carry on its business in a way that preserves its reputation for creditworthiness and its access to future credit. Put differently, the interests of shareholders and creditors broadly row in the same direction when the company is financially healthy (see *Sequana* at [294], *per* Lady Arden).

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71 A corollary of this is that it remains possible for a director to breach his duty to act in the best interests of the company at a time the company is solvent by undertaking acts that unjustifiably prejudice the interests of creditors. This is most obvious where a director acts with the intent of defrauding creditors. While such a director may not be obliged to accord significant weight to the interests of creditors in taking decisions for the company given the company's financial health, acting in complete disregard of creditor interests or acting in a way that is directly adverse to those interests will nevertheless evidence a failure to act in the best interests of the company.

72 This brings us to the third preliminary point, namely the rationale that underlies the Creditor Duty. This lies in the shift in who may be said to be the main economic stakeholder of the company as the company approaches insolvency (see *Sequana* at [86], *per* Lord Reed) and the asymmetry in corporate governance. To take each point in turn, whereas shareholders are the primary bearers of the risk of loss arising from the manner in which directors exercise their powers when the company is solvent (see [70] above), creditors displace them from this position when the company is insolvent because an insolvent company effectively trades and conducts its business with its creditors' money (see *Progen* at [52]). And even as creditors bear the risks of continued corporate trading in such a situation, they generally have no control over the conduct of the company's business (see *Sequana* at [263], *per* Lady Arden). There is consequently a need to constrain directors from externalising the risks of continued trading onto creditors, bearing in mind that shareholders usually have nothing to lose and everything to gain, and creditors, contrastingly, have everything to lose and nothing to gain by the continued trading of a company which is on the cusp of insolvency (see *Progen* at [52]; *Sequana* at [57], *per* Lord Reed, and at [238], *per* Lord Hodge). In essence, the law responds to the misalignment of incentives between those running the company and those

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bearing the consequences of actions undertaken by a financially distressed company by enjoining directors of such firms to take corporate decisions with the interests of creditors in mind (see Aurelio Gurrea-Martinez, "Towards an optimal model of directors' duties in the zone of insolvency: an economic and comparative approach" (2021) 21(2) Journal of Corporate Law Studies 365 ("*Towards an optimal model of directors' duties*") at 367–369).

73 Fourthly, we agree with Lord Reed and Lady Arden that creditors ought to be understood as a class for the purpose of the Creditor Duty (see *Sequana* at [48] and [256]). Even as the respective positions of individual creditors may differ, it is sensible to consider the interests of creditors as a body where the Creditor Duty is at issue because the identities of the company's creditors constantly change so long as debts continue to be incurred and discharged by the company (see *Sequana* at [48], *per* Lord Reed). In our judgment, treating the interests of the creditors as a class is also consistent with the underlying aim of the Creditor Duty in that the duty seeks to redress the fact that the risks of continued trading of the company has shifted from the shoulders of one stakeholder (namely, the shareholders) to another (namely, the creditors) (see [72] above). We add that creditors who may have been unfairly prejudiced vis-à-vis other creditors by actions undertaken by directors may potentially have a remedy under the statutory unfair preference regime, albeit that this is contingent on the company entering into judicial management or winding up and the judicial manager or liquidator making an application under s 225 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA").

74 Fifthly, in an action for breach of the Creditor Duty, the relevant question is whether the director exercised his discretion in good faith in what *he* considered (and not what the court considers) to be in the best interests of the company, as understood with reference to the financial state of the company

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prevailing at the material time. Although the duty is a subjective one in that sense, the court will assess a director's claim objectively, by asking whether the view the director claims to have formed was one that is credible or was reasonably open to him, given the information available at the time (see *Sequana* at [299], *per* Lady Arden). In so doing, the court may very well draw an inference that a director was not acting honestly where the transaction is objectively not one in the interests of the company (see *Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] 2 SLR 592 ("*Goh Chan Peng*") at [35]–[36]).

75 We make two related observations in this regard. First, in as much as the court is examining the business judgment of a director, it will be slow to interfere with commercial decisions made honestly but which, *on hindsight*, were financially detrimental to a company (*Goh Chan Peng* at [35]). Directors undertake corporate decisions based on information then available to them and it is not the role of the court to censure directors who, in good faith, have made commercial decisions which turn out to be incorrect (see *Vita Health Laboratories Pte Ltd and others v Pang Meng Sang* [2004] 4 SLR(R) 162 at [17]). Second, because directors do not operate with the benefit of hindsight, this is an area of law where clarity and practicality must be prioritised. Directors need clear standards to guide them, and the law must be developed with this recognition in mind (see *Sequana* at [87], *per* Lord Reed).

76 Finally, it must be remembered that the Creditor Duty is just one of a panoply of duties that a director is subject to. For instance, a director is also subject to a duty to act with reasonable diligence in the discharge of his office (see s 157(1) of the CA). This encapsulates the director's common law duty to exercise due care, skill, and diligence (*Ho Yew Kong* at [134]) and the court will, when faced with a claim for breach of either duty, assess whether the

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director had fallen foul of the objective standard of care and diligence expected of a director (*Lim Weng Kee v Public Prosecutor* [2002] 2 SLR(R) 848 at [28]).

77 The significance of this point is as follows. Because an action for breach of the Creditor Duty focuses on the subjective intentions of a director in committing a company to a certain course of action, it is theoretically possible, though perhaps uncommon, for a director to have honestly believed that he had acted in the best interests of the company and be found to have complied with the Creditor Duty even though his actions are found to fall below the objective standard of care and diligence expected of a director. In these circumstances, it remains open to a company to allege that the director had acted in breach of the duty of care and diligence he owes to it. The short point is that compliance with the Creditor Duty does not immunise a director from breaches of other directors' duties which may be engaged on the same set of facts.

78 With these preliminary points stated, we now turn to consider when the Creditor Duty is first engaged and the substance of the duty. As evident from the parties' submissions, there was some confusion over these aspects of the Creditor Duty. We therefore take the opportunity to restate the law, having regard to *Sequana*, the salient facts and reasoning of which we now set out.

The decision in Sequana

79 *Sequana* concerned the company, AWA. In May 2009, AWA's directors caused AWA to distribute a dividend of €135m ("May Dividend") to its parent company, Sequana SA ("Sequana"), which extinguished by way of set-off almost the whole of a slightly larger debt which Sequana owed to AWA. The May Dividend was paid out when AWA was solvent on both a balance sheet and cash flow basis. AWA, however, had long-term pollution-related contingent liabilities of a very uncertain amount which, together with an uncertainty as to

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the value of one class of its assets, gave rise to a real risk, although not a probability, that AWA might become insolvent at an uncertain date in the future. In the event, AWA went into insolvent administration almost ten years later, in October 2018. BTI 2014 LLC ("BTI"), the appellant and assignee of AWA's claims, thereafter sought to recover an amount equivalent to the May Dividend from AWA's directors on the basis that they had breached the Creditor Duty by authorising the payment of the May Dividend (see *Sequana* at [115], *per* Lord Briggs).

80 As the May Dividend was paid out almost ten years before AWA entered insolvent administration, BTI's case that AWA's directors had acted in breach of the Creditor Duty hinged on the duty arising when a company merely faced a real and not remote risk of insolvency. This formulation of when the Creditor Duty arose was rejected as too nascent by the UK High Court and the Court of Appeal. In the judgment of the Court of Appeal, the Creditor Duty did not arise until a company was insolvent, on the brink of insolvency or probably headed for insolvency. A real risk of insolvency, however real, was insufficient unless it amounted to a probability (see *Sequana* at [116], *per* Lord Briggs). On appeal, the UK Supreme Court affirmed that the Creditor Duty was not engaged at the time the May Dividend was paid out to Sequana and dismissed BTI's appeal on this basis. The broad strokes of its reasoning may be summarised as follows.

81 The court affirmed that the director's duty to act in the best interests of the company may, in certain circumstances, enjoin a director to have regard to the interests of creditors (*per* Lord Reed at [76], Lady Arden at [252]–[277]). However, in so far as the basis of the Creditor Duty is a shift in the economic interests of the company as the company nears insolvency or becomes insolvent (*per* Lord Reed at [45] and [59], Lord Hodge at [246]; see also [72] above), this shift will not be found to have occurred when a company merely faces even a

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real and not remote risk of insolvency (*per* Lord Reed at [83], Lord Briggs at [199], Lord Hodge at [247], Lady Arden at [250] and [306]). As long as a company is financially stable, its shareholders will have the predominant economic interest in the manner in which its affairs are managed, and their interests will normally be aligned with those of its creditors (*per* Lord Reed at [83], Lord Hodge at [246]). After all, most creditors are voluntary and are able to take precautions against corporate risk (such as, by way of a demand for security), armed with such public information about the financial position of the company as the law makes available or the company chooses to provide. It is furthermore inherent in the law's encouragement of risk-taking and commercial enterprise under limited liability that creditors of limited companies will get hurt from time to time (*per* Lord Briggs at [164]).

