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

[2023] SGHC 127

Suit No 233 of 2020

Between

(1) Hector Finance Group Limited
(2) Huizhou Xinsheng Paper Industry Co. Limited

… *Plaintiffs*

And

Chan Chew Keak

… *Defendant*

JUDGMENT

[Companies — Directors — Duties]
[Tort — Conspiracy]

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Hector Finance Group Ltd and another
v
Chan Chew Keak

[2023] SGHC 127

General Division of the High Court — Suit No 233 of 2020
Vinodh Coomaraswamy J
12–15, 19–22, 26–29 July, 2–5 August, 28 November 2022

26 May 2023 Judgment reserved.

Vinodh Coomaraswamy J:

Introduction

1 In 2019, at a time when the defendant was a director of both plaintiffs, he caused the second plaintiff to enter into two loan agreements under which the second plaintiff advanced RMB 14m to a third party. The third party has refused to repay the advance[1] and is now uncontactable.[2]

2 The plaintiffs' primary case in this action is that the defendant caused the second plaintiff to enter into the loan agreements in breach of the duty of fidelity and the duty of diligence that he owed to each plaintiff. The plaintiffs'

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1 Transcript, 27 July 2022 at p 120 lines 7–21.

2 Transcript, 26 July 2022 at p 32 lines 6–8; Transcript, 27 July 2022 at p 52 line 20 to p 53 line 14.

alternative case is that the defendant did so as part of a conspiracy between him and the third party who received the advance.

3 Having considered the evidence and the parties' submissions, I accept that the defendant breached the duty of diligence that he owed to the second plaintiff by causing it to enter into the loan agreements. But I do not accept that the defendant breached the duty of fidelity that he owed to either plaintiff by doing so. I also do not accept that he did so as part of a conspiracy with the third party as the plaintiffs allege or at all.

4 I now set out my reasons for reaching these conclusions.

The parties

The first plaintiff

5 The first plaintiff is a company incorporated in the British Virgin Islands ("the BVI") in May 2005.[3] It was established to invest in corrugated paper box plants producing container packaging in the People's Republic of China ("the PRC") and Southeast Asia.[4] The first plaintiff is now the ultimate holding company of a group of companies that produce and sell paper products and container packaging in the PRC and Southeast Asia ("the Group").[5]

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3 Statement of Claim (Amendment No. 2) dated 10 December 2021 ("SOC") at para 1; Defence (Amendment No. 1) dated 17 February 2022 ("Defence") at para 3; Chan Chew Keak's affidavit of evidence in chief dated 7 February 2022 ("CCK AEIC") at para 9.

4 CCK AEIC at para 9.

5 SOC at para 2; Defence at para 3.

6 Over 70% of the shares in the first plaintiff are owned and controlled by four men: (a) the defendant; (b) Siong Beng Seng ("Mr Siong"); (c) Edward Ching Hui Huat ("Mr Ching"); and (d) Keith Tay Ah Kee ("Mr Tay").[6]

7 The defendant has an interest in at least 20% of the shares in the first plaintiff. He holds this interest through a company incorporated in the BVI known as Caldicott Worldwide Ltd ("Caldicott"). Caldicott owns 40% of the shares in the first plaintiff. The defendant in turn owns 50% of the shares in Caldicott.[7] I say that the defendant has an interest in *at least* 20% of the first plaintiff because there is some suggestion that he in fact owns all of the shares in Caldicott, not just 50% of those shares.[8] If that is correct, the defendant has an interest in 40% of the shares in the first plaintiff. That would make the defendant the single largest shareholder of the first plaintiff and thereby of the Group.

8 Mr Siong owns 23% of the shares in the first plaintiff. He is an engineer by training. He has worked in the packaging industry since 1981. In that time, he has worked in a variety of roles in three corporate groups, including the Group. For the majority of his career – from 1981 to 1992 and then again from 2006 to 2019 – Mr Siong reported to the defendant either directly or indirectly.[9]

9 Mr Ching owns 16% of the shares in the first plaintiff. He holds a masters degree in business administration. He has worked in the packaging

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6 SOC at para 12; CCK AEIC at para 10; Siong Beng Seng's affidavit of evidence in chief dated 7 February 2022 ("SBS AEIC") at para 7.

7 SOC at para 7; Defence at para 5; CCK AEIC at para 10.

8 SBS AEIC at paras 7(a) and 9; Ching Hui Huat (Edward)'s affidavit of evidence in chief dated 10 February 2022 ("CHH AEIC") at paras 11–12 (1 BAEIC at p 203–204); SBS AEIC at para 12 (1 BAEIC at p 12).

9 SBS AEIC at para 2.

industry since 1995 in two corporate groups, including the Group. For the entirety of his career, at least until 2019, Mr Ching reported to the defendant.[10]

10 Mr Tay has an interest in 14% of the shares in the first plaintiff. He holds this interest through a company incorporated in Singapore known as Springfield Investments & Nominees Pte Ltd ("Springfield"). Springfield owns 14% of the shares in the first plaintiff. Mr Tay is the beneficial owner of all of the shares in Springfield.[11] He is an accountant by training and was managing partner of the Singapore office of an international accounting practice from 1984 to 1993. He has also served as a director of several prominent public and private companies. His relationship to the first plaintiff and the Group, at least until 2020, was purely as an investor. He has no background in the packaging industry and has never reported to the defendant at any time or any capacity.

11 Six minority shareholders own the remaining 7% or so of the shares in the first plaintiff. The identity and shareholding of these shareholders is not relevant to this action.[12] But the existence of these minority shareholders does mean that the interests of the first plaintiff as a whole are *not* co-extensive with the interests of its four major shareholders.

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10 CHH AEIC at para 2.

11 CCK AEIC at para 10; Tay Ah Kee (Keith)'s affidavit of evidence in chief dated 7 February 2022 ("TAKK AEIC") at para 5.

12 SBS AEIC at para 7(c).

The second plaintiff

12 The second plaintiff is a company incorporated in the PRC in August 2018.[13] It is a member of the Group. Its ultimate holding company is therefore the first plaintiff.[14]

13 There are two intermediate holding companies between the first plaintiff and the second plaintiff.[15] A Hong Kong company, AMB Interpac Containers Guangdong Ltd ("AMBHK"), is a wholly owned subsidiary of the first plaintiff. A PRC company with almost the same name, AMB Interpac Containers (Guangdong) Ltd ("AMBDG"), is a wholly owned subsidiary of AMBHK. The second plaintiff is a wholly owned subsidiary of AMBDG.

The defendant

14 The defendant is a Singapore citizen and resident.[16] He is an engineer by training. He also holds a masters degree in business administration. He has decades of experience in the packaging industry.

Background to the dispute

Management of the plaintiffs

15 Mr Ching has been a director of the first plaintiff since it was incorporated in 2005.[17] Mr Siong has been a director of the first plaintiff since

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13 CCK AEIC at para 61.

14 Statement of Claim (Amendment No. 2) dated 10 December 2021 ("SOC") at paras 3 and 4; Defence (Amendment No. 1) dated 17 February 2022 ("Defence") at para 3.

