IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA 17

Civil Appeal No 26 of 2022

Between

BIT Baltic Investment &
Trading Pte Ltd
(in compulsory liquidation)

… *Appellant*

And

Wee See Boon

… *Respondent*

In the matter of Originating Summons No 667 of 2021

Between

BIT Baltic Investment
& Trading Pte Ltd
(in compulsory liquidation)

… *Plaintiff*

And

Wee See Boon

… *Defendant*

JUDGMENT

[Companies — Directors — Duties]

BIT Baltic Investment & Trading Pte Ltd (in compulsory liquidation) v Wee See Boon

[2023] SGCA 17

Court of Appeal — Civil Appeal No 26 of 2022
Judith Prakash JCA, Tay Yong Kwang JCA, Belinda Ang Saw Ean JCA
16 January 2023

26 May 2023 Judgment reserved.

Judith Prakash JCA (delivering the judgment of the court):

1 This is an appeal arising from the decision made by a High Court judge ("**the Judge**") in HC/OS 667/2021 ("**OS 667**"). The appellant is BIT Baltic Investment & Trading Pte Ltd (in compulsory liquidation) ("**BIT Baltic**"). The respondent is Mr Wee See Boon ("**Mr Wee**"), a director of BIT Baltic prior to its liquidation.

2 In OS 667, BIT Baltic sought damages against Mr Wee in respect of alleged breaches of his fiduciary duties and duties of care, skill and diligence. BIT Baltic claimed that these breaches arose from unfair preference payments that it was caused to make between 12 December 2018 and 27 December 2018 to two companies ("**the Payments**") amounting to US$1,472,500 ("**the Principal Sum**") when Mr Wee was one of its directors. While the Payments were refunded before OS 667 was heard, BIT Baltic continued with the

application seeking additional damages from Mr Wee in the form of: (a) loss of interest on the Principal Sum; (b) the costs of the liquidator, and (c) the costs of the petitioning creditor. In the proceedings below, the Judge dismissed BIT Baltic's claims in their entirety on the basis that Mr Wee was not aware of the Payments at the time they were made and had nothing to do with making them. The Judge's reasons are set out in *BIT Baltic Investment & Trading Pte Ltd (in compulsory liquidation) v Wee See Boon* [2022] SGHC 110 ("**the Judgment**").

3 Having considered the evidence and parties' submissions, we allow BIT Baltic's appeal. In our judgment, when Mr Wee became aware of the Payments, and in particular because they were related party transactions, he had a duty to examine them and ascertain whether, in the light of BIT Baltic's financial position at the time of payment, it had been permissible for the Payments to have been made. If he had done so, it would have been clear to him that the Payments constituted unfair preferences and he would then have had a duty to alert the other directors and try to recover the Payments. In omitting to look into the propriety of the Payments, Mr Wee breached the duties of care, skill and diligence that he owed to BIT Baltic. As regards the damages sought by BIT Baltic, we allow these in part as more fully explained below.

4 We now set out the reasons for our decision.

Facts

The parties connected to the dispute

5 Prior to its liquidation, BIT Baltic was a company that was in the business of chartering and managing ships, tankers and vessels. On 19 June

2020, pursuant to a winding up petition filed by one of its creditors, OIG Giant I Pte Ltd (**"OIG"**) in April 2020, BIT Baltic was wound up by an Order of Court and Mr Mick Aw Cheok Huat (**"the Liquidator"**) appointed its liquidator. The amount owing to OIG was S$1,805,568.10.

6 The directors of BIT Baltic from the time of its incorporation on 8 April 2011 until their respective resignations on 26 March 2020 were:

(a) Mr Wee, the respondent in this appeal;

(b) Mr Peter Christian Harren ("**Mr Harren**"), a German national with a Singapore residence and BIT Baltic's managing director; and

(c) Dr Martin Harren ("**Dr Harren**"), a German national.

All three directors were authorised signatories of BIT Baltic's DBS bank accounts.

7 Three other corporate entities feature in this appeal:

(a) The first is BIT Baltic's former immediate holding company, Harren & Partner Singapore Holding Pte Ltd (**"HPSH"**). Mr Wee was one of the authorised signatories for HPSH's bank account.

(b) The second is BIT Baltic's former ultimate holding company, HPS International Holding GmbH (**"HPS"**). Dr Harren was a director of HPS at the material time.

(c) The third is HARPA Services & Support GmbH & Co. KG (**"HARPA"**), a German company in the business of providing support

services to ship owners and charterers of vessels. Dr Harren was also a director of HARPA at the material time.

Background to the dispute

8 As mentioned above, the present dispute concerns a series of payments that BIT Baltic made between 12 December 2018 and 27 December 2018 to HARPA and HPS. The Payments were made for services furnished by HARPA and HPS to BIT Baltic between March 2014 and September 2016. Specifically, HARPA provided BIT Baltic with vessel accounting, bookkeeping and IT services for the vessel "Blue Giant" while HPS provided controlling and financial services to BIT Baltic for "Blue Giant" until its redelivery by BIT Baltic to its registered owners. We shall refer to these services collectively as "**the Services**". Before October 2018, the amounts due to HARPA and HPS for the Services had not been documented or invoiced and were not reflected in BIT Baltic's accounts.

9 Notwithstanding that (a) HARPA's and HPS' provision of the Services concluded in 2016, and (b) BIT Baltic had stopped generating revenue as of December 2017, BIT Baltic entered into agreements for the Services with HARPA ("**the HARPA Agreement**") and HPS ("**the HPS Agreement**") on 1 October 2018. The HARPA Agreement provided that BIT Baltic was to pay HARPA a monthly fee of US$25,500 a month for its services, while the HPS Agreement provided that BIT Baltic was to pay HPS a monthly fee of US$22,000 for its services. The HARPA Agreement and the HPS Agreement were signed by Mr Wee, on behalf of BIT Baltic, and by Dr Harren, on behalf of HARPA and HPS respectively.

10 Once the contracts had been executed, HARPA and HPS issued invoices under the HARPA Agreement and HPS Agreement to BIT Baltic. The invoices were issued between 30 November 2018 and 19 December 2018, with each invoice falling due on the same date that it was issued. The total amounts due to HARPA and HPS under the invoices were US$790,500 and US$682,000, respectively. The invoices were settled between 12 and 27 December 2018, as mentioned earlier (at [8]). The money used to settle the invoices came almost completely from the proceeds of loan repayments made to BIT Baltic by HPSH between 12 December 2018 and 27 December 2018. As each repayment instalment was received by BIT Baltic it was almost immediately used to pay HPS and HARPA for the Services. The total amount paid out was US$1,472,500.