82 Given these conclusions, it was strictly unnecessary for the UK Supreme Court to determine: (a) the meaning of "insolvency" for the purpose of the Creditor Duty; (b) whether any other trigger earlier than insolvency suffices to engage the Creditor Duty; and (c) the substance of the Creditor Duty (*per* Lord Reed at [78], [83]–[84] and [88], Lord Briggs at [118] and [199], Lady Arden at [302], [307]–[308]). Nevertheless, members of the court took the opportunity to set out their provisional views on these matters. We are cognisant that these views may diverge at the margins but set out in broad strokes some key propositions which we consider relevant to our present analysis.

83 On the meaning of "insolvency" for the purpose of the Creditor Duty, Lord Reed and Lady Arden were inclined to the view that the term could aptly be understood in accordance with the cash flow or balance sheet insolvency tests (*per* Lord Reed at [88], Lady Arden at [307]–[308]). Lady Arden added that these tests must nevertheless be applied with a degree of flexibility appropriate to the rationale and context of the Creditor Duty. To that end, while directors

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should have regard to the company's liabilities which they foresee will arise in the reasonably near future, there also has to be some minor latitude so that prompt payment is not always thought to be insisted on (*per* Lady Arden at [308]).

84 As for whether any other trigger earlier than actual insolvency would suffice to engage the Creditor Duty, the court was inclined to answer this in the affirmative. In so far as the rationale for treating the company's interests as involving the creditors' interests is not based on the fact of insolvency but the shift in the economic interests in the company and consequently, the risk of loss arising from the manner in which the directors exercise their powers, this shift would typically be discernible before the company is formally insolvent (*per* Lord Reed at [86] and [88]). The formulation preferred by the majority of the *coram* broadly focused on whether a company was "bordering on insolvency" or faced a probability of an insolvent liquidation or administration (*per* Lord Reed at [86] and [88], Lord Briggs at [203], Lord Hodge at [247], Lady Arden at [279]).

85 Turning to the substance of the Creditor Duty, the majority held that prior to the time at which insolvent liquidation or administration becomes unavoidable, the Creditor Duty is a duty to consider the interests of creditors, to accord them appropriate weight, and to balance them against shareholders' interests where they may conflict (*per* Lord Reed at [81], Lord Briggs at [176], Lord Hodge at [238]). There was no reason to treat the interests of creditors as paramount at this stage when insolvency might not materialise and the financial difficulties may not be either permanent or fatal to the long-term success of the company (*per* Lord Reed at [50], Lord Briggs at [175]). Rather, as a general rule, the more parlous the state of the company, the more the interests of the creditors will predominate, and the greater the weight which directors should

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accord to their interests as against those of the shareholders (*per* Lord Reed at [81]). Ultimately, however, directors are exercising their commercial judgment about the benefits and risks of a transaction or course of action, and a reasonable decision by them in an attempt to rescue the company's business in the interests of both its shareholders and creditors would not occasion a breach of the duty (*per* Lord Hodge at [238]).

86 Following from the above, it is only where an insolvent liquidation or administration becomes unavoidable that shareholders cease to have any interest in the company and their interests can be left out of account in the context of the Creditor Duty (*per* Lord Reed at [50] and [80], Lord Hodge at [247], Lady Arden at [291], [302] and [311]).

Analysis

87 Against this backdrop, we observe that our own case law to date has not adopted uniform language in describing when the Creditor Duty is first engaged. Some pronouncements suggesting that directors are obliged to have regard to the interests of creditors in taking corporate decisions when "the company is, or [is] perilously close to being, insolvent" (*Progen* at [52]) sit alongside others that suggest that they are so obliged when the company is "in a parlous financial position" (*Lim Oon Kuin and others v Ocean Tankers (Pte) Ltd (interim judicial managers appointed)* [2022] 1 SLR 434 at [11]) or is "of doubtful solvency" (*Dynasty Line* at [32]). This has, unfortunately, resulted in some uncertainty as to the temporal scope of the Creditor Duty, as evidenced by the real difficulty the Judge faced in delineating the line between a "parlous financial state" and the "verge of insolvency", and in articulating what being in a "parlous financial state" entails (Judgment at [29]–[31]).

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88 That the point in time at which the Creditor Duty is first engaged has admitted of varying descriptions does not appear to be an issue unique to our jurisdiction. Looking beyond our shores, the thorough review of the English and Commonwealth authorities conducted by the Court of Appeal in *Sequana* was likewise observed to have revealed that there is not to be found in the authorities any clear guidance as to when the Creditor Duty is first engaged (see *Sequana* at [179], *per* Lord Briggs).

89 At the same time, it is important to recognise that our case law *has* spoken with one voice on the underlying rationale for the Creditor Duty, namely, the need to constrain directors from externalising the risks of continued trading of financially distressed companies onto creditors, and its analysis in this regard is entirely consistent with the UK Supreme Court's analysis of the same issue in *Sequana* (see [72] and [81] above). The doctrinal basis for the Creditor Duty provides a foundation for us to clarify the trigger and operation of the Creditor Duty, and is one of the key reasons we are unable to accept Mr Lee's invitation to reconceptualise the Creditor Duty as: (a) involving a single composite inquiry under which the court examines "whether the creditors' interests have been exposed to risk or prejudice of a nature and extent sufficient to justify the imposition of the Creditor Duty" and whether the relevant director has complied with this duty; and (b) a duty which persists "regardless of the state of the solvency of the company (see [53]–[54] above).

90 The basis of Mr Lee's former suggestion is a concern that the traditional two-stage inquiry of first ascertaining whether the Creditor Duty has arisen and thereafter considering the issue of breach insufficiently accommodates situations where a director suddenly and significantly imperils the financial stability of a hitherto healthy company. If the issue of whether the Creditor Duty has arisen is to be considered prior to and distinct from the issue of breach, a

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court may be inclined to conclude that the Creditor Duty is not engaged in such a scenario because the relevant course of action was undertaken whilst the company was financially healthy. This was said to unjustly immunise a director, who might have recklessly endangered the financial health of a company, from liability for breach of the Creditor Duty.

91 We do not consider this potential issue to warrant a reconceptualisation of the Creditor Duty in the terms suggested by Mr Lee. The issue of a director who causes a financially healthy company to suffer distress by committing it to a particular course of action is adequately addressed by accounting for the *impact* of the proposed transaction on the company's financial state. If the proposed transaction sufficiently imperils the financial health of the company, the Creditor Duty will be found to be engaged, and the court will evaluate whether the director had acted in the best interests of the company in entering into such a transaction. Indeed, in *Dynasty Line*, we observed that the Creditor Duty would be engaged where certain directors had caused the company to enter into the relevant transactions when they knew or must have known that the company "was insolvent or of doubtful solvency or *would become so as a result of entering into these transactions*" [emphasis added] (see *Dynasty Line* at [32]).

92 At the hearing before us, Mr Lee also expressed the concern that a court which is constrained to examine the financial state of a company in isolation may potentially lose sight of the distinction between corporate transactions that are entered into to benefit directors or shareholders (at the expense of creditors) and those which directors authorise in good faith in the best interests of the company. In our view, this concern is adequately addressed at the second stage of the conventional analysis under which the court examines the subjective intentions of the relevant director with reference to the nature of the contemplated transaction. We will elaborate on this later.

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93 Fundamentally, we see value in maintaining the doctrinal distinction between the issue of whether the Creditor Duty has arisen and the issue of whether a director has acted in breach of this duty, and in dealing with these two issues sequentially. For one, the two inquiries differ in nature. When the court examines the financial state of a company, it is essentially assessing where the economic interests of the company lie. As the company approaches a state where it "is effectively trading and running the company's business with the creditors' money" (*Progen* at [52]), the directors will come under an increasing obligation to consider the interests of creditors discretely for the reasons described above. Whether a director subjectively believed that his acts were performed in the best interests of the company is, however, a qualitatively distinct inquiry. The court's focus here is on the subjective *bona fides* of the director and whether he exercised his directorial powers with the interests of the company in mind or for some other legally objectionable reason.