15 SOC at para 4; Defence at para 3.

16 SOC at para 5; Defence at para 3.

17 CHH AEIC at para 2.

2010.[18] Mr Tay has been a director of the first plaintiff since 2018.[19] The defendant was a director of the first plaintiff from 2018 until he was removed from that position in 2020.[20]

16 The defendant was the sole legal representative and director of the second plaintiff from its incorporation in 2018 until he was removed from those positions in 2019.[21]

17 The defendant's removal from his positions in both plaintiffs was the result of the broader dispute between the parties that led Caldicott to commence minority oppression proceedings against Mr Siong, Mr Ching, Springfield and the first plaintiff in the BVI in December 2019[22] and which also led to the plaintiffs commencing this action in March 2020.

18 At all material times, Mr Siong and Mr Ching have been jointly responsible for the day-to-day management of the first plaintiff and of the Group. Mr Tay has never been involved in the day-to-day management of the first plaintiff or of the Group.

19 The defendant played an anomalous role in the management of the first plaintiff and the Group. The role he played did not arise from any formal appointment. Instead, his role arose from the unique interpersonal working

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18 SBS AEIC para 2; CCK AEIC at para 11(c).

19 Kenneth Chan Kwok Wei's affidavit of evidence in chief dated 7 February 2022 ("KC AEIC") at para 7.

20 Defence at para 4; Reply (Amendment No. 1) dated 3 March 2022 at para 3; CCK AEIC para 222.

21 SOC at paras 6 and 10; Defence at para 4(a)(ii); CCK AEIC at paras 14 and 67.

22 CCK AEIC at paras 217–224.

dynamic between the defendant on the one hand and Mr Siong and Mr Ching on the other.

The interpersonal working dynamic

20 It is clear from the evidence that, at all material times and at a very high level, the defendant exercised ultimate management control over the first plaintiff and the Group. This was the position from the outset, *ie,* from the time the first plaintiff was incorporated in 2005, and well before the defendant was appointed a director of the first plaintiff for the first time in June 2018. It stopped only when disputes arose between the first plaintiff's four major shareholders in July 2019. The defendant was able to arrogate this role to himself, not through any appointment to any office or any right under any contract, but through the sheer force of his own personality combined with Mr Siong's and Mr Ching's deference and acquiescence.

21 From the first plaintiff's incorporation in 2005 until disputes arose between the four major shareholders in 2019, the defendant styled himself internally and held himself out externally as the Chairman of the first plaintiff and of the Group.[23] He adopted this title even though the first plaintiff had never conferred it upon him and even when he was not a director of the first plaintiff.

22 From 2005 until 2019, the defendant instructed and ordered Mr Siong and Mr Ching as to how to manage the business of first plaintiff and of the Group in terms of overall direction and strategy.[24] He felt entitled to take this approach because of his seniority (both in age and in experience in the packaging business), his working relationship with Mr Siong and Mr Ching as

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23 SBS AEIC at para 12.

24 SBS AEIC at para 10 (1 BAEIC p11).

his subordinates in their previous employment, and because he considered himself, through Caldicott, to be the single largest shareholder in the first plaintiff. He even threatened to remove Mr Siong and Mr Ching as directors of the first plaintiff if they disobeyed his instructions and orders.[25]

23 Mr Siong and Mr Ching perceived the defendant's conduct as domineering and oppressive. Despite this, they did not oppose him. They simply did his bidding.[26] They accepted and acquiesced in his exercise of ultimate management control without question.[27] They did so out of deference to the defendant, out of a desire to avoid conflict with the defendant and out of a real fear that the defendant would persuade Mr Tay to vote together with him to remove them as directors of the first plaintiff.[28]

A sheet board plant is proposed

24 It was against the background of this interpersonal working dynamic that, in late 2017, the defendant told Mr Siong, Mr Ching and Mr Tay that the Group should invest in a new sheet board plant in the PRC.[29] An investment in a sheet board plant was a departure from the Group's existing business, which was in box plants only.[30] It is common ground that there is a material difference between a box plant and a sheet board plant, between the business models of the

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25 SBS AEIC at paras 13–14, 17 and 146; CHH AEIC at paras 13–16, 30 and 116.

26 SBS AEIC at para 17 (1 BAEIC at p 14).

27 SBS AEIC at para 11 (1 BAEIC at p 12); CHH AEIC at paras 11–13 (1 BAEIC at p 203–204).

28 CHH AEIC at para 16 (1 BAEIC at p 205).

29 SOC at para 12; Defence at paras 9(b) and 10.

30 SBS AEIC at para 73; Transcript, 28 July 2022 at p 75 lines 17–19.

two types of plant and between the management considerations involved in setting up and running both types of plant.[31]

25 The investment in a sheet board plant was discussed at meetings held in February 2018 in Dongguan ("the February 2018 Meeting") and April 2018 in Singapore ("the April 2018 Meeting").[32] A key issue in contention between the parties is the nature and outcome of these meetings. In particular, it is hotly contested whether these meetings sufficed, both in fact and in law, to approve the steps that the defendant took to set up a sheet board plant.

The defendant takes three steps to set up a sheet board plant

26 The defendant took three such steps between August 2018 and January 2019.

27 First, in August 2018, the defendant caused AMBDG to incorporate two wholly owned subsidiaries in the PRC:[33] (a) the second plaintiff; and (b) a company known as Huizhou Shengjia Industry Co. Ltd ("Huizhou SJ"). The second plaintiff was to be the operating company for a sheet board plant. Huizhou SJ was to be the automation company for a sheet board plant.

28 Second, in September 2018, the defendant caused AMBDG to purchase equipment for a sheet board plant. AMBDG thus entered into a contract with BHS Corrugated Machinery (Shanghai) Co. Ltd ("BHS") to purchase a corrugator at a price of RMB 31m ("the BHS Contract").[34] Two weeks later, on

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31 Transcript, 12 July 2022 at p 20 line 7 to p 21 line 1; Transcript, 28 July 2022 at p 63 lines 10–12; DCS at para 125.

32 Defence at paras 10(i) and 11(g).

33 SOC at para 13; Defence at para 9.

34 SOC at para 15; Defence at para 14(a).

18 September 2018, AMBDG paid RMB 9.3m to BHS as a deposit for the corrugator.[35]

29 Third, in January 2019, the defendant caused AMBDG to transfer RMB 30m to the second plaintiff to be used to set up a sheet board plant. The defendant emailed Mr Siong and Mr Ching on 10 January 2019 ("the January 2019 Email")[36] to tell them that he had "more or less" identified land in Huizhou for a sheet board plant. To this end, he asked that AMBDG transfer RMB 30m to the second plaintiff for four purposes:

(a) to repay AMBDG the sum of RMB 10m for the deposit it had paid to BHS for the corrugator;

(b) to pay Huizhou SJ the sum of RMB 5m as a deposit for the purchase of automation equipment for the second plaintiff;

(c) to pay the sum of RMB 10m as a deposit for the purchase of land in the district of Huizhou in the PRC; and

(d) to leave the second plaintiff with the sum of RMB 5m for what the defendant characterised as "some minor expenses".