11 Following the winding up of BIT Baltic in June 2020, the Liquidator took control of its books and investigated its affairs. On 5 July 2021 BIT Baltic commenced OS 667 against Mr Wee for damages in respect of alleged breaches of his director's duties in relation to the Payments. BIT Baltic claimed that Mr Wee breached these duties by failing to determine whether it was permissible for BIT Baltic to make the Payments in preference to BIT Baltic's other creditors when BIT Baltic was insolvent, or when the Payments would have resulted in BIT Baltic becoming insolvent. BIT Baltic thus sought an assessment of damages as against Mr Wee for "all loss and damage suffered".

12 On 24 August 2021, Mr Wee applied for OS 667 to be converted into a writ. BIT Baltic objected to the application and the learned Assistant Registrar subsequently dismissed it on the basis that there was no substantial dispute of fact that would be better determined through a writ action. Mr Wee did not appeal against this decision. Although Mr Wee had submitted that OS 667

should have been converted to a writ because of the availability of processes such as discovery and cross examination of witnesses such as Dr Harren and Mr Harren, he did not thereafter apply for these procedures even though it was open for him to do so (see for example, O 24 r 1(1) and O 28 r 4(4) of the Rules of Court 2014).

13 On 23 December 2021, two months before the hearing of OS 667, HPS and HARPA repaid the Principal Sum in full to BIT Baltic. Nonetheless, BIT Baltic continued its action against Mr Wee and sought the recovery of additional damages ("**the Additional Damages**") in the form of:

(a) interest for the loss of use on the Principal Sum from December 2018 to 22 December 2021 at 5.33% per annum amounting to US$256,026.41 ("**the Interest Claim**");

(b) costs incurred by the Liquidator in reviewing BIT Baltic's financial affairs amounting to S$130,400 ("**the Liquidator's Costs Claim**"); and

(c) costs incurred by OIG in investigating and commencing the winding up proceeding against BIT Baltic amounting to S$45,381.30 ("**the OIG Costs Claim**").

14 In response, Mr Wee denied that he had breached his fiduciary duties. He maintained that he had acted in good faith in the conduct of BIT Baltic's affairs. He described himself as "a nominee director of [BIT Baltic], and a person of limited means". In the alternative, Mr Wee submitted that even if he were found to have breached his duties, the principle of restitution ought to apply to the Interest Claim. As such, the applicable rate of interest should only be the then-prevailing fixed deposit interest rate to which BIT Baltic would have

been entitled – that of 0.8% per annum. Mr Wee also submitted that BIT Baltic would have been wound up in any case due to business failure and that the Liquidator's Costs Claim and the OIG Costs Claim would have been incurred in any event.

The decision below

15 On 13 May 2022, the Judge dismissed OS 667. First, she found that the Payments were unfair preference payments to HARPA and HPS and that BIT Baltic had either been insolvent at the time of the Payments or had been made insolvent by them. In relation to Mr Wee, however, she concluded that BIT Baltic had failed to prove that Mr Wee was "aware or should have been aware" of the Payments. In the Judge's view, it was reasonable for Mr Wee to have been unaware of the Payments. She observed that Mr Wee was the sole local director of BIT Baltic and that it was Mr Harren and Dr Harren "who had full management and conduct of [BIT Baltic's] business operations and financial matters". She thus concluded that Mr Wee's primary responsibilities were "limited to that of doing the necessary paperwork with auditors, relevant agencies, and dealing with regulatory authorities in Singapore". Citing *Prima Bulkship Pte Ltd (in creditor's voluntary liquidation) and another v Lim Say Wan and another* [2017] 3 SLR 839 at [49], the Judge observed that Mr Wee's limited role in BIT Baltic would impact the extent to which he would have been expected to be informed of BIT Baltic's affairs.

16 For these reasons, the Judge held that Mr Wee did not breach his duty to act in the interests of BIT Baltic or his duty to exercise due care, skill and diligence.

The parties' cases

BIT Baltic's case

17 BIT Baltic appealed against the following portions of the Judge's decision:

(a) First, that Mr Wee was the sole local resident director whose "primary responsibilities were limited to that of doing the necessary paperwork with auditors, relevant agencies and dealing with regulatory authorities in Singapore". BIT Baltic contends that the finding that Mr Wee had a "limited" role in BIT Baltic was plainly against the weight of the evidence.

(b) Secondly, that BIT Baltic failed to show that Mr Wee was "aware or should have been aware" of the unfair preference payments to related parties. BIT Baltic contends that Mr Wee should have been put on notice when he signed the HARPA Agreement and HPS Agreement to make payment for the Services 10 months after BIT Baltic had ceased generating revenue.

(c) Thirdly, that BIT Baltic's audited 2018 Financial Statements (**"the 2018 Financial Statements"**) did not go further than to indicate that Mr Wee would have been aware of BIT Baltic's debt owing to OIG. BIT Baltic contends that the qualified opinion of the auditors on the 2018 Financial Statements would have alerted Mr Wee to BIT Baltic's parlous financial state and that the Payments had been made to HARPA and HPS given that they were recorded as "significant related party transactions".

18 As such, BIT Baltic submits that by turning a blind eye or failing to make the necessary inquiries regarding the Payments, Mr Wee breached: (a) his duty to act honestly and use reasonable diligence under s 157 of the Companies Act (Cap 50, 2006 Rev Ed) (**"Companies Act"**) and the corresponding common law duty to act *bona fide* in its best interests; and (b) his duty to exercise care, skill and diligence. BIT Baltic submits these breaches by Mr Wee entitle it to claim the Additional Damages.

Mr Wee's case

19 It should first be noted that Mr Wee did not in his Respondent's Case challenge in any way the Judge's finding that the Payments were unfair preferences (see [19] of the Judgment). Nor did he challenge the important finding made by the Judge that BIT Baltic was insolvent at the time of the Payments or became insolvent because of them (see [21] of the Judgment). Thus, it is clear he accepts that BIT Baltic was insolvent when the Payments were made or was made insolvent by the Payments and, therefore, that they should not have been made.

20 Rather, in support of the Judgment and in response to the appeal, Mr Wee makes three broad points.

(a) First, Mr Wee submits that BIT Baltic has shifted its case on appeal. Mr Wee argues that as framed in OS 667, BIT Baltic's case was that his breach of duties was "focused and … restricted to his acts and omissions *at the time* the Payments were made". BIT Baltic should therefore not be allowed to assert that Mr Wee failed to make any inquiries or take any action to recover the assets *after* the Payments were made.

(b) Secondly, Mr Wee submits that there was no evidence to show that he knew or ought to have known about the Payments when they were being made. He therefore could not have enquired about or prevented a transaction of which he had no knowledge. As such, Mr Wee maintains that he did not breach his duties as BIT Baltic's director.