94 Indeed, it is because the two inquiries serve different analytical functions that they embody different standards. In determining whether the Creditor Duty is engaged, a court *objectively* examines a company's solvency at the time the material transactions were entered into. It considers the surrounding circumstances of the case, including the claims, debts, liabilities and obligations of a company (*Dynasty Line* at [33]–[34]). When ascertaining whether the director had acted in breach of the Creditor Duty, however, the court examines whether the director *subjectively* believed he had acted in the best interests of the company. In as much as the court is, at this latter stage, scrutinising the business judgment of a director, it will not substitute its own decisions in place of those made by directors in the honest and reasonable belief that they were for the best interests of the company, even if those decisions turned out subsequently to be wrong ones (see *ECRC Land Pte Ltd (in liquidation) v Ho Wing On Christopher and others* [2004] 1 SLR(R) 105 at [49]).

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95 A further reason why we consider it beneficial to ascertain the financial state of a company before examining whether a director had acted in breach of the Creditor Duty is that the financial state bears on the weight a director ought to attribute to the interests of creditors when taking decisions for the company. The court cannot meaningfully assess this without a clear understanding of the financial state of the company at the material time. Hence, whilst Mr Lee correctly points out that many of the factors relevant to the question of whether the Creditor Duty has arisen may also apply to the issue of whether it has been breached, we find it helpful to approach the two issues sequentially and endorse the traditional two-stage analysis in the terms described at [90] above. At heart, the two inquiries serve different purposes, embody different standards, and the question of whether the Creditor Duty is engaged on the facts is logically anterior to the issue of breach.

96 Separately, we also respectfully decline Mr Lee's invitation to reconceptualise the Creditor Duty as a duty which exists "regardless of the state of the solvency of the company". In Mr Lee's view, "it does not seem right that directors have no duty to have proper regard to creditors' interests as long as the company is not insolvent" since "creditors' interests can quite conceivably be prejudiced by actions taken by a company prior to actual insolvency". Whilst the latter proposition is undoubtedly true, two matters must not be overlooked.

97 To begin, it is not the case that the interests of creditors only acquire relevance as a company approaches insolvency. As we have explained at [70]–[71] above, while a director may not be *obliged* to separately consider the interests of creditors when the company is in a financially healthy state, if he acts in complete or direct disregard of these interests, he may still be found to have acted in breach of the duty to act in the best interests of the company.

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98 Furthermore, the basis of the Creditor Duty lies in the shift in who may be said to be the main economic stakeholder of the company as the company approaches insolvency. This being the case, there is no principled reason for obliging directors to separately consider the interests of creditors regardless of the financial state of the company. We repeat that, in the case of a solvent company, the interests of creditors are ordinarily sufficiently protected, at the very least, by the creditors' prospective entitlement to the company's assets upon its winding up (see [70] above).

99 We briefly add that we foresee theoretical and practical problems in the operation of the Creditor Duty as conceived by Mr Lee. It may safely be said that the principal concern of creditors is the safety of their investment and being paid the amounts they are due to be paid on a timely basis. On this basis, creditors could typically be unbothered by any breaches of the Creditor Duty (in the terms reconceptualised by Mr Lee) that may be committed by directors while the company is solvent since the company would nonetheless remain able and presumably willing to pay off its loans. There would thus be no shift in terms of who the main economic stakeholder of the company is, which is the rationale that underlies the Creditor Duty (see [72] above).

100 Moreover, claims that a director failed to consider the interests of creditors in making decisions for a solvent company may be difficult for the court to police in practice, bearing in mind that the Creditor Duty is subjective (see [94] above). A court can effectively adjudicate on whether a director had breached the Creditor Duty in the context of imminent corporate insolvency because the veracity of a director's claim that he had considered the interests of creditors in taking decisions for the company may be tested against the nature of the act, the company's prevailing financial prospects and its then-likelihood of entering into insolvency proceedings. Where a solvent company is

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concerned, short of a director perpetrating fraud on the creditors, it is difficult to disprove a director's claim, however self-serving, that he had considered the interests of creditors in so taking decisions for the company.

101 Returning to the core issues of when the Creditor Duty is engaged and the content of this duty, we preface our analysis by endorsing Lord Reed's observations that (*Sequana* at [62]):

> … being on the brink of insolvency does *not* necessarily require an immediate cessation of trade and the realisation of the company's assets. Depending on the circumstances, continuing to trade may be honestly believed to offer the best prospect of the creditors being paid, even if it also carries some further financial risk. If so, that course of action will be consistent with the directors' performance of the [Creditor Duty].
>
> [emphasis added]

Insolvency is not an uncommon phenomenon in the life of viable companies, and directors may, depending on the circumstances, in good faith perceive that there is a reasonable prospect that the company will be able to trade itself out of insolvency for the benefit of both creditors and shareholders (see *Sequana* at [120], *per* Lord Briggs).

102 Having regard to the underlying logic of the Creditor Duty and with a view to ameliorating the difficulties that practitioners and judges may face in making sense of the various descriptions in the case law of the circumstances that engage the Creditor Duty (see [87]–[88] above), we prefer an analysis of the scope and content of the Creditor Duty that proceeds as follows.

103 When faced with a claim that a director had acted in breach of the Creditor Duty, the court should, in the first instance, objectively ascertain the financial state of the company that was prevailing at the time the transaction sought to be impugned was entered into or that was likely to arise as a result of

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the company entering into the said transaction. This latter limb addresses Mr Lee's concern described at [90] above, and broadly dovetails with Lady Arden's approach in *Sequana* of considering whether the directors plan to enter into a transaction which would place the company in a situation where the Creditor Duty is ordinarily engaged (see *Sequana* at [279]).

104 We affirm our holding in *Dynasty Line* that ascertaining the company's solvency at the time a particular transaction was entered into is, in the present context, done with a view to determining whether a director had breached the Creditor Duty. The court is not concerned with the question of whether the company was technically insolvent or whether it would have been appropriate to liquidate the company. Hence, whilst the "going concern" test and the "balance sheet" tests provide useful indicia of the financial health of the company, a strict and technical application of these tests should be eschewed. We agree with Lady Arden that these tests must be applied with the degree of flexibility appropriate to the rationale and context of the Creditor Duty, and the court should be alive to the reality that prompt payment may not always be insisted on by creditors (see [83] above; *Sequana* at [308]). Rather, the court should engage in a "broader assessment of the surrounding circumstances", which would include a consideration of all claims, debts, liabilities and obligations of a company (*Dynasty Line* at [33]–[34]).

105 In our judgment, having regard to the foregoing indicia, the court should objectively determine which of three financial stages the company was in at the time the transaction was entered into or that was likely to arise as a result of the company entering into the said transaction. We categorise the three stages as follows:

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

(b) **Category two**: Where a company is imminently likely to be unable to discharge its debts. This category encompasses cases where a director ought reasonably to apprehend that the contemplated transaction is going to render it imminently likely that the company will not be able to discharge its debts. It is, in other words, no excuse for a director to claim that he did not appreciate how dire the company's financial state was if he ought reasonably to have done so.

And in this latter regard, the court should assume the vantage point of that director and consider which factors he ought reasonably to have then taken into account in assessing whether the contemplated transaction would result in imminent corporate insolvency.

A non-exhaustive list of relevant factors includes: (a) the recent financial performance of the company, in particular whether the company's financial performance has been improving or deteriorating as well as the duration and extent of any such improvement or deterioration; (b) the industry that the company operates in, including its recent and future prospects; and (c) any other external developments, such as geopolitical ones, which may have an impact on the company's business. These are all factors which may affect the financial performance of a company. They are also capable of being known to directors at the point they undertake decisions for the company, and there is therefore little risk of the court holding directors to unrealistic standards by its determination of whether and when the Creditor Duty has arisen on the facts of a particular case.

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(c) **Category three**: Where corporate insolvency proceedings are inevitable. To the extent that Lord Briggs took the view in *Sequana* that it is only the onset of liquidation itself that converts creditors into the main economic stakeholders of the company (see *Sequana* at [164]–[165] and [192]), we respectfully align ourselves with the views of the other members of the UK Supreme Court that a clear shift in the economic interests in the company (from the shareholders to the creditors as the main economic stakeholders of the company) would occur where insolvent liquidation or administration (or judicial management under Singapore law) is inevitable. We adopt this as the third possible classification of a company's financial state. In our view, even at this relatively earlier stage, the shift in who may be said to be the main economic stakeholder of the company would be apparent.

106 Having ascertained the financial state of the company at the material time, the court should then examine the subjective intentions of the director and determine whether he acted in what he considered to be the best interests of the company (see [74] above). As foreshadowed, the financial state of the company provides a useful analytical yardstick against which the subjective *bona fides* of the director may be tested (see [95] above). We develop the analysis to be undertaken at this stage of the forensic exercise with specific reference to the three financial states a company may be found to have been in at the time a disputed transaction was entered into, as explained in the preceding paragraph.