As a result of the January 2019 Email, AMBDG transferred RMB 30m to the second plaintiff in January 2019.[37]

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35 SOC at para 16; Defence at para 14(a).

36 SOC at para 17; Defence at para 18; 4CB 2563.

37 SOC at para 18; Defence at para 19(a)(i).

The defendant causes the second plaintiff to enter into the loan agreements

30 In the first quarter of 2019, the defendant caused the second plaintiff to enter into the two loan agreements which are the subject matter of this action.[38] Under the loan agreements, the second plaintiff transferred RMB 14m out of the RMB 30m which it had received from AMBDG in January 2019 to a third party, Li Yuanchang ("Mr Li").

31 The second plaintiff entered into the first loan agreement with Mr Li in January 2019. Under this agreement, the second plaintiff agreed to lend Mr Li the sum of RMB 10m for "land purchase at industrial park". The loan was at an interest rate of 3% per annum over a two-year term, from January 2019 to January 2021.[39] On the same day, the second plaintiff transferred the RMB 10m to Mr Li.[40]

32 The second plaintiff entered into the second loan agreement with Mr Li in March 2019. Under this agreement, the second plaintiff agreed to lend Mr Li the sum of RMB 4m, again for "land purchase at industrial park". The loan was again at an interest rate of 3% per annum and again for a two-year term, this time from March 2019 to March 2021.[41] On the same day, the second plaintiff transferred the RMB 4m to Mr Li.[42]

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38 SOC at para 24; Defence at para 23(a).

39 SOC at para 24(d); Defence at para 34.

40 SOC at para 24(e); Defence at para 36.

41 SOC at para 24(f); Defence at para 37.

42 SOC at para 24(g); Defence at para 39.

The first plaintiff votes not to proceed with any sheet board plant

33 In July 2019, the first plaintiff's directors resolved that the Group should not proceed with any investment in a sheet board plant.[43] The defendant voted against the resolution. In light of this resolution, the defendant asked Mr Li to repay the loans. Mr Li refused to do so.[44]

34 In October 2019, Mr Li made two payments totalling RMB 150,000 against the interest payable under the two loan agreements. Apart from this sum of RMB 150,000, Mr Li has not paid any part of the interest due on the loans, let alone any part of the principal.[45]

The plaintiffs commence this action

35 Between August 2019 and January 2020, the first plaintiff invited the defendant to make satisfactory proposals to resolve all outstanding matters between them. These matters included recovering the RMB 14m advanced to Mr Li. The defendant did not accept that he was liable in any way for this sum.

36 In March 2020, the plaintiffs commenced this action.

The parties' cases

The plaintiffs' case

37 In this action, the plaintiffs' case is as follows.

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43 SBS AEIC at para 183; CCK AEIC at paras 159 and 167(k).

44 Transcript, 27 July 2022 at p 119 line 24 to p 120 line 21.

45 Lock Man Pan's affidavit of evidence in chief dated 10 February 2022 ("PL AEIC") at para 109 (1 BAEIC 323).

38 The defendant breached the fiduciary duty and the duty of diligence that he owed to the *first* plaintiff under BVI law[46] when he:

(a) failed to apply the RMB 30m that AMBDG transferred to the second plaintiff for the purposes set out in the January 2019 Email;[47] and

(b) caused the first plaintiff to take steps to set up a sheet board plant even though he did not have the necessary approval to do so.[48]

39 The defendant breached the duty of fidelity and the duty of diligence that he owed to the *second* plaintiff under PRC law[49] when he caused the second plaintiff to enter into the loan agreements with Mr Li.[50]

40 In the alternative, the defendant conspired with Mr Li to injure the plaintiffs by both unlawful and lawful means. First, the defendant and Mr Li conspired by *unlawful* means when they agreed that the defendant would cause the second plaintiff to enter into the loan agreement with Mr Li and transfer RMB 14m to Mr Li in breach of the defendant's duties of fidelity and diligence owed to both plaintiffs.[51] Second, they conspired by *lawful* means when they agreed that the defendant would cause the second plaintiff to enter into the loan agreements with Mr Li with the predominant purpose of causing injury to the second plaintiff.[52]

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46 SOC at para 8.

47 PCS at para 249.

48 PCS at para 258.

49 SOC at para 11.

50 SOC at para 30(a) and (b); Plaintiffs' Closing Submissions dated 5 October 2022 ("PCS") at para 231.

51 SOC at paras 32–35; PCS at paras 293–309.

52 PCS at paras 310–313.

41 The plaintiffs therefore seek the following relief against the defendant:[53]

(a) RMB 14m in damages;

(b) an order that the defendant account for the RMB 14m and all profits he has made with that money;

(c) RMB 1.26m being the interest due but unpaid under both loan agreements from the date of the loans up to 30 September 2022; and

(d) RMB 5.77m being expenses incurred by AMBDG in investigating and mitigating the effects of the defendant's breaches of duty.

The defendant's case

42 The defendant's case is as follows.

43 The first plaintiff has no cause of action against the defendant for the relief it seeks in this action (see [41] above). The first plaintiff did not advance the RMB 14m to Mr Li. The second plaintiff did. The plaintiff accordingly has suffered no loss by reason of the loans proving irrecoverable. Only the second plaintiff has suffered this loss.[54] So too, only the second plaintiff has a cause of action which can yield an account of alleged profits which the defendant derived from the RMB 14m. The first plaintiff has no cause of action against the defendant which can yield that relief.

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53 PCS at paras 275–277.

54 Defendant's Closing Submissions dated 5 October 2022 ("DCS") at paras 24–42.

44 Further, *both* the first plaintiff *and* the second plaintiff have no cause of action to recover the RMB 5.77m in investigation expenses. Those expenses were incurred by AMBDG, not by either plaintiff.[55]

45 On the substance of the *first* plaintiff's claims, the defendant did not breach his fiduciary duty to the first plaintiff. The defendant caused the second plaintiff to enter into the loan agreements only after Mr Siong, Mr Ching and Mr Tay had conducted themselves in such a way that the defendant was entitled to and did honestly believe that they had agreed to set up a sheet board plant and that that was in the first plaintiff's best interest.[56] Further, Mr Siong and Mr Ching orally agreed with the defendant: (a) to engage Mr Li as the Group's consultant to identify and acquire land in the PRC for a sheet board plant;[57] and (b) to transfer money to Mr Li in advance, to ensure that he would be able to move quickly to acquire land for a sheet board plant once it had been identified.[58]

46 The defendant also did not breach the duty of diligence that he owed the first plaintiff under BVI law. Causing the second plaintiff to enter into the loan agreements with Mr Li was a course that was open to a reasonably competent director in the defendant's circumstances.[59]

47 On the substance of the *second* plaintiff's claims, the defendant did not breach the duty of fidelity that he owed to the second plaintiff under PRC law

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55 DCS at para 43.