(c) Thirdly, even if BIT Baltic were to succeed on liability, Mr Wee submits that he should only be ordered to pay interest on the Principal Sum at the fixed deposit rate of 0.8% per annum from 15 August 2019 to 22 December 2021(being a sum of US$27,755.61) and not at the rate of 5.33% per annum. He accepts that interest should run at 5.33% per annum from 23 December 2021 to the date of judgment but contends that in this respect it should be calculated on the sum of US$27,755.61 and not on the Principal Sum. Mr Wee also submits that the Liquidator's Costs Claim and the OIG Costs Claim are unmeritorious and that costs on an indemnity basis should not be ordered since he did not behave unreasonably.

Issues on appeal

21 Four issues thus arise for our determination:

(a) First, did BIT Baltic shift its case on appeal?

(b) Secondly, what was Mr Wee's role in BIT Baltic as a director and how did this role affect the duties he owed to BIT Baltic, if at all?

(c) Thirdly, did Mr Wee breach his duties as BIT Baltic's director?

(d) Fourthly, if Mr Wee breached these duties, what damages is BIT Baltic entitled to?

Issue 1: Did BIT Baltic shift its case on appeal?

22 In our judgment, BIT Baltic did not shift its case on appeal. Mr Wee's submission that BIT Baltic had restricted its assertions of breach of duty to his acts and omissions at the time the Payments were made is not reflected in the manner in which OS 667 was framed.

23 A review of the prayers sought in OS 667 and the Liquidator's affidavit filed in support of OS 667 makes it clear that BIT Baltic framed its case *broadly* to assert that Mr Wee had breached his duties in failing to: (a) determine whether the Payments had been made in unfair preference to BIT Baltic's other creditors; and (b) ascertain whether Mr Harren and Dr Harren had breached their duties by facilitating the Payments. The assertions of breach were not limited to the time at which the Payments were made.

24 Prayers 1 and 2 of OS 667 state the following:

> 1. The Defendant subordinated the interests of the Plaintiff's other creditor(s) to the interests of [HARPA] and/or [HPS], in:
>
> (a) failing to determine whether or not it was permissible for the Plaintiff to pay US$790,500.00 to HARPA in the period between 12 December 2018 and 27 December 2018, in preference to the Plaintiff's other creditor(s) when the Plaintiff was insolvent or which would have resulted in the Plaintiff becoming insolvent;
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> (b) failing to determine whether or not it was permissible for the Plaintiff to pay US$682,000.00 to HPS in the period between 12 December 2018 and 27 December 2018, in preference to the Plaintiff's other creditor(s) when the Plaintiff was insolvent or which would have resulted in the Plaintiff becoming insolvent;

> (c) failing to ascertain whether or not one or more of the other directors of the Plaintiff, namely Mr Peter Christian Harren and/or Dr Martin Harren, were acting in breach of their statutory duties under the Companies Act in facilitating the payment of US$790,500.00 to HARPA in the period between 12 December 2018 and 27 December 2018, in preference to the Plaintiff's other creditor(s) when the Plaintiff was insolvent or which would have resulted in the Plaintiff becoming insolvent …
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> …
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> 2. by reason of one or more of the Defendant's acts and/or omissions as set out in paragraph 1 above, the Defendant breached his director's duties owed to the Plaintiff and caused loss and damage to the Plaintiff and the Plaintiff's other creditor(s) in failing to:
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> (a) act in good faith and in the best interests of the Plaintiff;
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> (b) act with honesty and loyalty towards the Plaintiff;
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> (c) act for a proper purpose for the benefit of the Plaintiff;
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> (d) act *bona fide* and in good faith in the interests of the Plaintiff;
>
> (e) exercise the care, diligence and skill required of him as a director of the Plaintiff;
>
> (f) ensure that the affairs of the Plaintiff were properly administered and that its assets and property were properly accounted for and not dissipated or exploited to the prejudice of some of the Plaintiff's creditors over others;
>
> (g) disclose to the Plaintiff the aforesaid breaches of his fiduciary duties, statutory duties under the Companies Act and/or duties under the Plaintiff's Constitution owed to the Plaintiff; and/or
>
> (h) disclose to the Plaintiff the aforesaid breaches of the fiduciary duties, statutory duties under the Companies Act and/or duties under the Plaintiff's Constitution, of one or more of the directors of the Plaintiff, namely Mr Peter Christian Harren and/or Dr Martin Harren;

25 The Liquidator's affidavit dated 5 July 2021 states the following at [42]:

> … Despite this, there is no evidence that the Defendant *had ever attempted to question, stop or undo the payments* to HARPA and HPS or disclose the breach of duties of the directors, Dr Martin Harren and/or Mr Peter Christian Harren to the Plaintiff.
>
> [emphasis added]

26 It is clear to us from these excerpts that BIT Baltic's case was always framed broadly to include any breach of duties by Mr Wee occurring *after* the Payments were made. In our view, there is nothing in Prayers 1 and 2 of OS 667 that limits BIT Baltic's claim against Mr Wee to the period during which the Payments were made. Prayer 2 does not limit the timing of Mr Wee's breaches to the dates at which the Payments were made. Instead, the Liquidator's affidavit makes it clear that BIT Baltic's claims against Mr Wee included his failure to undo the Payments and disclose to BIT Baltic the possible breaches of directors' duties by the other directors. We emphasise that these were actions that could only have been taken *after* Mr Wee became aware that the Payments had been made.

27 There was also nothing in the wording of OS 667 nor the documents filed in support to suggest that BIT Baltic's claim against Mr Wee for breach of his duties as a director was limited only to the time the Payments were made. All that can be said is that the focus of BIT Baltic's submissions in the proceedings below was on Mr Wee's breaches at the time of the Payments while the focus of BIT Baltic's submissions on appeal was on Mr Wee's breaches after the Payments were made. However, a change in what is emphasised on appeal is not the same as a shift in a party's case. While we accept that BIT Baltic's emphasis on the actions and omissions of Mr Wee at the point of time the Payments were made may have influenced the Judge to reach the conclusions

she did, we are of the view that OS 667 is framed broadly enough to include breaches by Mr Wee *after* the Payments were made.

28 Accordingly, having reviewed the language of OS 667 and the supporting affidavit, we are satisfied that BIT Baltic did not shift its case on appeal.

Issue 2: What was Mr Wee's role in BIT Baltic and how did this affect the duties he owed to BIT Baltic, if at all?

29 We turn now to address the second issue. In this regard, we find it helpful to begin by setting out the types of duties that are owed by directors to their company.