(a) **Category one**: Where a company is, all things considered, financially solvent and able to discharge its debts, a director typically does not need to do anything more than act in the best interests of the shareholders to comply with his fiduciary duty to act in the best interests of the company. This is so for the reasons we have set out at [70] above.

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In short, the Creditor Duty does not arise as a discrete consideration in these circumstances. That said, we reiterate that the underlying fiduciary duty is owed to the company and acts that a director undertakes to defraud creditors will suffice to ground a breach of his duty to act in the best interests of the company even at this juncture.

(b) **Category two**: In this intermediate zone, the court will scrutinise the subjective *bona fides* of the director with reference to the potential benefits and risks that the relevant transaction might bring to the company. The court will be slow to second-guess the honest, good faith commercial decisions made by a director to afford the company the best possible chances of revitalising its fortunes. We reiterate that if a director considers in good faith that he can and should take action to promote the continued viability of the company, and that there is a way out of the company's financial difficulties which will benefit shareholders and creditors, he is not obliged to treat creditors' interests as the exclusive or primary determining factor in determining what the company should do next (see [101] above; *Sequana* at [284], *per* Lady Arden).

Conversely, transactions undertaken at this time which appear to exclusively benefit shareholders or directors will attract heightened scrutiny. We agree with Mr Lee that the declaration and payment of dividends or the repayment of shareholders' loans during this period of time will weigh heavily against a director as shareholders are, in the usual course, the exclusive beneficiaries of these transactions. We add that the greater the extent to which the transaction is one which exclusively benefits shareholders or directors (and does not benefit the company as an entity), the more closely a court will scrutinise the

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decision of the director to determine whether he had breached the Creditor Duty.

(c) **Category three**: Lastly, where corporate insolvency proceedings are inevitable, there is a clear shift in the economic interests in the company (from the shareholders to the creditors as the main economic stakeholders of the company) because the assets of the company at this stage would be insufficient to satisfy the claims of creditors. In the context of liquidation, shareholders as residual claimants will stand to recover little or nothing. Consequently, the Creditor Duty operates during this interval to prohibit directors from authorising corporate transactions that have the exclusive effect of benefiting shareholders or themselves at the expense of the company's creditors, such as the payment of dividends.

107 Should the court find that a director had acted in breach of the Creditor Duty, it should lastly consider whether it is appropriate to relieve him of liability under s 391 of the CA. The court retains the discretion to so relieve a director on the cumulative account of him having acted honestly and reasonably, and in so far as it is fair for the court to excuse him for his default (see *Nordic International Ltd v Morten Innhaug* [2017] 3 SLR 957 ("*Nordic International*") at [86]–[87]). The burden lies on the director to prove these matters and we appreciate the potential relevance of s 391 of the CA in cases where directors may, in good faith, have misjudged the financial state of the company and failed to adequately consider the interests of creditors in undertaking certain acts on behalf of the company. We stress, however, that such cases are likely to be few and far between.

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108 We draw this section of our analysis to a close by reiterating that the Creditor Duty is simply one of several duties that directors are subject to. Thus, even if a director is found to have complied with the Creditor Duty, whether he had acted in breach of other duties, such as the duty to exercise reasonable diligence in the discharge of his duties, is a separate inquiry altogether (see [77] above).

Whether OP3 lacked standing to claim repayment of the Disputed Dividend from Mr Foo

109 We next consider Mr Foo's submission that OP3 lacks standing to bring a claim for breach of the Creditor Duty in respect of the Disputed Dividend against him because OP3 is in substance alleging that Mr Foo had caused OP3 to pay him a dividend in breach of s 403(1) of the CA and such a claim cannot be brought by OP3. For the avoidance of doubt, Mr Foo does not raise a similar argument in respect of the Disputed Payment.

110 It is true that a claim for breach of the Creditor Duty predicated on the wrongful payment of dividends overlaps to some extent with a claim for breach of s 403(1) of the CA. Like the Creditor Duty, s 403(1) serves to protect creditors. Since creditors are restricted, by the principle of limited liability, to recovering their debts from the assets of the company and any contributions that must be made by the shareholders in the event a company is unable to meet its debts, s 403(1) of the CA prevents a company from issuing dividends except out of its profits (see *Miao Weiguo v Tendcare Medical Group Holdings Pte Ltd (formerly known as Tian Jian Hua Xia Medical Group Holdings Pte Ltd) (in judicial management) and another* [2022] 1 SLR 884 at [117]). In other words, s 403(1) of the CA restricts a specific type of transaction, namely the payment of dividends, that without proper safeguards, can be used opportunistically to

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shift wealth from creditors to shareholders (see *Towards an optimal model of directors' duties* at 371; *Sequana* at [25], *per* Lord Reed).

111 But it would be wrong to infer from any such overlap that s 403(1) of the CA was intended as the exclusive legal regime that regulates the position whenever a director authorises the payment of a dividend. In our judgment, the overlap in this context arises as an incident of the nature and scope of the Creditor Duty. As we have explained above, the Creditor Duty is an aspect of or the logical corollary of the director's fiduciary duty to act in the best interests of the company (see [69] and [72] above). Because the latter is a constant duty and conditions all forms of management decision-making by directors, it inevitably overlaps with other duties, statutory or otherwise, that directors may also be subject to, as it does with s 403(1) of the CA. Nothing advanced by Mr Foo has convinced us that there is any additional significance to the overlap between the Creditor Duty and s 403(1) of the CA, and particularly in the terms he contended.

112 Indeed, the qualitative differences between a claim for breach of the Creditor Duty that is premised on the payment of a dividend, and a claim for breach of s 403(1) of the CA, underscore that the two are distinct, albeit overlapping, duties. Whereas a claim for breach of the Creditor Duty must necessarily be brought against a company director, an action for breach of s 403(1) of the CA is not so limited and may also be brought against the Chief Executive Officer of a company (see s 403(2) of the CA). Similarly, whereas directors are liable under s 403(2)(*b*) of the CA to the creditors of the company for the quantum of the debts due by the company to the creditors to the extent by which the dividends so paid have exceeded the profits of the company, no similar limitation applies to the damages recoverable pursuant to a successful action for breach of the Creditor Duty.

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113 We also accept Mr Lee's submission that there are differences in the meaning and ambit of the word "profits" for the purposes of s 403(1) of the CA and how this is dealt with in the context of the Creditor Duty. The notion of profits for the purpose of s 403(1) of the CA seems to bear a narrow sense of *current* profits (meaning the profits of the company in a particular financial year) and need not account for: (a) a company's historical, accumulated losses (see Hans Tjio, Pearlie Koh and Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at para 13.010; Ministry of Finance, *Report of the Steering Committee for the Review of the Companies Act* (Consultation Paper, June 2011) at 3–29); (b) losses a company suffers after its annual financial accounts have been finalised (see *Sequana* at [338], *per* Lady Arden); or (c) a company's ability to pay its debts as they fall due (meaning cash flow solvency) (see *Sequana* at [161], *per* Lord Briggs). We are mindful that there are differences in the statutory provisions regulating the payments of dividends in the UK and Singapore, but the observations of Lady Arden and Lord Briggs in *Sequana* on the limitations of the scope of "profits" under the UK statutory scheme regulating the payment of dividends seem to us to apply with equal force to s 403(1) of the CA. And whilst Mr Lee had pointed to these differences to suggest that the Creditor Duty fills a lacuna in the operation of s 403(1) of the CA in that it requires directors to adopt a more holistic view of the company's financial position before authorising the payment of dividends to shareholders, it is, to our minds, preferable to understand the differences in the scope and content of the Creditor Duty and s 403(1) of the CA as pointing to the two operating as distinct, albeit overlapping and mutually reinforcing, legal regimes.

114 We therefore reject the assertion that OP3's claim for repayment of the Disputed Dividend is in substance a claim that Mr Foo had acted in breach of s 403(1) of the CA. OP3's claim in this regard is premised on a distinct cause of action which it clearly had standing to pursue.

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Whether OP3 was legally prohibited from bringing a claim against Mr Foo for breach of the Creditor Duty because the Disputed Transactions were, in substance, unfair preferences and the prevailing statutory clawback period for unwinding such transactions had lapsed by the time OP3 brought Suit 152

115 We come next to Mr Foo's claim that OP3 is legally prohibited from bringing a claim against him for breach of the Creditor Duty because the Disputed Transactions are, in substance, unfair preferences and the prevailing statutory clawback period for unwinding such transactions had lapsed by the time OP3 brought Suit 152.