56 DCS at paras 66–67 and 107.

57 DCS at para 200.

58 DCS at para 232.

59 DCS at paras 262–268.

because: (a) he did not misappropriate the RMB 14m;[60] and (b) he did not require consent to cause the second plaintiff to lend money to Mr Li.[61]

48 The defendant also did not breach the duty of diligence that he owed the second plaintiff under PRC law. The plaintiffs have failed to show that a good administrator exercising reasonable care would not have caused the second plaintiff to enter into the loan agreements.[62]

49 Finally, the plaintiffs' claim in conspiracy fails because: (a) there is no evidence that the defendant and Mr Li "combined" to use the loan agreements to misappropriate funds from the Group;[63] (b) there was nothing unlawful about the defendant causing the second plaintiff to enter into the loan agreements;[64] (c) it was not the defendant's purpose at all, let alone his predominant purpose, to injure either of the plaintiffs by causing the second plaintiff to enter into the loan agreements;[65] and (d) the first plaintiff, at least, has not in fact suffered any loss recognisable in law arising from the second plaintiff entering into the loan agreements.[66]

Issues to be determined

50 This summary of the parties' cases gives rise to two principal issues.

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60 DCS at paras 275–288.

61 DCS at paras 289–302.

62 DCS at para 311.

63 DCS at paras 342–402.

64 DCS at para 403 and 312–331.

65 DCS at paras 404–425.

66 DCS at paras 426 and 24–34.

51 The first principal issue is whether the defendant breached the duties he owed as a director to either plaintiff. This principal issue raises three subsidiary issues:

(a) Did the defendant breach his duty of fidelity to either plaintiff when he caused the second plaintiff to enter into the loan agreements?

(b) Did the defendant breach his duty of diligence to either plaintiff when he caused the second plaintiff to enter into the loan agreements?

(c) Did either plaintiff suffer loss in respect of any breach of duty found against the defendant?

52 The second principal issue is whether the defendant conspired with Mr Li to injure one or both of the plaintiffs, whether by unlawful or lawful means.

53 I take these two principal issues in turn.

The first plaintiff's claim for breach of duty

54 I start by considering the first plaintiff's claim against the defendant for breach of the fiduciary duty and the duty of diligence that he owed the first plaintiff under BVI law.

55 I accept the defendant's submission that the first plaintiff has no sustainable cause of action for breach of duty. This is because loss is an essential element of this cause of action. And the first plaintiff has not even alleged, let alone proven, that it suffered any loss as a result of the defendant's alleged breach of either duty.

Fiduciary duty

56 I begin with an analysis of the fiduciary duty that the defendant owed the first plaintiff.

The first plaintiff must prove loss

57 For the first plaintiff to succeed in its claim for breach of fiduciary duty against the defendant, it must prove that it suffered loss by reason of the defendant's alleged breach. That is because the first plaintiff's claim arises from a *non-custodial* breach of fiduciary duty. A company who sues a director for a non-custodial breach of fiduciary duty must show that the breach caused the company loss: *Sim Poh Ping v Winsta Holding Pte Ltd and another and other appeals* [2020] 1 SLR 1199 ("*Sim Poh Ping*") at [254(a)].

58 A non-custodial breach of fiduciary duty is a breach of fiduciary duty that does not arise from the fiduciary's stewardship of the assets subject to the fiduciary obligation. A custodial breach of fiduciary duty, on the other hand, does arise from the fiduciary's stewardship of such assets and is the result of "the misapplication of the principal's funds or trust funds" (*Sim Poh Ping* at [105]–[106]).

59 The *first* plaintiff's case against the defendant is for a non-custodial breach of fiduciary duty. The first plaintiff's case is that the defendant breached the fiduciary duty that he owed to it when he (a) failed to apply the RMB 30m that AMBDG transferred to the second plaintiff for the purposes specified in the January 2019 Email; and (b) caused the first plaintiff to take steps to set up a sheet board plant without approval.[67]

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[67] PCS at paras 249 and 258.

60 It is undisputed that the RMB 30m in question belonged to AMBDG and not to the first plaintiff. The first plaintiff's claim against the defendant for breach of fiduciary duty does not therefore arise from the defendant's stewardship of *the first plaintiff's* assets. It arises from the defendant's stewardship of *AMBDG's* assets. The breach of fiduciary duty that the first plaintiff alleges against the defendant is therefore a non-custodial breach of the duty.

61 In order to have a sustainable cause of action, therefore, the first plaintiff must plead and prove that it suffered loss.

No allegation that the first plaintiff suffered loss

62 Despite this, the first plaintiff has not even alleged that it suffered any loss as a result of the defendant's alleged breach of the fiduciary duty that he owed to it, let alone proven any such loss.

63 The first plaintiff does not make any such allegation in its pleadings. Its only plea is a general plea: "As a result of the Defendant's breaches of duties…the Plaintiffs have suffered loss and damage."[68] This plea does not distinguish between the first plaintiff and the second plaintiff. And it does not provide particulars as to the nature or quantum of any loss or damage that the first plaintiff may have suffered.

64 The first plaintiff does not make any such allegation in its prayer for relief. The prayer does not seek any relief for the alleged breaches of the fiduciary duty that the defendant owed to the *first* plaintiff. The first paragraph of the prayer simply asks for damages to be assessed for the defendant's

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[68] SOC at para 37.

breaches of fiduciary duty, again without distinguishing between the first plaintiff and the second plaintiff and without particularising the damage.[69] The remaining paragraphs of the prayer, in so far as they seek relief for breach of duty, are all directed specifically and only to relief sought by the *second* plaintiff.

65 The first plaintiff does not make any such allegation even in its closing submissions. There is no mention in the plaintiffs' closing submissions of any loss that the *first* plaintiff suffered by reason of this alleged breach of fiduciary duty. The only position that the plaintiffs take in the closing submissions is that the *second* plaintiff suffered loss and that the defendant should be ordered to pay damages to the *second* plaintiff.[70]

The first plaintiff cannot claim AMBDG's loss as reflective loss

66 The first plaintiff does not even allege that it suffered loss in the form of a diminution in the value of its shareholding in AMBHK to complete its cause of action. Even if it did so, treating that as the necessary loss would be contrary to the reflective loss principle.

67 The reflective loss principle characterises a loss arising from a wrong done to a company as a loss suffered *only* by the company and not by the holders of shares in the company (*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 ("*Miao Weiguo*") at [200]). The law does not treat the company's shareholders as having suffered a loss even though a wrong causing loss to a company inevitably diminishes the

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69 SOC at p 21.

70 PCS at paras 272–276.

value of the shares in the company. As the Court of Appeal said in *Miao Weiguo* (at [201]):

> … when a wrong is done to the company which causes the company loss, even when the result is a diminution in the value of the shares or a reduction in distributions, this is not ultimately a loss that the law recognises as being suffered by the shareholder *personally*. It is the company's loss, and the company is the proper plaintiff to pursue the claim …
>
> [emphasis in original]

AMBDG's loss is not the first plaintiff's loss

68 There is also no basis for the first plaintiff to characterise AMBDG's loss as its own loss in order to complete its cause of action. In *Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] 2 SLR 592, the Court of Appeal held that the holding company of a group of companies cannot recover loss suffered by a subsidiary simply on the basis that, as the group's holding company, it was in a position to direct and control how its subsidiaries apply cash and profits (at [70]). A subsidiary's loss in fact cannot be transformed into its parent's loss in law, even if consolidated accounts are prepared for the group as a whole. A group of companies may function as a single economic unit. But each company in the group nevertheless remains a legal person separate from the other companies in the group just as much as it remains a legal person separate from a company that is not a member of the group (at [71]). To adopt the concept of a group as a single economic entity in order to transform a subsidiary's loss into the parent's loss would be contrary to both principle and authority (at [75]).