General description of directors' duties

30 It has long been accepted that a director is a fiduciary of their company and has an overriding duty to act in good faith in the interests of the company. Several specific duties have been recognised in this regard as falling into the categories of: (a) the fiduciary duties; and (b) the duties of skill, care and diligence. We must emphasise the importance of the distinction between the fiduciary duties and the duties of care, skill and diligence given the different remedial consequences that follow depending on the type of duty that is breached. As the Judge rightly pointed out at [12] of the Judgment, the breach of fiduciary duties would typically entitle a claimant to the relief of equitable compensation while the breach of the duties of care, skill and diligence would only allow the claimant to obtain compensatory damages by reference to the losses suffered. We now turn to consider the two categories of directors' duties in greater detail.

31 A director's fiduciary duties to the company are: (a) the duty to act honestly and in good faith in the best interests of the company; (b) the duty not to exercise his powers for an improper purpose such as to profit personally from his office; and (c) the duty not to place himself in a position which will result in a conflict of interest between his duties to the company and his personal interests: *DM Divers Technics Pte Ltd v Tee Chin Hock* [2004] 4 SLR(R) 424 at [80]–[81].

32 The duty to act honestly and in good faith in the best interests of the company represents the overarching duty of "single-minded loyalty" owed to the company. It is the distinguishing obligation of a director as a fiduciary of the company: Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at para 9.003. As the learned authors also state at para 09.043, the duty obliges the director to exercise his discretion in a manner that he thinks best serves or advances the company's interests. While the company is solvent, generally the interests of the shareholders would be the interests of the company. When it is in an insolvent situation, however, the interests of the company's creditors as a group have to be considered as well and should not be prejudiced.

33 The high standard of loyalty required of directors is exacted through the specific duties not to profit personally from the office and not to put themselves in a conflict of interest with the company. The relationship between these duties and the standard of loyalty expected were described by Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18 in the following terms:

> The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his

> interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.

34 On the other hand, the duty to act with due care, skill and diligence is a related but distinct duty owed by directors to their company. It is not a fiduciary duty because it is not imposed to exact loyalty from a director: *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 ("***Sakae Holdings***") at [135]. Instead, it relates to the standard of care and diligence expected of a director that is assessed objectively: *Lim Weng Kee v PP* [2002] 2 SLR(R) 848 ("***Lim Weng Kee***") at [28].

35 The difference between the fiduciary duties and the duties of care, skill and diligence was explained at paragraphs 134 and 135 of *Sakae Holdings* and we reproduce these paragraphs below:

> Section 157(1) of the Companies Act provides that "[a] director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office". The duty under s 157(1) to "act honestly" enshrines in statute a director's common law duty to act *bona fide* in the best interests of the company: see *Ho Kang Peng v Scintronix Corp Ltd* [2014] 3 SLR 329 at [35] and *Townsing Henry George* ([92] supra) at [59]. In contrast, the duty under s 157(1) to "use reasonable diligence in the discharge of the duties of [a director's] office" encapsulates a director's separate common law duty to exercise due care, skill and diligence: see *Lim Weng Kee v PP* [2002] 2 SLR(R) 848 ("*Lim Weng Kee*") at [22] and *Falmac Ltd v Cheng Ji Lai Charlie* [2013] SGHC 113 at [65]. These two duties are "conceptually distinct" and are "different aspects of a director's bundle of duties even though they may overlap on certain facts": see *Lim Weng Kee* at [32].
>
> Although a company director is a quintessential example of a fiduciary (see *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134), not all the duties which he owes his company are fiduciary duties. Fiduciary duties in the classic sense encompass the two distinct rules proscribing a fiduciary from making a profit out of his fiduciary position (namely, the no-profit rule) and putting himself in a position where his own interests and his duty to

> his principal are in conflict (namely, the no-conflict rule): see *Bray v Ford* [1896] AC 44 and *Chan v Zacharia* (1984) 154 CLR 178. Although conceptually distinct, these two rules share a common foundation in a director's duty of loyalty to his company. ***The duty of care, skill and diligence is not a fiduciary duty because it is not imposed to exact loyalty from a director, and accordingly does not encompass either of the two aforementioned rules that are the hallmarks of a fiduciary obligation:*** see Hans Tjio, Pearlie Koh & Lee Pey Woan, Corporate Law (Academy Publishing, 2015) at para 9.097. As Millett LJ aptly put it in *Bristol and West Building Society v Mothew* [1998] Ch 1 (at 18):
>
> > … Breach of fiduciary obligation … connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.
>
> [emphasis in original in italics; emphasis added in bold italics]

Scope of Mr Wee's duties

36 Returning to the present facts, we note that the parties do not disagree that Mr Wee owed both fiduciary duties and the duties of care, skill and diligence to BIT Baltic as its director. Where they diverge is on the scope of these duties and whether they were breached in the present case. Specifically, the parties disagree on whether Mr Wee's duties were attenuated because of his role as the "local resident director" of BIT Baltic who was not fully aware of the operational affairs of the company. While the Judge did not express a definitive conclusion on this, she appeared to take the view that Mr Wee was not required to be fully apprised of BIT Baltic's activities due to his primary responsibility of ensuring the company's compliance with regulations (see the Judgment at [38], [40], [41] and [46]).

37 On appeal, BIT Baltic's position is that Mr Wee's duties went far beyond looking after the "necessary paperwork with auditors, relevant agencies

and regulatory authorities in Singapore" and that he did not have a limited role in BIT Baltic. Instead, the evidence adduced showed that Mr Wee actively participated in the business activities of BIT Baltic.

38 On the other hand, Mr Wee's position on appeal is that without a trial or cross-examination, the court will not be able to understand the circumstances of his role and his execution of the HARPA Agreement and HPS Agreement. Mr Wee also states that Dr Harren and Mr Harren were the "material directors" who had "full management and conduct of [BIT Baltic's] business operations and all financial matters".

39 In our view, with respect, the Judge erred in concluding that Mr Wee was a "local resident director whose primary responsibility was to ensure that the necessary paperwork with auditors, agencies and regulatory authorities in Singapore" was prepared and submitted and that this should therefore "impact the extent to which [Mr Wee] is expected to be informed about [BIT Baltic's] affairs" (see the Judgment at [11] and [46]). Rather, the evidence indicates that the scope of Mr Wee's role in BIT Baltic was larger than what the Judge found. In our judgment, Mr Wee played a material role in the operations of BIT Baltic given that he was the company's signatory for several material contracts and had oversight of BIT Baltic's finances. There are two points that are worth highlighting.

40 First, it is uncontested that Mr Wee was *the sole signatory* of the HARPA Agreement and HPS Agreement on behalf of BIT Baltic. The direct inference from this is that Mr Wee must have: (a) applied his mind to the contents of the agreements; (b) been aware of the obligations that they contained; and (c) have had knowledge of the context in which they were

entered. Moreover, these agreements were not routine regulatory declarations but operational contracts for services rendered to BIT Baltic. There would thus have been a minimum degree of familiarity that Mr Wee would have had with the operations of BIT Baltic for him to have signed off on the HARPA Agreement and HPS Agreement. This was also not the only time in which Mr Wee had signed an operational contract on BIT Baltic's behalf – Mr Wee had previously signed a "standard ship management agreement" with Harren & Partnership Management GmbH & Co. KG (on 10 April 2014).