116 Counsel for Mr Foo, Mr Suresh Nair ("Mr Nair"), eventually abandoned this argument at the oral hearing before us. In our judgment, he was correct to drop the point. Pertinently, his submission rested on the absence in s 329 of the CA and ss 99 and 100 of the Bankruptcy Act (Cap 20, 2000 Rev Ed) ("BA") – the unfair preference provisions prevailing at the time Mr Foo authorised the Disputed Transactions – of a provision equivalent to s 227(7) of the IRDA which states that the provisions of the IRDA apply "without prejudice to the availability of any other remedy". However, as Mr Lee pointed out, such a provision existed even at the time the CA and BA were operative. Regulation 9 of the Companies (Application of Bankruptcy Provisions) Regulations provided that the application of ss 98–103 of the BA was "without prejudice to the availability of any other remedy", and this made it clear that a court's power to reverse unfair preferences has always been without prejudice to its power to provide other remedies in law.

117 Putting aside this technical point, this court has previously recognised in *Parakou Shipping (CA)* that the statutory unfair preference regime does not operate as a fetter on a company's ability to bring a claim for breach of the Creditor Duty. In *Parakou Shipping (CA)*, the liquidator of a company, Parakou

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Shipping Pte Ltd, averred that certain directors had acted in breach of the Creditor Duty by authorising several payments from the said company to two related companies. In that connection, this court observed that there was nothing objectionable in the liquidator bringing those claims at a time the two-year clawback period for undue preferences had expired and that the two claims were maintainable both independently and concurrently (*Parakou Shipping (CA)* at [110]). This in fact echoed our observations in *Progen* that the Creditor Duty goes hand in hand with the statutory avoidance provisions and "may even be a basis for independent recovery from the directors if the preferred creditor is unable to repay the amount adjudged to be an unfair preference" (*Progen* at [47]).

118 Indeed, there is no reason to circumscribe a claim for breach of the Creditor Duty with reference to the clawback periods that pertain to a claim for unfair preferences. As Mr Lee also pointed out, the statutory clawback periods governing the unfair preference regime serve an entirely different purpose, namely the interest of finality of transactions in view of third parties potentially acquiring proprietary rights in the assets disposed of. This much can be gleaned from juxtaposing the relatively stringent clawback periods of one or two years relevant to the statutory unfair preference regime (see ss 226(1)(*b*) and 226(1)(*c*) of the IRDA) with the limitation period of six years generally applicable to a claim for breach of a director's fiduciary duties (see *Dynasty Line* at [53]). The law's interest in upholding the finality of transactions is, however, not germane where an action for breach of the Creditor Duty is at issue. The latter claim is one brought against a director personally, and directors may be liable for breach of the Creditor Duty without any concomitant impact on the finality of commercial transactions. We therefore do not accept that the clawback periods relevant to the unfair preference regime have any bearing on the limitation period for a claim for breach of the Creditor Duty.

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119 As an aside, we note Mr Lee's submission that in a case involving a company in liquidation proceedings, the cause of action for a breach of the Creditor Duty crystallises upon the making of the winding-up order rather than the date of breach. Mr Lee saw the cause of action for a breach of the Creditor Duty in this manner because he conceived of the Creditor Duty as elevating the company's ability to discharge its liabilities to its creditors into a legally protected interest that is given effect through the liquidation process. Put differently, on Mr Lee's analysis, a cause of action for breach of the Creditor Duty crystallises upon the company entering into liquidation proceedings as this is the point in time at which the company will typically act to recover damages occasioned to it by the director's breach of the Creditor Duty and then distribute its assets to its creditors as a class. In this regard, an analogy may be drawn with causes of action for single torts requiring proof of damage which accrue when damage, rather than breach, materialises (see *Lian Kok Hong v Ow Wah Foong and another* [2008] 4 SLR(R) 165 at [24]). If the Creditor Duty is understood in the way Mr Lee suggests, the conclusion he proposes may be logical and would further underscore why the clawback periods relevant to a claim for unfair preferences do not bear on that pertaining to a claim for breach of the Creditor Duty. This is in so far as the limitation period for a claim for breach of the Creditor Duty begins to run upon the company entering into liquidation proceedings, whereas the "clawback periods" for claims predicated on unfair preferences are backward-looking and envelope preferences the company had given within one or two years before the commencement of the judicial management or winding up (as the case may be). It is not necessary for us to decide this point in this case, and we did not hear full arguments on this issue. Further, there are cases which suggest that the limitation period for a claim for breach of the Creditor Duty begins to run from the point of breach (see *Ho Pak Kim Realty Co Pte Ltd (in liquidation) v Ho Soo Fong and another*

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[2020] SGHC 193 at [109]; *Vivendi SA and another v Richards and another* [2013] EWHC 3006 (Ch) at [118]; *Re Oxford Pharmaceuticals Ltd; Wilson and another v Masters International Ltd and another* [2009] 2 BCLC 485 at [105]). We therefore leave the point open until the issue arises in a case where it is necessary to be decided.

120 While our conclusions at [116]–[118] suffice to dispose of Mr Foo's submission described at [115] above, we also highlight some other important differences between an action for breach of the Creditor Duty and a claim for breach of the statutory unfair preference regime:

(a) As mentioned, the Creditor Duty conditions all forms of management decision-making by directors (see [111] above), even if these do not amount to an unfair preference within the meaning of s 225 of the IRDA.

(b) The crux of a claim for breach of the Creditor Duty is the *bona fides* of a director and whether he had taken a decision with the best interests of the company in mind. A claim to recover an unfair preference, however, focuses on unwinding transactions made shortly before a company enters into judicial management or winding-up proceedings, where these transactions upend the *pari passu* distribution of the company's assets amongst its creditors. For this reason, it is possible that a director who authorises the payment of an unfair preference in breach of s 225 of the IRDA may nonetheless be acting in the best interests of the company and in compliance with the Creditor Duty. An example of this may be where payment of a certain creditor is particularly important to the continued trading of the company and therefore to the interests of the creditors as a whole (see *Living the Link*

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Pte Ltd (in creditors' voluntary liquidation) and others v Tan Lay Tin Tina and others [2016] 3 SLR 621 ("*Living the Link*") at [78]; *Sequana* at [101], *per* Lord Reed).

(c) The proper plaintiff for a claim for breach of the Creditor Duty is ordinarily the company. In contrast, a company's judicial manager or liquidator applies to the court for an order under s 225 of the IRDA (see s 225(1) of the IRDA).

(d) Different thresholds of solvency engage the two "duties". We repeat that when a court is faced with a claim for breach of the Creditor Duty, it first assesses the company's solvency status to determine whether a director was, in undertaking a certain corporate decision, obliged to accord weight to the interests of creditors and therefore engages in a "broader assessment of the surrounding circumstances of the case" to determine if the Creditor Duty is engaged (see [104] above). This contrasts with the court's task in adjudicating a claim for breach of s 225 of the IRDA. In the latter regard, the court must determine whether the unfair preference was given at a time the company was unable to pay its debts within the specific meaning of s 125(2) of the IRDA or that the company became unable to pay its debts within this meaning in consequence of the transaction or preference (see s 226(2) of the IRDA).

(e) Whereas directors are first subject to the Creditor Duty when a company is imminently likely to be unable to discharge its debts or a contemplated transaction is going to render it imminently likely that the company is not going to be able to discharge its debts (see [105(b)] above), s 225 of the IRDA applies to transactions which take place within the specific periods of time set out in s 226(1) of the IRDA.

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(f) A court order made pursuant to a finding of breach of the Creditor Duty is necessarily directed at the relevant company director. Orders made pursuant to s 225 of the IRDA are, contrastingly, directed at the impugned transactions themselves and seek to reverse the effects of these transactions. Flowing from this, the orders that a court may make pursuant to s 225 of the IRDA are wide-ranging. The court may, for instance, "require any property transferred as part of the transaction, or in connection with the giving of the preference, to be vested in the company" (s 227(1)(*a*) of the IRDA) or "release or discharge (in whole or in part) any security given by the company" (s 227(1)(*c*) of the IRDA).

121 Before us, Mr Nair reframed his submission on how the unfair preference regime interfaces with a claim for breach of the Creditor Duty. Mr Nair submitted, with reference to [88] and [92] of *Living the Link*, that the court should be *slow* to find breaches of the Creditor Duty where the disputed transactions are in substance unfair preferences and were made outside the statutory clawback period for such preferences.