69 In the absence of a plea and proof of loss, the first plaintiff's cause of action against the defendant for breach of fiduciary duty is incomplete. It must therefore be dismissed.

Duty of diligence

70 The same analysis dictates the same result for the first plaintiff's claim against the defendant for breach of his duty of diligence. Loss is equally necessary for a cause of action for breach of this duty. Equally, there is no allegation, let alone proof, that the first plaintiff suffered any loss by reason of any alleged breach of this duty.

71 In the absence of a plea and proof of loss, the first plaintiff's cause of action against the defendant for breach of the duty of diligence is equally incomplete. It must therefore also be dismissed.

The second plaintiff's claim for breach of duty

72 I next consider the second plaintiff's claim against the defendant for breach of the fiduciary duty and the duty of diligence that he owed the second plaintiff under PRC law.

73 It is common ground that the defendant owed both a duty of fidelity and a duty of diligence to the second plaintiff under PRC law. He owed these duties under Article 147 of the Company Law of the People's Republic of China (Order No.15 of the President of the People's Republic of China promulgated and effective on 26 October 2018) ("the PRC Company Law"):[71]

> **Article 147** The directors, supervisors and senior management personnel of a company shall abide by laws, administrative regulations and the company's articles of association. They shall be faithful and diligent to the company.

74 I begin my analysis with the duty of fidelity.

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[71] Mr Liu Yiwu's ("Mr Liu") 1st Expert Report at para 27 (6 BAEIC 3677).

Duty of fidelity

75 Article 148 of the PRC Company Law elaborates on the general duty of fidelity imposed by Article 147 by setting out a specific list of acts which the duty of fidelity prohibits:

> **Article 148** A director or senior management person of a company is prohibited from any of the following acts:
>
> (a) Misappropriating the funds of the company;
>
> (b) Opening an account in his/her own name or the name of any other individual to deposit the funds of the company;
>
> (c) Without the consent of the shareholders' meeting, the general meeting or the board of directors, loaning the funds of the company to others or using the company's property to provide guarantee for others in violation of the company's articles of association;
>
> (d) Concluding contracts or making deals with the company in violation of the company's articles of association or without the consent of the shareholders' meeting or the general meeting;
>
> (e) Without the consent of the shareholders' meeting or the general meeting, seeking, for the benefit of his/her own or others, any business opportunity that belongs to the company by taking advantage of his/her powers, and operating for his/her own or for others any business that is of the same type with that of the company that he/she serves;
>
> (f) Accepting, and keeping in his/her possession, commissions for the transactions between others and the company;
>
> (g) Disclosing the company's secrets without authorization; or
>
> (h) Committing other acts in violation of his/her obligation of loyalty to the company.
>
> The income gained by the director or senior management person from any of the acts listed in the preceding Paragraph shall belong to the company.

76 A breach of Article 148 yields for the company both a gain-based remedy and a loss-based remedy. The gain-based remedy is found in the concluding sentence of Article 148. That sentence renders a director who breaches Article 148 liable to account to the company for any income he has derived as a result of the breach. The loss-based remedy is found in Article 149 of the PRC Company Law:

> **Article 149** Where any director, supervisor or senior management person of a company violates laws, administrative regulations or the company's articles of association during the performance of duties, he/she shall be liable for compensation if any loss is caused to the company.

77 The second plaintiff's case is that the defendant breached three specific prohibitions in Article 148 of the PRC Company Law:

(a) Article 148(a), which prohibits a director from misappropriating the company's funds;

(b) Article 148(c), which prohibits a director from lending the company's funds to others without the consent of the company's shareholders or directors; and

(c) Article 148(h), which is a catch-all provision prohibiting a director from performing any other act which is contrary to his obligation of loyalty to the company.

78 The second plaintiff also relies on the duty prescribed by Articles 36 and 38 of the second plaintiff's articles of association. But these two articles simply track the language of Article 148 of the PRC Company Law. Both parties' PRC law experts therefore agree that these two articles are coextensive with Article

148 of the PRC Company Law itself.[72] Articles 36 and 38 of the second plaintiff's articles of association therefore add nothing of substance to the second plaintiff's case against the defendant for breach of his duty of fidelity. I need not and do not analyse separately the second plaintiff's claims under these two articles.

79 I now analyse in turn the three prohibitions in Article 148 of the PRC Company Law on which the plaintiff relies.

Article 148(a) of the PRC Company Law

80 I begin with the plaintiffs' case against the defendant under Article 148(a) of the PRC Company Law.

(1) The defendant's expert evidence

81 The defendant's expert is Mr Liu Yiwu ("Mr Liu"). Mr Liu is a partner in the Beijing office of the law firm King & Wood Mallesons.[73]

82 Mr Liu's opinion sets out an exegesis in two limbs on the scope of a director's duty under Article 148(a). According to him, a director misappropriates the company's funds if:

> (a) the director takes advantage of his powers to operate the company by "misappropriating the company's funds"; and

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72 Mr Liu's 1st Expert Report at paras 69 and 70 (6 BAEIC 3687); Dr Zhang Guanglei's ("Dr Zhang") 1st Expert Report at para 19 (2 BAEIC 927).

73 Mr Liu's 1st Expert Report at para 1 (6 BAEIC 3672).

(b) he does so for his own personal interests or for the interests of an "interested party" *and* not for the benefit of the company.[74]

According to Mr Liu, therefore, the second limb requires that the director exercise his powers *both* for his own personal interest or those of an "interested party" *and* for a purpose that is not for the benefit of the company.

83 The use of the word "misappropriation" in the first limb appears to make Mr Liu's exegesis circular. He is attempting to explain a statutory provision which turns on the concept of misappropriation by using the concept of misappropriation itself. The meaning of Mr Liu's exegesis is nevertheless clear. I read the first limb of the exegesis as setting out what amounts to an *appropriation* of the company's funds by a director, whereas the second limb sets out the factors which Mr Liu says turn the director's *appropriation* of those funds into a *misappropriation* of those funds contrary to the prohibition in Article 148(a).

84 Mr Liu also expresses the opinion that, in considering whether an appropriation by a director amounts to a misappropriation, a PRC court will consider as relevant factors both whether the appropriation of the funds has "a corresponding contractual, business basis or other purposes in line with common commercial sense", as well as the nature and closeness of the relationship between the director and the transferee of the funds.[75] As support for this, Mr Liu cites *Interpretation of PRC Company Law and Report on Trial Experience and Methods of Adjudication in Similar Cases* ("*Interpretation of PRC Company Law*").