41 Secondly, although Mr Wee was not responsible for BIT Baltic's business operations, he had oversight of and some involvement in its finances. Mr Wee signed off on BIT Baltic's audited financial statements from 2011 to 2018 and was the authorised signatory of BIT Baltic's bank accounts, including the bank account from which the Payments were made. Mr Wee also signed a directors' resolution dated 4 January 2016 that rescinded a standing loan arrangement of US$1.5m (dated 13 April 2015) and approved a fresh loan of US$2m to HPSH, as well as the corresponding loan agreements. These were substantial loans that BIT Baltic extended to HPSH and it must follow that Mr Wee would have had a sufficient grasp of BIT Baltic's financial position before signing these documents.

42 In our judgment, the totality of the evidence shows that Mr Wee's role in BIT Baltic was not limited to ensuring compliance with local regulations but instead extended into active participation in the financial activities of the company, albeit he may not have been a main decision maker. As such, the extent to which Mr Wee was expected to be informed of BIT Baltic's affairs should not be attenuated.

43 In any event, Mr Wee would still be held to the minimum standard that is required from all directors even if he were merely a nominee director who was appointed to fulfil the statutory requirement under the Companies Act. We reiterate that every director, including a nominee local resident director, is subject to the same duties and is expected to acquire and maintain sufficient knowledge and understanding of a company's business in order to perform those duties adequately: *Vita Health Laboratories Pte Ltd and others v Pang Seng Meng* [2004] 4 SLR(R) 162 at [21]. This is so whether the director has an executive or non-executive role in the company or whether the director is appointed for the sole purpose of satisfying statutory requirements: *Re Haeusler, Thomas* [2021] 4 SLR 1407 at [135].

44 Finally, we also note that once BIT Baltic became insolvent the scope of Mr Wee's duties to BIT Baltic would have included the additional duty to consider the interests of BIT Baltic's creditors as a whole and not prefer any creditor over the others. As we have observed, when a company becomes insolvent, the directors must manage the company with the interests of the creditors in mind. The evidence of the Liquidator on the point, based on the books of BIT Baltic, was that whichever test for insolvency was applied, *ie*, the balance sheet test or the cashflow test, BIT Baltic was insolvent when the Payments started or became insolvent before they were completed. This evidence was accepted by the Judge and her finding on the point was not contested in the appeal.

Issue 3: Did Mr Wee breach his duties as BIT Baltic's director?

45 We turn now to consider whether Mr Wee breached his fiduciary duties and duties of care, skill and diligence to BIT Baltic. In this regard, we note that

the Judge's conclusion that Mr Wee did not breach either fiduciary duties or duties of care, skill and diligence to BIT Baltic hinged on her finding that BIT Baltic had not demonstrated that Mr Wee "knew or should have known" about the Payments. The question of whether Mr Wee knew about the Payments and if so, *when* he knew of them is therefore one of the key requirements needed to establish the alleged breaches. As such, we begin by re-examining this factual issue.

Mr Wee's knowledge of the making of the Payments

46 BIT Baltic's case on appeal is that Mr Wee would have had "the requisite state of knowledge to make him accountable for the failure to take actions … to prevent … the [P]ayments" at several points in time:

(a) First, Mr Wee would have been alerted to the Payments when he signed the HARPA Agreement and HPS Agreement on *1 October 2018* that committed BIT Baltic to pay HARPA and HPS monthly fees for services rendered between 2014 and 2016.

(b) Secondly, Mr Wee was informed by BIT Baltic's finance manager of the Payments between *late December 2018 and early 2019*.

(c) Thirdly, Mr Wee would have known of the Payments when he signed the 2018 Financial Statements on *15 August 2019*.

47 On the other hand, Mr Wee's case on appeal is that he did not know of the Payments "when they were being made". However, Mr Wee accepts that he was aware of the Payments *by August 2019* when the 2018 Financial Statements were signed and claims that at that time, he "was already informed of the same". The latter concession is likely to be a reference to the fact that Mr Wee was

informed by BIT Baltic's finance manager of the payments shortly after they were made. This is consistent with BIT Baltic's position.

48 In our judgment, Mr Wee would have known that the Payments were to be made in the near future when he signed the HARPA Agreement and HPS Agreement on 1 October 2018. The Services had been rendered between 2014 and 2016 and the only point of concluding the two agreements in October 2018 must have been to allow HARPA and HPS to invoice BIT Baltic. Mr Wee could not have been unaware of this purpose. Then, and at the very latest, on 15 August 2019, when he signed the Director's Statement to the 2018 Financial Statements he would have been aware of the disbursement of the Payments. On that date, he was still a director of BIT Baltic and therefore owed fiduciary duties and duties of care, skill and diligence to it.

49 Even if Mr Wee was unaware of the exact time at which the Payments were made, his position is that he was informed of the Payments by BIT Baltic's finance manager between late December 2018 and early 2019, and that these payments had been "approved by the German finance department". It is pertinent that Mr Wee expressed no surprise at the Payments having been made at that time, though he was quick to aver in his affidavit that only Mr Harren and Dr Harren would have known at the time of payment whether BIT Baltic was solvent or not.

50 Although not explicitly stated, the Judge's conclusion that Mr Wee did not know about the Payments was likely restricted to an assessment of Mr Wee's knowledge at the point at which the Payments were made between 12 December 2018 and 27 December 2018. The Judge may have misdirected herself to only considering this limited time frame because of the stronger emphasis BIT Baltic

placed in the proceedings below on proving a breach at the point at which the Payments were made. However, as we have previously observed, BIT Baltic's case in OS 667 was not framed so narrowly. BIT Baltic's second prayer in OS 667, which relates to its claim that Mr Wee breached his fiduciary duties and duties of care, skill and diligence, does not limit these alleged breaches to the period in which the Payments were made.

51 The inescapable conclusion on the facts is that Mr Wee was aware of the Payments by 15 August 2019 at the latest, while he was still a director of BIT Baltic.

52 There is another important point that flows from Mr Wee's sighting of the 2018 Financial Statements on 15 August 2019: at that date, at the latest, Mr Wee would also be fixed with knowledge that BIT Baltic was insolvent and that it had been insolvent when the Payments were made. It was clear from the 2018 Financial Statements that at the end of the Financial Year 2018, BIT Baltic could not meet its liabilities either from assets or cashflow, it having ceased business at the end of 2017. Its assets had been decimated as a result of the Payments and it had nothing with which to pay its remaining indebtedness, including that to OIG.