122 We do not accept this submission. Read in context, all that the court in *Living the Link* was cautioning against was finding that a director had breached the Creditor Duty *solely* because he had preferred certain creditors. Pertinently, the liquidator's claim against the director for breach of director's duties in *Living the Link* was predicated on the director having been "influenced by a desire to prefer [certain] associate companies in procuring" certain payments (*Living the Link* at [92]). As we have explained at [120(b)] above, however, a director who deliberately prefers an associate company may nonetheless be found to have acted in the best interests of the first company. Hence, "where the [disputed] transaction [falls outside] the statutory clawback period, the party

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seeking recovery must prove that the acts are in breach of fiduciary duties, and in seeking to prove a breach, the mere fact of payments to related parties is not sufficient" (see *Parakou Shipping (CA)* at [110]). The point that was being emphasised at [88] and [92] of *Living the Link* is that whether the conditions of the unfair preference provisions are satisfied is not determinative of whether there has been a breach of the Creditor Duty (see also *Sequana* at [106], *per* Lord Reed). This, however, is entirely different from the relationship between a claim for breach of the Creditor Duty and a claim in respect of an unfair preference that Mr Nair urges us to endorse.

123 For these reasons, we are satisfied that neither formulation of Mr Nair's submission on how a claim in respect of an unfair preference bears on a claim for breach of the Creditor Duty withstands scrutiny.

Whether the Creditor Duty was engaged at the time Mr Foo authorised the Disputed Transactions

124 The crux of the dispute centred on whether the Creditor Duty was engaged at the time Mr Foo authorised the Disputed Transactions. We uphold the Judge's finding that it was so engaged for the following reasons.

The Disputed Dividend was not paid to Mr Foo as part of the Disputed Payment

125 We do not accept Mr Nair's submission that the Disputed Dividend was paid to Mr Foo as part of the Disputed Payment. In our judgment, the Judge correctly found that OP3 paid $1,182,394 rather than $682,394 to Mr Foo between December 2016 and January 2017. In the result, OP3's financial statements accurately reflected that it was in poor financial health at the end of 2016 and 2017. In particular, it had cash and cash equivalents of just $87,747

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as at 31 December 2016 and a negative net asset value of $545,568 as at 31 December 2017.

126 We agree with the Judge that the burden lay on Mr Foo to prove his claim that the Disputed Dividend was paid to him as part of the Disputed Payment on 25 January 2017 and he had failed to discharge this burden.

127 In arriving at this conclusion, we place weight on OP3's Statements of Cash Flow for the financial years ending 2016 and 2017 ("2016 and 2017 Statements of Cash Flow"). These two statements reflect that OP3 had paid dividends of $500,000 to Mr Foo in 2016. It should be recalled that the July 2016 Dividend was erroneously recorded in OP3's financial statement for the financial year ending 2015 (see [21] above). It follows that the dividend entry of $500,000 recorded as having been paid in the 2016 financial year in the statements for both 2016 and 2017 could only have referred to the Disputed Dividend. Significantly, the 2016 and 2017 Statements of Cash Flow were prepared by Mr Foo *himself*. Mr Foo never once explained why he had stated that the Disputed Dividend was paid out in 2016 in these statements if this were untrue. Nor did he ever testify that the 2016 and 2017 Statements of Cash Flow were inaccurate in this regard. To our minds, this constitutes a simple reason for affirming the Judge's finding that the Disputed Dividend and the Disputed Payment were distinct transactions.

128 We note that Mr Foo relies on two general ledgers reflecting changes in the amounts due from and to Mr Foo in 2016 and 2017 respectively ("2016 General Ledger" and "2017 General Ledger", collectively "2016 and 2017 General Ledgers") to substantiate his assertion that the Disputed Dividend was paid to him as part of the Disputed Transaction. These ledgers respectively provide:

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2016 General Ledger

13171 Amt Due Frm/(To) Kelvin Foo

			Balance at C31/12/15	3,758,920.94	4,173,374.68	-414,453.74
04/01/16 JV/019/1216	016645	Kelvin Foo Kian Be	Donald loan repayment to Kelvin Foo	1,700.00		-412,753.74
15/01/16 JV/002/0116	JV/002/0116	CPF Board	CPF-kelvin paid for ricky's Jan'16 CPF		1,020.00	-413,773.74
15/01/16 JV/003/0116	JV/002/0116	CPF Board	CPF-kelvin paid for LTK's Jan'16 CPF		1,020.00	-414,793.74
			Total Month January	1,700.00	2,040.00	-414,793.74
15/02/16 JV/001/0216	JV/002/0216	CPF Board	CPF-kelvin paid for ricky's Feb'16 CPF		1,020.00	-415,813.74
15/02/16 JV/002/0216	JV/002/0216	CPF Board	CPF-kelvin paid for LTK's Feb'16 CPF		1,020.00	-416,833.74
			Total Month February		2,040.00	-416,833.74
18/03/16 JV/001/0316	JV/002/0316	Foo Kian Beng	FKB-paid CPF on b/f (JV/024/0415-JV/002/0216)	16,830.00		-400,003.74
31/03/16 JV/003/0316	JV/003/0316	Foo Kian Beng	KF-overpaid to KF (refer DBS300053 dd18/3/16)	38.15		-399,965.59
			Total Month March	16,868.15		-399,965.59
30/05/16 FKB-CLAIM M	017210	Foo Kian Beng	KF-Returned overpaid pymt refer DBS300053(18/3/		34.41	-400,000.00
			Total Month May		34.41	-400,000.00
28/06/16 JV/001/0716	UOB089358	Payment of Dividen	Payment of Dividend YE 2015 1/2	200,000.00		-200,000.00
			Current page	200,000.00		200,000.00
			Previous page	200,000.00		200,000.00
28/06/16 JV/001/0716	UOB089358	Payment of Dividen	Payment of Dividend YE 2015 1/2	-200,000.00		-400,000.00
29/06/16 P1606044	017306	Foo Kian Beng	KF-Cash Advance for Autobacs @ Bukit Batok	30,000.00		-370,000.00
			Total Month June	30,000.00		-370,000.00
13/07/16 P1607022	UOB089358	Foo Kian Beng	Interim dividend declare for YE 2015 1/2	200,000.00		-170,000.00
			Total Month July	200,000.00		-170,000.00
30/09/16 JN/009/0916	JN/009/0916	WWFS Conservati	Amt Due Frm/(To) Kelvin Foo		1,750.00	-171,750.00
			Total Month September		1,750.00	-171,750.00
14/10/16 P1610015	017539	Foo Kian Beng	KF-Dwn pymt for China Shipmt-Infineon (DBS0173		30,000.00	-201,750.00
			Total Month October		30,000.00	-201,750.00
31/12/16 JN/022/1216	JN/022/1216		Dividend YE2016		500,000.00	-701,750.00
31/12/16 JN/022/1216	JN/022/1216		Dividend YE2016		-500,000.00	-201,750.00
31/12/16 JN/022/1216	JN/022/1216	Interim dividend 20	Interim dividend 2016		400,000.00	-601,750.00
31/12/16 JN/022/1216	JN/022/1216	Interim dividend 20	Interim dividend 2016		-400,000.00	-201,750.00
31/12/16 JN/022/1216			Amt Due Frm/(To) Kelvin Foo		500,000.00	-701,750.00
			Total Month December		500,000.00	-701,750.00
			Balance at 31/12/16	248,568.15	535,864.41	-287,296.26
			Total Date Range	4,007,489.09	4,709,239.09	-701,750.00

2017 General Ledger

13171 Amt Due Frm/(To) Kelvin Foo

			Balance at C31/12/16	4,007,489.09	4,709,239.09	-701,750.00
08/01/17 JN/1701/003	JN/1701/003	Y P Chee & Associ	YP Chee-KF paid o/b POSB613724 dd 8/1/17		10,000.00	-711,750.00
25/01/17 P1701019	017581	Kelvin Foo	Advances to Director Mr.Kelvin Fo	500,000.00		-211,750.00
10/02/17 P1701026	017586	Foo Kian Beng (Kel	Repymt to Director (Kelvin Foo)	211,750.00		0.00
05/04/17 R1701021	POSB 613741	Kelvin Foo	Advances from director		20,000.00	-20,000.00
01/11/17 P1711001	017614	Kelvin Foo	Repayment to Director	20,000.00		0.00
			Total Year 2017	731,750.00	30,000.00	
			Balance at 31/12/17	731,750.00	30,000.00	701,750.00

129 In short, Mr Foo argues that the final entry of the 2016 General Ledger pertains to the Disputed Dividend and as suggested by the ledger, this dividend remained unpaid as at 31 December 2016. We reject this submission as contrived. It is artificial to interpret the final entry of the 2016 General Ledger as pertaining to the Disputed Dividend. The Disputed Dividend was already

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accounted for in the 2016 General Ledger under the entry titled "Dividend YE2016". There is also no reason why the Disputed Dividend would be recorded under the heading "Amt Due Frm/(To) Kelvin Foo" when all other dividends in this ledger are labelled as "dividends". If anything, the 2016 General Ledger reveals that the moneys OP3 owed Mr Foo decreased from $701,750 to $201,750 after OP3 paid the sum labelled "Dividend YE2016" to Mr Foo, which is entirely consistent with the Disputed Dividend having been paid out to Mr Foo in 2016.