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74 Mr Liu's 1st Expert Report at paras 58–59 (6 BAEIC 3685).

75 Mr Liu's 1st Expert Report at paras 60–61 (6 BAEIC 3685).

85 The second of these two relevant factors brings into play the concept of an "interested party" which appears in the second limb of Mr Liu's exegesis (see [82(b)] above). The term "interested party" is not defined either in the PRC Company Law or in *Interpretation of PRC Company Law*.[76] But Mr Liu cites another document, *Research on Issues Concerning Disputes over Liability for Damage to Corporate Interests* issued by the Shanghai No. 1 Intermediate People's Court ("*Damage to Corporate Interests*").[77] This document asserts that in "trial practice", the following categories of persons may be considered to be "interested parties": (a) the spouse, relatives and friends of the director and other persons who have a close relationship to the director; (b) the partners and agents of persons in the first category; and (c) other companies or organisations in which the director or the company's senior management also hold positions.

(2) The plaintiffs' expert evidence

86 The plaintiffs' expert is Dr Zhang Guanglei ("Dr Zhang"). Dr Zhang is a partner in the Beijing office of the law firm Jingtian & Gongchen. There are only two material points of difference between Dr Zhang's opinion and Mr Liu's opinion on the scope of Article 148(a).

87 First, Dr Zhang says that Mr Liu is wrong to try to constrain the unconstrained words of Article 148(a) by reference either to *Interpretation of PRC Company Law* or to *Damage to Corporate Interests*.[78] These two documents, Dr Zhang says, are not sources of PRC law and are therefore not enforceable as law in the PRC.[79] At most they are merely non-exhaustive

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76 Mr Liu's 1st Expert Report at para 62 (6 BAEIC 3685).

77 Mr Liu's 1st Expert Report at para 62 (6 BAEIC 3685).

78 Dr Zhang's 2nd Expert Report at paras 9 to 10 (2 BAEIC 1054).

79 Dr Zhang's 2nd Expert Report at paras 8 and 14 (2 BAEIC 1054–1055).

illustrations, and are therefore not capable under PRC law of constraining the statutory text.[80]

88 Second, Dr Zhang says that Mr Liu has mistranslated the provision of *Interpretation of PRC Company Law* on which he relies for the second limb of his exegesis (see [82(b)] above).[81] According to Dr Zhang, a director misappropriates the company's funds if:

(a) he appropriates (*cf* [83] above) the company's funds; and

(b) he does so either: (i) for his own personal interests or for those of an "interested party; *or* (ii) not for the benefit of the company.[82]

(3) Reconciling the expert opinions

89 It appears to me that the first material point of difference between Mr Liu and Dr Zhang's opinions on the scope of Article 148(a) is more apparent than real. I accept that Dr Zhang is correct when he says that the deliberately unconstrained language of Article 148(a) cannot as a matter of law be constrained either by non-statutory texts such as *Interpretation of PRC Company Law* or by *Damage to Corporate Interests*. But I do not read Mr Liu's opinion as suggesting that it should be. Mr Liu is simply using these non-statutory texts to predict how a PRC court is likely to interpret and apply Article 148(a) rather than to suggest that these texts prescribe how a PRC court must interpret and apply Article 148(a).

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80 Dr Zhang's 2nd Expert Report at para 10 (2 BAEIC 1054).

81 Dr Zhang's 2nd Expert Report at para 11 (2 BAEIC 1054).

82 Dr Zhang's 2nd Expert Report at paras 11–12 (2 BAEIC 1054); Plaintiff's Reply Closing Submissions dated 16 November 2022 ("PRS") at para 100.

90 As for the second material point of difference, I do not consider it necessary to reconcile the experts' differing opinions. Even if I were to take the second plaintiff's case at its highest and adopt Dr Zhang's disjunctive test (see [88(b)] above) instead of Mr Liu's conjunctive test (see [82(b)] above), it is my view that the second plaintiff has failed to establish *both* elements of Dr Zhang's disjunctive test.

91 I have arrived at that conclusion for the following reasons.

(4) The loan agreements were for the second plaintiff's benefit

92 The second plaintiff characterises the loan agreements as a "sham". But the second plaintiff does not use the word "sham" in the legal sense. A document is a sham contract in the legal sense if it appears on its face to be a contract creating legal rights and obligations but was executed only to give the appearance of doing so and with no actual intention whatsoever of creating any legal rights or obligations. A sham contract in this sense is not a contract at all and is unenforceable as a contract given the absence of any intention to create legal relations. (see *Toh Eng Tiah v Jiang Angelina and another appeal* [2021] 1 SLR 1176 at [73]–[76]).

93 What the second plaintiff means by characterising the loan agreements as a "sham" is merely that the agreements are not what they purport to be on their face. They purport to be agreements by the second plaintiff to lend money to Mr Li to enable him to identify and acquire land on the second plaintiff's behalf for a sheet board plant. But, the second plaintiff says, the agreements are in truth merely a pretence for the defendant and Mr Li to conceal their

illegitimate arrangement to siphon money out of the Group and into Mr Li's hands, contrary to the interests of the second plaintiff.[83]

94 On the second plaintiff's case, therefore, the two loan agreements are a sham because they in truth have nothing to do with identifying or acquiring land for a sheet board plant. The loan agreements would, of course, be a sham in the legal sense if both parties intended that Mr Li should never repay the RMB 14m to the second plaintiff. But, in the sense which the second plaintiff uses the word, the loan agreements would equally be a sham if both parties entered into them fully intending that Mr Li should be contractually obliged to repay the RMB 14m to the second plaintiff but for a purpose unconnected to identifying or acquiring land for a sheet board plant. The critical factor making it a sham, according to the second plaintiff, is that the stated purpose for the loans is not the true purpose for the loans.

95 The defendant's case is that the loan agreements are not a sham and were indeed entered into for the second plaintiff's benefit. The purpose stated for the loans in the loan agreements was its actual purpose: for Mr Li to assist the second plaintiff in identifying and acquiring land on the second plaintiff's behalf for a sheet board plant. The purpose of the first loan agreement in January 2019 (see [31] above) was, once land had been identified, to enable Mr Li to pay a vendor a deposit, thereby securing the right to negotiate to acquire the land.[84] The purpose of the second loan agreement in March 2019 (see [32] above) was to allow Mr Li to pay a vendor the costs of applying to secure the necessary zoning rights to allow the second plaintiff to use the land for a sheet board

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83 PCS at paras 143 and 286; PRS at para 75; Transcript, 28 November 2022 at p 16 lines 14–28; p 18 lines 20–28; p 21 lines 1–2.

84 CCK AEIC at para 131 (1 BAEIC 394).

plant.[85] Further, the loan agreements protected the second plaintiff in that two consequences would ensue if Mr Li did not use the money for the purpose for which it was advanced. First, the second plaintiff would have documentary evidence of the purpose of the advance. Second, Mr Li would be under a legal obligation to repay the advance, together with interest.[86]

96 I accept the defendant's submission that the true purpose of the loan agreements was its stated purpose: for Mr Li to assist the second plaintiff to identify and acquire land in the PRC for a sheet board plant. It follows that I do not accept the second plaintiff's submission that the loan agreements were a sham, in the sense that the second plaintiff uses that word. I therefore accept that the defendant caused the second plaintiff to enter into the loan agreements for the second plaintiff's benefit for the purposes of the second limb of Mr Liu's exegesis. I say that for three reasons.