Mr Wee's breaches of duty

53 In light of our conclusion that Mr Wee was aware of the Payments and BIT Baltic's insolvent situation by 15 August 2019, the Judge's conclusion that Mr Wee was not in breach of any of his duties needs to be revisited.

54 We deal first with the fiduciary duties. We have described at some length at [31]–[33] above, what a director's fiduciary duties consist of. It is well

established in case law that when a company is insolvent, the directors' fiduciary duty to act in the best interests of the company extend to ensuring that the company's assets are not misapplied to the prejudice of the interests of the creditors as a whole. Generally, a director who procures an undue preference payment acts in breach of that duty and is liable (subject to relief under relevant statutory provisions being granted) to reimburse the company with the amount of the payment (see for example *Living the Link Pte Ltd (in creditors' voluntary liquidation) & ors v Tan Lay Tin Tina & ors* [2016] 3 SLR 621 at [78], [82]–[90], [97] and *Liquidators of Progen Engineering Pte v Progen Holdings Ltd* [2010] 4 SLR 1089) (**"*Progen*"**). In *Progen* at [48], the court observed that the fiduciary duties of a director of an insolvent company required the director to ensure that the company's assets were not dissipated to the prejudice of the company's creditors.

55 In this case, Mr Wee is not being criticised for anything he did. Instead, the complaint concerns what he did not do. Putting aside, for the time being any consideration of omissions perhaps having to be treated differently from actions for the purpose of liability, on the facts here we cannot see any breach of fiduciary duty on Mr Wee's part. He played no part in deciding to prefer HARPA and HPS over the other creditors of BIT Baltic. The evidence also does not show that he was consulted before the Payments were made. Thus, there was no point during that payment process at which Mr Wee had the opportunity or need to consider what the interests of BIT Baltic required. It therefore follows that he could not have breached his fiduciary duty then. Just to round off the point, we observe that Mr Wee did not put his personal interests before the interests of BIT Baltic, he did not make a profit from his position nor was he dishonest in his dealings with BIT Baltic in relation to the making of the

Payments. We agree with the Judge, therefore, albeit on different grounds, that Mr Wee did not breach his fiduciary duties to BIT Baltic.

56 We turn to BIT Baltic's submissions that Mr Wee breached his duties of care, skill and diligence. For the duty to act with care, skill and diligence, a director must meet the minimum objective standard of care which entails the obligation to take reasonable steps to place oneself in a position to guide and monitor the management of the company: *Sakae Holdings* at [137]. This standard applies to all directors, whether executive or non-executive.

57 This is also the position in the United States and Australia, which adopt a similarly robust stance on the standards imposed in relation to a director's duties of care, skill and diligence. Indeed, the position in these jurisdictions appears to be that not only has a director the duty to keep aware of the company's transactions but also that if the director becomes aware of an illegal course of action, he has a duty to object to and correct the misconduct. Two relevant decisions are cited below.

(a) In *John J Francis v United Jersey Bank* 432 A 2d 814 (1981) (**"*John J Francis*"**) which was cited with approval in *Sakae Holdings* at [137], the Supreme Court of New Jersey held at 822 that "directors may not shut their eyes to corporate misconduct and then claim that because they did not see the misconduct, they did not have a duty to look. The sentinel asleep at his post contributes nothing to the enterprise he is charged to protect". This case was also cited with approval by the Supreme Court of New South Wales in *Daniels v Anderson* (1995) 16 ACSR 607 (**"*Daniels v Anderson*"**).

(b) In *Daniels v Anderson*, which was also cited with approval in *Sakae Holdings* at [137], the Supreme Court of New South Wales cited with approval Pollock J's judgment in *John J Francis* that "while directors are not required to audit corporate books, they should maintain familiarity with the financial status of the corporation by a regular review of financial statements" (at 666-667). Pertinently, the court accepted that the American position that "the review of financial statements, however, may give rise to a duty to inquire further into matters revealed by those statements" and that "upon discovery of an illegal course of action, a director has a duty to object and, if the corporation does not correct the conduct, to resign". This is in keeping with the principle that "a director is not an ornament but an essential component of corporate governance".

58 In our judgment, Mr Wee breached his duty to act with care, skill and diligence by failing to make the necessary inquiries about the Payments, which he should have done, at the latest, when he became aware of BIT Baltic's insolvent state. As we have mentioned, the full picture of BIT Baltic's financial state at the time the Payments were made and the nature of the Payments would have presented itself to Mr Wee when he signed the Director's Statement to the 2018 Financial Statements on 15 August 2019, at which point he should have realised that BIT Baltic's insolvent state had been brought about by related party transactions. It was significant that the 2018 Financial Statements contained a qualified opinion by the auditors that stated the following:

> As disclosed in Note 1 to the financial statements, the Company's total and current liabilities exceeded its total and current assets by $1,132,751 and $1,132,751 respectively. *These conditions indicate the existence of a material uncertainty which may cast significant doubt on the Company's ability to*

> *continue as [a going concern] and discharge [its liability] in the ordinary course of business.*
>
> [emphasis added]

59 While the directors expressed the view in their Statement that there were reasonable grounds to believe that BIT Baltic would be able to pay its debts as they fell due, this view was totally undercut by the Auditors. In their qualified opinion, they stated that they had not been able to "obtain sufficient evidence from management to substantiate and ascertain the reasonableness of" management's assumption that BIT Baltic would be able to continue as a going concern because its holding company would provide continuing financial support to enable it to meet its obligations as they fell due. In our view, the auditor's qualified opinion ought to have alerted Mr Wee that he would need to consider the interests of BIT Baltic's creditors given the material uncertainty as to BIT Baltic's ability to continue as a going concern.

60 Moreover, the 2018 Financial Statements also included two explanatory notes which documented and provided the context for the Payments. Note 13 to the 2018 Financial Statements stated that there were back charges amounting to US$1,472,500 incurred in 2018 while note 16 to the 2018 Financial Statements highlighted that these back charges were "significant related party transactions". When viewed in totality, the 2018 Financial Statements would have made it clear that the Payments should not have been permitted given BIT Baltic's financial state. If Mr Wee had thought about it, it would have been clear to him that the Payments had not been in the best interests of BIT Baltic or its creditors. It should have been an extra red flag that the payments had been made to related parties. Mr Wee's duty then was to alert the other directors to the wrongful payment and request them to take steps to recover the Payments. In this regard, the decision in *Ho Pak Kim Realty Co Pte Ltd (in liquidation) v Ho Soo Fong*

and another [2020] SGHC 193 ("***Ho Pak Kim***"), which was affirmed on appeal, is instructive. In *Ho Pak Kim,* the liquidator claimed against the defendants for a breach of their duty to collect a sum of $3.59m from the company's (**"HPK"**) related party. The second defendant (**"D2"**) claimed that he had left the management of HPK to the first defendant (**"D1"**) and therefore did not have knowledge of the relevant debts owed to HPK. The court found in favour of the liquidator and held at [97]–[98] as follows:

> I had rejected D2's claims that he did not know about Suit 36 until 2007 or about third party debts owed to HPK, that he was purportedly a "sleeping" director who signed documents blindly on D1's instructions, and that he was unaware of his obligations to HPK. *Even if these claims were true, D2 would still have breached his duty to exercise reasonable diligence or to exercise due care, skill and diligence. He was not a greenhorn to business or to HPK. As a director of HPK, he is subject to a minimum standard of care to take reasonable steps to monitor the management of HPK. This would entail some knowledge of HPK's business activities and what assets and liabilities it had, even if he did not know the minute details. If D2 had taken some steps to monitor HPK's management, it would not have gone unnoticed to him that HPK's main asset even in 2012 was the $3.59m Sum owed by the Related Parties and which remained uncollected*, especially given that D2 had signed the 2012 Financial Statement and he knew that HPK was doing construction projects…
>
> Hence, D2 had clearly not discharged the minimum objective standard of care required of him in monitoring the management of HPK, *which standard applied to all directors including one engaged in a non-executive capacity* …
>
> [emphasis added]

61 The Judge rejected BIT Baltic's reliance on *Ho Pak Kim* on the basis of her finding that Mr Wee was not aware of, or placed in a position such that he should have been aware of, the Payments (see the Judgment at [41]). With respect, this finding was incorrect. Given our conclusion that Mr Wee's duties were not limited to what the Judge had found, Mr Wee would have been aware

that BIT Baltic had no business activities and would also have known of the extent of its assets and liabilities, even if he did not know all the minute details. As such, Mr Wee's failure to check on the "significant related party transactions" and make the necessary inquiries into the propriety of the Payments following his signing of the 2018 Financial Statements and to then take follow-up steps was a failure to exercise care, skill and diligence.

Issue 4: What damages should BIT Baltic be entitled to?

62 When directors breach their duties of care, skill and diligence and the company suffers loss as a result, the company is entitled to claim the common law remedy of compensatory damages from the directors. In this case, as noted above, BIT Baltic originally claimed the Principal Sum but that has already been repaid to BIT Baltic. As such, only the Additional Damages that BIT Baltic seeks are in issue.

BIT Baltic is entitled to recover damages for interest loss on the Principal Sum at the rate of 0.8% per annum compounded annually

63 As regards the Interest Claim, we are of the view that BIT Baltic should be entitled to damages for loss of use of the Principal Sum for the period between 15 August 2019 and 22 December 2021, but at the rate of 0.8% per annum rather than the rate of 5.33% per annum.

64 BIT Baltic submits two alternative figures for the Interest Claim:

(a) US$256,026.41, this being interest at 5.33% per annum between the dates the Payments were made (from 12 December 2018 to 27 December 2018) and the date the Principal Sum was repaid (22 December 2021).

(b) Alternatively, and at the minimum, US$185,136.82, this being interest at 5.33% per annum computed on a simple basis, between the date when Mr Wee learnt of the Payment (*ie*, 15 August 2019) and the date the Principal Sum was repaid.

65 As a preliminary point, we note that the alternative figure above only appears to have been raised on appeal. Moreover, BIT Baltic also accepted in its oral submissions below that part of the Principal Sum (of US$1,472,500) would have to be repaid to the OIG, and thus stated that it would "only claim interest based on the US$800,000". However, this concession was not repeated in BIT Baltic's case on appeal.

66 On the other hand, Mr Wee does not seriously dispute that moneys would be owing for loss of use of the Principal Sum if he were found liable for breach of his duties. He accepts that if BIT Baltic had not been wrongfully deprived of the Principal Sum, it could have placed the sum on fixed deposit with its bank. Where Mr Wee diverges from BIT Baltic's submissions is in relation to: (a) the applicable interest rate; and (b) whether the figure should be compounded monthly or annually. We deal with these two points in turn.

The applicable rate of interest should be 0.8%, not 5.33%

67 In our judgment, the applicable interest rate should be 0.8% per annum (*ie*, the then-prevailing fixed deposit rate of BIT Baltic's bank), and not 5.33% per annum. This is because there is no evidence that if the money had remained in BIT Baltic's bank account or had been paid back earlier it would have earned anything more than the then-prevailing fixed deposit interest rate. To be clear, this interest rate is only applicable to the period from 15 August 2019 when the breach of duty occurred to the date of the repayment of the Principal Sum. As

to pre-judgment interest following the date of repayment to the date of the judgment, there is no reason to depart from the standard rate of 5.33% per annum, and Mr Wee did not contest this before us. It should be noted, however, that interest at 5.33% per annum is only to be applied to the interest amount that should have been earned on the Principal Sum and not on the Principal Sum itself.

68 Prior to repayment, however, we are of the view that there is no basis to impose interest of 5.33% per annum. In this regard, two authorities raised by BIT Baltic in support of its position warrant further scrutiny.

69 The first is the Supreme Court Practice Directions 2013 (**"the PDs"**). While we agree with BIT Baltic's observation that para 77(9) of the PDs prescribes 5.33% per annum as the default interest rate for pre-judgment interest, it bears emphasising that the same paragraph explicitly qualifies that "the Court retains the overriding discretion to depart from the default interest rate based on the facts of the individual case".

70 The second is *Jurong Technologies Industrial Corp Ltd (under judicial management) v Coöperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International, Singapore Branch)* [2011] 2 SLR 413 (**"*Jurong Technologies*"**), a case that BIT Baltic cites in its submissions. In our view, this authority does not assist BIT Baltic. As in the present case, the court there found that the payments amounted to an undue preference under s 227T of the then-applicable Companies Act. However, Andrew Ang J clearly applied the rate of 5.33% per annum only to *post-judgment interest*: *Jurong Technologies* at [70]. As to *pre-judgment* interest, Ang J applied "the applicable fixed deposit rate the defendant was paying its prime customers on or about 22 December 2009".

71 We agree with the approach taken in *Jurong Technologies* and adopt it in the present case. In its oral submissions below, BIT Baltic contended that after OIG's debt had been paid off, it would still have had some US$800,000 which "could have been used for trading, for fixed deposit or some other purposes". However, it is no more probable that the US$800,000 would have been used for trading (at a rate of profit in excess of the fixed deposit rate) than it being maintained in its fixed deposit account. BIT Baltic provides no cogent evidence that it would have been used for the former. Moreover, it is doubtful that such trading would have been legally permissible in the first place. BIT Baltic's own evidence is that it was already insolvent by December 2018 and this was so "[e]ven if [BIT Baltic] had not made the [Payments]". In the circumstances, it appears to us that the more likely situation would have been the placing of the Principal Sum on fixed deposit with BIT Baltic's bank, at the rate of 0.8% per annum.