130 Reading the 2016 General Ledger with the 2017 General Ledger does not assist Mr Foo's case either. All that the 2017 General Ledger states is that OP3 paid Mr Foo $500,000 under the heading "Advances to Director" on 25 January 2017. There is no indication that this pertained to the Disputed Dividend, and we reiterate that the payment of dividends had been specifically labelled as such in the 2016 General Ledger. Mr Foo also failed to explain why OP3 would declare the Disputed Dividend in December 2016 and only purport to pay it to him as part of the Disputed Payment in January 2017.

131 In so far as Mr Foo argues that the only bank statements OP3 adduced in evidence, namely its DBS bank account statements, do not show that the Disputed Dividend was paid to Mr Foo in December 2016, this is neither here nor there. It is common ground between the parties that OP3 had accounts with banks other than DBS and the statements pertaining to these bank accounts were not before the court. Mr Foo further alleges that this should not be held against him because he had asked OP3's liquidator for these bank statements but did not receive them. We do not agree. In fact, as was submitted to us, Mr Foo had selectively disclosed documents and did not disclose all of OP3's bank statements to OP3's liquidator. We need only refer here to the undisputed fact that Mr Foo had throughout been in possession of the 2016 and 2017 General

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Ledgers but did not disclose these to OP3's liquidator, choosing instead to reveal two pages from the ledgers for the first time in Mr Foo's affidavit of evidence-in-chief.

132 Further, Mr Foo could have, but did not instruct his expert witness, Mr Kon Yin Tong ("Mr Kon"), whom he had engaged to opine on whether OP3 was insolvent at certain material dates, to provide his view on the accuracy of OP3's 2016 and 2017 Statements of Cash Flow which reflected that the Disputed Dividend had been paid to Mr Foo in 2016. And when Mr Kon was cross-examined on whether he thought the Disputed Dividend and Disputed Payment were paid to Mr Foo as distinct transactions, his view was that the two separate entries in the 2017 Statement of Cash Flow pertaining to the Disputed Dividend and Disputed Payment indicated or suggested that they were distinct.

133 We are therefore satisfied that the Disputed Dividend was a transaction distinct from the Disputed Payment, and OP3 paid Mr Foo $1,182,394 between December 2016 and January 2017. This in turn bears on the financial state of the company at the relevant times Mr Foo authorised the Disputed Transactions as explained at [125] above.

OP3's contingent liability in Suit 498 was one reasonably likely to materialise and thus had to be taken into account in assessing its solvency at the material times the Disputed Transactions were paid out to Mr Foo

134 Next, we affirm the Judge's finding that OP3's contingent liability in Suit 498 was reasonably likely to materialise and therefore had to be taken into account in assessing OP3's solvency at the times the Disputed Transactions were paid out to Mr Foo.

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135 We agree with the Judge that little weight could be placed on the legal advice Mr Foo received from Parwani Law on the merits of Smile Inc's claim in Suit 498. It is clear that Mr Foo had sought such legal advice. But on the entirety of the evidence before us, the legal advice that Parwani Law provided Mr Foo was extremely cursory. The primary legal advice Mr Parwani gave to Mr Foo was provided orally, and in respect of which no "written notes of [those] conversations" exist. Parwani's E-mail confirms that Mr Parwani had advised Mr Foo that OP3 "ha[d] a strong defence" in Suit 498, but again, this is bereft of any details. Parwani's E-mail is, in any event, inadmissible hearsay. There is nothing before us which suggests that Mr Parwani had reviewed the relevant documents (such as the Contract and the e-mail correspondence between Smile Inc and OP3 on the First and Second Floods) or conducted a site visit to the Clinic in coming to his view that OP3 had a strong defence to Smile Inc's claim in Suit 498. This is not to say that he had not done so, but there is nothing in the evidence that allows us to arrive at a contrary conclusion.

136 We reiterate that the mere fact that legal advice was taken does not mean that a defendant-director will inevitably be found to have acted *bona fide* in undertaking a certain course of action. It is imperative that the court be provided sufficient information about the circumstances under which such advice was provided so as to be able to evaluate the extent to which an individual can fairly rely on the fact of legal advice (see *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [338]). Such details were sorely lacking in the present case.

137 We are also troubled that Mr Parwani did not testify as a witness in Suit 152. Whilst Mr Parwani may not have been open to being questioned on matters falling within the scope of legal professional privilege, the issue in Suit 152 concerned the *bona fides* of his client in concluding that he did not

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need to have any regard to OP3's potential liability in Suit 498. By the time Suit 152 had taken place, it was obvious that whatever advice Parwani Law had given Mr Foo on the merits of Smile Inc's claim in Suit 498 was incorrect. In those circumstances and given how poor the state of the evidence was on what legal advice Mr Foo had received from Parwani Law on the merits of Smile Inc's claim in Suit 498, it seems reasonable to us to conclude that Mr Parwani ought to have been called as a witness by Mr Foo.

138 Apart from the legal advice he received from Parwani Law, Mr Foo also pointed to the hydrostatic tests OP3 had conducted in the wake of both the First and Second Floods. To recapitulate, these tests revealed that there were no holes in the drainage pipes OP3 installed at the Clinic (see [10] and [12] above). We do not consider these tests to support the conclusion that OP3's liability in Suit 498 was not reasonably likely to materialise. Holes in these drainage pipes were *not* the root cause of the First and Second Floods and Mr Foo knew this to be the case.

139 Rather, it was the lack of an access panel which would have allowed Smile Inc to clear debris that had accumulated in the drainage area that was the root cause of the First Flood. We note that Mr Foo initially claimed that OP3 was not responsible for the lack of the access panel at the Clinic. He said that OP3 "was not the first contractor to work on the fitting out" of the Clinic and had simply adopted the designs of the Clinic's plumbing system that the previous contractor had produced. This was untrue. As Chan J found in Suit 498, there was no evidence that Mr Foo had ever requested the drawings for the drainage system from the previous contractor. OP3's subcontractor also attested in Suit 498 that it had designed the drainage area in conjunction with OP3 (see *Smile Inc Dental Surgeons* at [55] and [58]).

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140 Indeed, under cross-examination before the Judge, Mr Foo eventually conceded that his team overlooked the need to install an access panel at the Clinic and this was known to him even in 2014. Consistent with this, Ms Chong informed Mr Matthew Chee (of OP3) on 20 January 2014 and Mr Foo on 27 January 2015 that the "only floor trap in the [Clinic] … was sealed up with the raised flooring" and "[t]here was no access to the floor trap made available by OP3". Thus, whether the drainage pipes OP3 installed in the Clinic had holes was beside the point and could not have been the basis for Mr Foo to conclude that OP3's liability in Suit 498 was not one that was reasonably likely to materialise.

141 Mr Foo submits that even if OP3 had been negligent in failing to install the access panel at the first instance, it had done so following the First Flood. According to Mr Foo, Smile Inc would thereafter have been well-equipped to maintain the drainage area, which in turn grounded his purported belief that OP3 bore no liability in respect of the Second Flood. We are unpersuaded by this. Before the Judge, Mr Foo's position was that an inquiry had to be carried out to determine the cause of the Second Flood. There was also no evidence as to the nature and quality of the inspections that OP3 performed at the Clinic following the Second Flood (see [12] above). There was, in sum, little to substantiate Mr Foo's purported belief *at the material time* that OP3 was *not* liable in respect of the Second Flood.

142 For much the same reasons, Mr Chee's Report could not have helped Mr Foo. Mr Foo relied in particular on Mr Chee's statement in his report that there was a "much higher probability that the water incidences resulted from lack of due maintenance of the floor trap". This, however, overlooked Mr Chee's remark in the same report that "[i]t was an oversight on the part of [OP3] in not providing an access panel, to facilitate future maintenance of the

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floor trap/sump, at the time of handing over the renovation works", and we repeat our observations at [139]–[141] above.

143 Finally, it should be recalled that OP3's fitting out works at the Clinic were not just defective but tardy (see [18(a)] above). Mr Foo did not account for this failure on OP3's part.