97 First, the purpose of entering into the loan agreements is clear on their face. The loan agreements state expressly that the purpose of entering into both agreements is "[l]and purchase at industrial park".[87] Those words are not, of course, conclusive as to the true purpose of entering into the loan agreements. But, taken together with the defendant's oral evidence, they do set the starting point in the inquiry. It is the second plaintiff's burden to prove that the loan agreements are not what they purport to be on their face.

98 Second, the circumstances in which the defendant caused the second plaintiff to enter into the loan agreements lead me to accept that the stated

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85 CCK AEIC at para 136 (1 BAEIC 397).

86 CCK AEIC at paras 131 and 136 (1 BAEIC 394–395 and 397).

87 4CB 2653 and 2829.

purpose in both loan agreements was indeed the true purpose for entering into them. By that time, *ie,* the first quarter of 2019, the defendant had raised an investment in a sheet board plant for discussion multiple times. The first mention of a sheet board plant is on 5 December 2017, when the defendant suggested setting one up to Mr Siong and Mr Ching. He made the suggestion in order to address Mr Tay's concern that the Group's business was stagnating.[88] The defendant expressed the view that a sheet board plant was more efficient than a box plant in terms of producing sheet board and that most investors in the PRC prefer to build sheet board plants instead of box plants.[89] The defendant asked Mr Ching to arrange for him to visit the top five sheet board plants in Dongguan.[90] Mr Ching agreed.[91]

99 Following that, the defendant raised setting up a sheet board plant again at meetings on 13 December 2017,[92] February 2018[93] and April 2018.[94]

100 At the meeting on 13 December 2017, the defendant presented to Mr Siong and Mr Ching his preliminary analysis showing that a sheet board plant has better returns than a box plant.[95] Two weeks later, on 27 December 2017, the defendant sent an email to Mr Siong saying that he "honestly" felt that the

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88 CCK AEIC at para 18; 1CB 113–115.

89 CCK AEIC at para 18.

90 CCK AEIC at para 19.

91 1CB 116.

92 Transcript, 12 July 2022 at p 30 lines 11–15; CCK AEIC at para 21; DCS at para 81.

93 CCK AEIC at para 29; Transcript, 12 July 2022 at p 58 lines 21–24, p 62 lines 10–19, p 63 lines 13–15.

94 SBS AEIC at paras 35 and 84.

95 CCK AEIC at para 21; 1CB 119–122; Transcript, 12 July 2022 at p 27 lines 2–10.

Group should "start a sheet plant" to improve corrugator efficiency and that "[r]unning a sheet plant is the most efficient way of producing sheet board".[96]

101 In February 2018, the defendant, Mr Siong and Mr Ching met in Dongguan. The defendant proposed setting up a sheet board plant at this meeting, saying that the first plaintiff needed to do so in order to grow.[97] Following the meeting, the defendant circulated the minutes ("the February 2018 Minutes") to Mr Siong, Mr Ching and Mr Tay. The minutes record the defendant's proposal. All three recipients replied to acknowledge receipt of the minutes without objection to the Proposal. Mr Tay, in particular, replied that the plan was "well written" and looked "clear enough for execution".[98]

102 I deal with the April 2018 meeting below.

103 Third, I accept the defendant's submission that, by the time he caused the second plaintiff to enter into the loan agreements, the first plaintiff had taken two other steps on the defendant's instructions to advance the investment in a sheet board plant: (a) by seeking quotations for a new corrugator between December 2017 and May 2018;[99] and (b) by exploring internal and external options for raising finance for the new sheet board plant in the first half of 2018.[100] For the reasons which follow, I do not accept the first plaintiffs' submission that it took these steps in connection with a new box plant.

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96 1AB 356–357.

97 1CB 295; Transcript, 12 July 2022 at p 58 lines 21–24, p 63 lines 16–25.

98 1CB 297.

99 DCS at paras 119 and 126; PCS at para 91.

100 DCS at paras 134–135; PCS at para 49.

104 The evidence shows that Mr Siong followed the defendant's instructions and sought quotations for a new corrugator between December 2017 and May 2018 from three sources: (a) BHS; (b) a Japanese vendor; and (c) a US vendor. Mr Siong's evidence is that he sought these quotations for the Group's existing box plant business and not for a sheet board plant. But Mr Siong gave different explanations as to where the new corrugator was to be installed. In his affidavit of evidence in chief, he claimed that he sought the quotations to upgrade the corrugators at the Group's existing box plant in Singapore.[101] But in an email that he sent to a Japanese vendor of corrugators in December 2017, he said that the Group intended to install the new corrugator "in our China plant next year". When asked to explain this discrepancy in cross-examination, Mr Siong claimed that the Group was looking for a new corrugator for *both* the existing box plant in Singapore *and* "concurrently" for a new *box* plant in Dongguan.[102]

105 This claim is not pleaded and is not supported by the contemporaneous evidence. The email correspondence in December 2017 and the minutes of two meetings, one in December 2017 and another in February 2018, show that the parties were considering and discussing only a new *sheet board* plant *in the PRC*.

106 As regards the financing that Mr Siong explored in the first half of 2018, there is in evidence an email that he sent to the Group's finance executives in February 2018. In this email, he told them that the Group was "going to make big investments in China on new plants" in order to position the Group for an initial public offering of its shares. As a result, the Group would need to raise

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101 SBS AEIC at paras 121–126.

102 Transcript, 12 July 2022 at p 24 lines 15–19; Transcript, 12 July 2022 at p 44 lines 19–22.

bank financing. He therefore instructed them in this email to explore the terms of such financing with four or five banks. The question is what type of plant Mr Siong was referring to in this email.

107 Mr Siong's evidence is that his reference in this email to "big investments in China on new plants" was merely a reference to the Group's general strategy for expansion which was then focused only on "acquiring or building more of the same box plants that the Hector group was already operating and managing in the PRC"[103] and not for a sheet board plant.[104] He goes on to say that he was seeking this financing to supplement the Group's working capital *generally*.[105]

108 I do not accept Mr Siong's evidence. I accept instead the defendant's evidence that he instructed Mr Siong to explore bank financing in the first half of 2018 for a new sheet board plant in the PRC. There is no contemporaneous evidence that the first plaintiff was, at that time, considering upgrading an existing box plant in Singapore or setting up a new box plant anywhere, whether in Singapore or in the PRC. Further, no such case pleaded. Quite the opposite: all of the contemporaneous evidence shows that the only new plant that was being discussed in 2018 and even in 2019 was a new sheet board plant that the defendant had proposed setting up in the PRC. The evidence also shows that Mr Siong and Mr Ching accepted, or at the very least acquiesced in, the defendant's proposal.

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103 SBS AEIC at para 73.