The sum should be compounded annually, not monthly

72 We turn next to whether the sum should be compounded annually or monthly. BIT Baltic's sole reason for proposing compound interest on a *monthly* basis rests on its reliance on recommendations from a 2005 Law Reform Committee report on pre-judgment and post-judgment interest. In this regard, Mr Wee rightly points out that these recommendations are neither binding on the courts, nor have they been taken up by Parliament.

73 There are two further points that are pertinent. First, the report was only expressing a "provisional recommenda[tion]" that monthly rests should be used. Second, the reason given is that this is the "best reflection of commercial reality". Given the evidence that *in this case* the fixed deposit rate was 0.8% *per*

annum, there is no reason to superimpose a monthly rest that may (or may not) better reflect *general* commercial practice.

Interest should only run from the time of Mr Wee's breaches

74 Finally, we consider when interest should run from. In our judgment, interest should *not* run from the time the Payments were made (contrary to BIT Baltic's primary submission), but from the time Mr Wee was made fully aware of the Payments and the company's insolvent state which was when he signed the 2018 Financial Statements on 15 August 2019. This flows logically from: (a) the principle that pre-judgment interest generally begins to run only after the cause of action accrues; and (b) the relevant breaches discussed in Issue 3 only occurred once Mr Wee was fixed with the requisite knowledge.

BIT Baltic is not entitled to the Liquidator's Costs Claim

75 With respect to the Liquidator's Costs Claim, BIT Baltic submits that compulsory winding up was a reasonably foreseeable and not too remote consequence of Mr Wee's breaches. It elaborates that the costs of compulsory winding up would have been avoidable if a liquidator did not have to be appointed to investigate Mr Wee's breaches. Instead, the petitioning creditor would have proceeded with its voluntary winding up. For these reasons, BIT Baltic argues that Mr Wee should be required to personally bear the Liquidator's costs in reviewing BIT Baltic's financial affairs.

76 In our judgment, BIT Baltic's submissions take an unduly expansive view of causation, which does not find any statutory basis in the Companies Act. More fundamentally, investigating a company's affairs – including any wrongdoing, unfair preferences, *etc* – falls *squarely* within the responsibilities

of a liquidator. In this regard, we think that there is some force in Mr Wee's submissions that from the Liquidator's description of work done (*eg*, corresponding with the auditors and past officers), the tasks performed were tasks commonly undertaken by liquidators in discharge of their duties to understand the company's affairs and financial health (see s 143(1) Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) (**"the IRDA"**)) and to collect the company's assets, if any (see r 126 of the Insolvency, Restructuring and Dissolution (Corporate Insolvency and Restructuring) Rules 2020).

77 Moreover, BIT Baltic cites no local authorities for its argument. Instead, it relies on three New Zealand cases to suggest that directors may sometimes be required to personally compensate the company for the liquidators' costs. These are readily distinguishable on the facts, and we say no more about them. Suffice it to say, BIT Baltic has not provided a suitable legal basis for holding Mr Wee personally responsible for the Liquidator's costs and we therefore do not allow the Liquidator's Costs Claim.

BIT Baltic is not entitled to the OIG Costs Claim

78 Finally, we address the OIG Costs Claim. In our judgment, the OIG Costs Claim is not sustainable. In its submissions below (on which BIT Baltic relies in the appeal), both the Liquidator's and OIG's costs were justified on the same basis. As such, the OIG Costs Claim must necessarily fail.

79 At its core, BIT Baltic's argument is akin to an argument that a defendant should have to compensate a successful claimant for all expenses incurred in having to commence proceedings in court. Not only that, by this argument, even the costs of the claimant's investigation of the state of affairs

prior to commencing proceedings would also fall upon the defendant. However, party-and-party costs are not awarded on this basis. Moreover, parties are *not* entitled to recover, by way of party-and-party costs, the full extent of solicitor-and-client costs.

80 In any event, we agree with Mr Wee's specific arguments on the facts that:

(a) Parts of OIG's legal costs appear to relate to work done prior to when OIG could have (at the earliest) begun investigating BIT Baltic's financial affairs (*ie*, on 18 April 2020).

(b) The Liquidator could have been appointed under a creditors' voluntary winding up thus raising the question of whether a compulsory winding up with its corresponding costs was necessary.

(c) As is the ordinary course of events under ss 127(1) and 127(2) of the IRDA, a petitioning creditor will have to "at their own cost prosecute all proceedings in the winding up" until a liquidator is appointed. Thereafter, reimbursement comes out of the company's assets.

81 For these reasons, we do not allow the OIG Costs Claim.

Conclusion & Costs

82 To conclude, we allow the Interest Claim to the extent that BIT Baltic is entitled to recover interest for the loss on the Principal Sum for the period between 15 August 2019 and 22 December 2021 at a fixed deposit rate of 0.8% per annum, *ie*, the sum of US$27,755.61. It is also entitled to recover interest at

the rate of 5.33% per annum on US$27,755.61 from 23 December 2021 to the date of judgment. However, we do not allow the Liquidator's Costs Claim or the OIG Costs Claim.

83 As regards costs, we note that BIT Baltic had sought indemnity costs before the Judge although this was not expressly sought before us. An order for indemnity costs is appropriate only in exceptional circumstances: *CCM Industrial Pte Ltd v Uniquetech Pte Ltd* [2009] 2 SLR(R) 20 at [32]. The touchstone for such an order is unreasonable conduct, such as an action that is clearly without basis or an abuse of process: *Lim Oon Kuin and others v Ocean Tankers (Pte) Ltd (interim judicial managers appointed)* [2022] 1 SLR 434 at [36].

84 In our view, the aspects of Mr Wee's conduct highlighted by BIT Baltic do not constitute exceptional circumstances for the purpose of assessing costs on an indemnity basis. Instead, we agree with Mr Wee that there was some basis for the way he ran his case below – such as his application to apply for conversion of OS 667 to a writ. We set aside the costs order made by the Judge and award BIT Baltic costs of $15,000 plus reasonable disbursements for the proceedings below. We fix costs of this appeal at $30,000, inclusive of disbursements, to be paid by Mr Wee to BIT Baltic.

Judith Prakash
Justice of the Court of Appeal

Tay Yong Kwang
Justice of the Court of Appeal

Belinda Ang Saw Ean
Judge of the Court of Appeal

Ponnampalam Sivakumar and Phang Shi Ting (BR Law Corporation) for the appellant;
Sim Chong (instructed) (Sim Chong LLC); Lai Kwok Seng (Lai Mun Onn & Co) for the respondent.