144 In short, neither Mr Foo nor his lawyers adduced cogent evidence to show that Mr Foo honestly believed or could honestly have believed that OP3 would face no liability in respect of the First and Second Floods. We are satisfied that OP3's contingent liability in Suit 498 was reasonably likely to materialise and ought to have been accounted for by Mr Foo, as a director of the company, at the material time.

145 This throws the sub-issue of the value to be ascribed to the potential liability in Suit 498 into sharp relief. We emphasise that in the present context, the court is not valuing contingent liabilities in the technical accounting sense or for the purpose of ascertaining whether a party has standing to present a winding-up application within the meaning of s 124(1)(*c*) of the IRDA. Rather, the relevant question is what extent of the contingent liability a court should take into account in ascertaining whether the Creditor Duty was engaged at the time a particular contemplated transaction was entered into.

146 We have outlined the Judge's analysis of this issue at [39] above. With respect, we find the Judge's approach to be overly generous to Mr Foo. The principal problem with the Judge's approach is the steep discount (of between 60% and 65%) she applied to the value of OP3's contingent liability to Smile Inc on account of Mr Foo having received legal advice from Mr Parwani. On the evidence, there was little reason for the Judge to have discounted the

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potential liability, given what was known (or not known) about the nature and basis of the legal advice Mr Foo received from Parwani Law. This, coupled with the fact that Mr Foo knew contemporaneously that OP3 bore some liability in respect of the First and Second Floods, suggests to us that there should have been no discount or, at best, a marginal discount to the sum Smile Inc claimed against OP3 in Suit 498 when valuing this as a contingent liability.

147 This issue underscores the importance of ensuring that any assessment of the quantum of a contingent liability that should be considered in ascertaining the financial health of the company in the context of a claim for breach of the Creditor Duty ought not to be skewed by the benefit of hindsight. Directors operate in a fast-moving commercial environment and the courts will assess their decisions based on the facts and circumstances prevailing at the material time those decisions were taken. As Lord Reed put it, principle has to be reflected in the law in a way which can operate as a practical guide in the day-to-day conduct of directors managing companies without the benefit of hindsight (see *Sequana* at [87]).

148 And if no discount or only a limited discount was to be accorded to Smile Inc's claim against OP3 in Suit 498, and even allowing for the admitted weakness of the claim for loss of management time and effort, as well as the Balance Sum, this would have left a potential liability of around $1,470,000 (rounded up). If an amount of this order had been taken into account as a contingent liability, it would have become clear at once that OP3 was imminently likely to be unable to discharge its debts. The Creditor Duty was therefore engaged at the times Mr Foo authorised the payment of the Disputed Transactions to himself. For completeness, we express no view on whether OP3 was inevitably headed for corporate insolvency proceedings during these times

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as we heard no submissions on this point and OP3's case was not predicated on this state of affairs.

149 Not only was OP3 bogged down by its contingent liability in Suit 498 to the tune of approximately $1,470,000, it had cash and cash equivalents of just $87,747 as at 31 December 2016 and a negative net asset value of $545,568 as at 31 December 2017. For the avoidance of doubt, these valuations of OP3 did not factor in OP3's contingent liability in Suit 498.

150 Additionally, OP3 had been experiencing a steep decline in business. Mr Nair's characterisation of OP3's business in 2016 as healthy is untenable. OP3's revenue had nosedived from $10,834,505 in 2015 to $1,343,323 at the end of 2016, and to $316,888 by 31 December 2017. Its cost of sales figures likewise declined from $7,854,229 to $635,637 between 2015 and 2016, and further declined from $635,637 to $406,184 between 2016 and 2017. OP3's profits were consequently impacted and plummeted from $996,894 in 2015 to losses of $79,299 and $703,251 in 2016 and 2017 respectively.

151 All of these figures paint a picture of a rapidly deteriorating operating environment for OP3. Indeed, on Mr Foo's own account, a number of OP3's major clients declined to continue engaging OP3 after Smile Inc commenced Suit 498, and OP3 "found it difficult to persuade" sub-contractors to accept jobs, and subcontractors who were willing to work for OP3 "would insist on cash payments upfront". Mr Foo further admitted that OP3 had to declare pending law suits when bidding for projects, that business was not going well for OP3 in 2016, and that he was forced to rely on a second corporate entity, OP3 Creative Pte Ltd, as his primary business vehicle because clients were unwilling to contract with OP3.

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152 Taking a holistic view of OP3's affairs, we are amply satisfied that the Creditor Duty was engaged at the time Mr Foo authorised the payment of the Disputed Transactions to himself. In so authorising the transactions, Mr Foo was obliged to have regard to the interests of OP3's creditors.

Whether Mr Foo breached the Creditor Duty by authorising the payment of the Disputed Transactions to himself

153 To complete the analysis, we are satisfied that Mr Foo failed to consider the interests of OP3's creditors and acted in breach of the Creditor Duty by authorising the payment of the Disputed Transactions to himself. This point was not seriously pressed by Mr Nair before us and we deal with it briefly.

154 A point which carries significant weight in our analysis is the nature of the Disputed Transactions. OP3's creditors stood to gain nothing from the Disputed Transactions. This was not a case where Mr Foo took a strategic commercial decision to revitalise the fortunes of the company and under which OP3's creditors could potentially enjoy some upside if Mr Foo's commercial judgment paid off. Rather, the Disputed Transactions singularly enriched Mr Foo at the expense of OP3's creditors and we repeat our observations at [106(b)] above.

155 It is also telling that Mr Foo did not draw any dividends between 2012 and 2015 but paid himself $2,800,000 in dividends and $820,746 in loan repayments after Smile Inc commenced Suit 498 (see [20] above). Even though a large proportion of these dividends was not the subject of the present appeal, the timing and quantum of the withdrawals point to Mr Foo acting to extract as much as he could from OP3 in the face of a declining business and impending corporate liability.

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Whether Mr Foo ought to be relieved of liability under s 391 of the CA

156 Finally, we consider Mr Foo's claim that he ought to be relieved of liability under s 391 of the CA. As mentioned, three cumulative requirements must be fulfilled for the court to grant such relief. The director must have acted honestly, and reasonably, and it must be fair for the court to excuse him for his default. A director would be regarded as having acted honestly if his conduct was "without deceit or conscious impropriety" or "without intent to gain an improper benefit or advantage" (*Nordic International* at [86]–[87]).

157 We decline to grant Mr Foo such relief. To the extent that Mr Foo's plea rests on his having received legal advice from Parwani Law that OP3 had a strong defence to Smile Inc's claim in Suit 498 and the statement in Mr Chee's Report that it was more likely that the First and Second Floods resulted from the lack of maintenance of the floor trap, we have already explained why these strands of evidence do not assist Mr Foo.

158 Mr Foo also relies on the advice he received from Mr Wong that a director could declare and pay dividends if the company had sufficient earnings to substantiate his plea for relief (see [22] above). In our view, Mr Wong's advice does not take Mr Foo very far. Mr Wong was consulted on an informal basis and was not then engaged by OP3 as its auditor. Moreover, Mr Wong explained that his advice hinged on Mr Foo's word that Suit 498 was unmeritorious. We have explained that Mr Foo could not have believed this to be true (see [134]–[143] above) and would have therefore known that Mr Wong's advice could not be unquestioningly accepted. Indeed, any reliance on professional advice must be balanced against the responsibility that the law places upon every individual director to bring to bear his own judgment in

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evaluating the advice received (see *Ong Chow Hong (alias Ong Chaw Ping) v Public Prosecutor and another appeal* [2011] 3 SLR 1093 at [34]).

159 In the result, we uphold the Judge's finding that Mr Foo did not act honestly. In our view, Mr Foo enriched himself at the expense of OP3's creditors. He did so knowing that there was some merit to Suit 498 and at a time when OP3's business was on a steep decline. These factors would also show that Mr Foo did not act reasonably, and it is not fair to excuse him from liability.

Conclusion

160 For these reasons, we are satisfied that the Creditor Duty was engaged at the time Mr Foo authorised the payment of the Disputed Transactions to himself and that Mr Foo failed to consider the interests of OP3's creditors in breach of this duty by so authorising the transactions. The appeal is accordingly dismissed.

161 We award costs to OP3 fixed at $60,000 (inclusive of disbursements), this being the quantum of costs sought by OP3. The usual consequential orders are to apply.

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162 In closing, we express our deep appreciation to Mr Lee for his assistance and characteristically thoughtful submissions in this matter. Though we did not agree with all of his submissions, they were nonetheless of considerable assistance to us in navigating the issues raised in the present appeal.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Belinda Ang Saw Ean
Justice of the Court of Appeal

Kannan Ramesh
Judge of the Appellate Division

Judith Prakash
Senior Judge

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