104 Transcript, 12 July 2022 at p 91 lines 2–5.

105 SBS AEIC at paras 74 and 78; CHH AEIC at para 60.

109 Having regard to the totality of the evidence, I accept on the balance of probabilities that entering into the loan agreements was one more of the several steps which the second plaintiff took in 2018 and 2019 to set up a new sheet board plant in the PRC. I accept also that a sheet board plant was for the second plaintiff's benefit.

110 I therefore find that the defendant caused the second plaintiff to enter into the loan agreements for the benefit of the second plaintiff for the purposes of Article 148(a). That finding suffices in itself to defeat the plaintiff's claim under Article 148(a).

(5) Failure to prove benefit to an interested party

111 I find also that the second plaintiff has failed to discharge its burden of proving that the defendant caused the second plaintiff to enter into the loan agreements for a purpose connected to the personal interests of the defendant or of an "interested party".[106] The plaintiffs accept that they have no evidence that the defendant himself derived a personal benefit from the RMB 14m or any part of it. But they point to the undisputed fact that Mr Li received the RMB 14m and rely on circumstantial evidence to submit that Mr Li is an "interested party" as against the defendant. I must therefore analyse the circumstantial evidence on which the plaintiffs rely for this submission.

112 The second plaintiff's case is that Mr Li is a close associate of the defendant and also of one Luo Shanmei ("Ms Luo"). Both Mr Li and Ms Luo are shareholders in China Huaxia International Holdings Ltd ("China HX"), a company incorporated in Hong Kong. The plaintiffs assert that Mr Li and

106 DCS at para 287.

Ms Luo often act in the defendant's business affairs as his nominees or at his direction.[107] It is also the plaintiff's case that Ms Luo is in an intimate personal relationship with the defendant.[108]

113 In response, the defendant's case is that he engaged Mr Li as a consultant to identify and acquire land for the second plaintiff to set up a sheet board plant and to negotiate for the land on the second plaintiff's behalf with local authorities. The defendant further asserts that Mr Siong and Mr Ching agreed orally that the defendant could cause the second plaintiff to engage Mr Li for this purpose.[109]

(A) THE DEFENDANT'S RELATIONSHIP WITH MR LI

114 I am unable to find, on the evidence before me, that Mr Li is an "interested party" as against the defendant for the purposes of Article 148(a). The objective and contemporaneous evidence is more consistent with the defendant's evidence that he engaged Mr Li to assist the second plaintiff to identify and acquire land for a sheet board plant. I rely on the following evidence for this finding.

115 A legal opinion on the acquisition of land in the PRC issued to AMBDG by its lawyers, Guangdong Songfang Law Firm ("GSLF"), in June 2018 records that GSLF had assigned a lawyer to accompany, among other members of AMBDG's staff, "Land Consultant, Li Changyuan".[110] I accept the defendant's submission that "Li Changyuan" is a typographical error and is a reference to

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107 SOC at para 24(c).

108 SOC at para 24(b); SBS AEIC at paras 19 to 20.

109 CCK AEIC at paras 79 and 81; DCS at para 65.

110 2 CB 1335.

Mr Li. Mr Siong, as a director of AMBDG, instructed GSLF to produce this opinion. Mr Siong and Mr Ching, as directors of AMBDG, must have received this opinion. Yet neither of them objected to the description of Mr Li or to his description as "Land Consultant".[111]

116 Huizhou SJ's former General Manager, one Wu Chin Mou ("Mr Wu"),[112] gave evidence that he met Mr Li for the first time in September 2018 at a restaurant in Dongguan together with the defendant. The defendant told Mr Wu that Mr Li was helping the Group to identify and acquire land in the PRC.[113] Further, Mr Wu gave evidence that he met Mr Li together with the defendant in October 2018 at a potential site for acquisition. This again supports the defendant's case that Mr Li was engaged to identify land in the PRC for acquisition.

117 In January 2018, Mr Ching met Mr Li at AMBDG's factory in Liaobu, along with Huizhou government officials in charge of land allocation. Before this meeting, the defendant gave Mr Li's full name to Mr Ching.[114] Mr Ching confirms that he gave Mr Li "tax materials" and "photocopied certificates".[115] There would be no reason for Mr Ching to do so if Mr Li had not been engaged to identify land in the PRC for acquisition.

118 In October 2018, Mr Ching asked the defendant if it would be faster to ask "Adviser Li Changyuan" to arrange a meeting with the secretary of the town

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111 DCS at para 204(a).

112 Wu Chin Mou's affidavit of evidence in chief dated 25 February 2022 ("WCM AEIC") at para 26.

113 WCM AEIC at para 17; DCS at para 204(b).

114 1 CB 228.

115 1 CB 228.

committee of Xiegang.[116] Again, I accept that "Li Changyuan" is a reference to Mr Li. Mr Ching would not have described Mr Li as "Adviser" if Mr Li had not been engaged to identify land in the PRC for acquisition and if Mr Ching did not know that to be the case.

119 In November 2018, Mr Ching messaged the defendant that he "met Li Chanyuan in the office as he was thought to be able to settle Xiegang's land".[117] Mr Ching also suggested to the defendant that they check with Mr Li if he knew of "other lands to consider".[118] Mr Ching would not have done this if Mr Li had not been engaged to identify land in the PRC for acquisition and if Mr Ching did not know that to be the case.

120 All of this leads me to accept the defendant's case that he engaged Mr Li to assist the second plaintiff to identify and acquire land for a sheet board plant.

121 The circumstantial evidence does not warrant an inference that Mr Li was an "interested party" as against the defendant. The second plaintiff asserts that the engagement of Mr Li is unusual and that the unusual nature of the engagement shows the loans did not have any "purposes in line with common commercial sense" for the purposes of Article 148(a).[119] To support this argument, the second plaintiff makes two points.

122 First, it points to the fact that the arrangement with Mr Li was structured as a *loan*, which is quite a different transaction from a principal putting a consultant in funds in anticipation of an acquisition. To address this point, the

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116 3 CB 2020, 2053.

117 3 CB 2057.

118 3 CB 2057.

119 PCS at para 238.

defendant called an expert witness on business practices in the PRC: Mr Huili Du Harry ("Mr Du"). Mr Du's evidence was that it is common practice for foreign companies who intend to acquire land in the PRC to engage consultants to assist them in identifying and acquiring the land.[120] Further, according to Mr Du, it is not uncommon for a foreign investor to transfer money to the consultant in advance so that the consultant can act quickly to conclude an acquisition at a favourable price by paying a deposit for the land without delay.[121]

123 But Mr Du's evidence was unhelpful to the defendant in two respects. First, he testified that, where a foreign investor transfers money to a consultant in advance, the consultant will usually hold the money on trust for the investor under an escrow, custody or other similar agreement.[122] It is undisputed that the loan agreements are not a similar type of agreement. Second, the second plaintiff is *not* a foreign investor. It is a company incorporated in the PRC.

124 The plaintiffs called Ms Yi Qian ("Ms Yi") as their expert witness on business practices in the PRC. Ms Yi picked up on this last point. She testified that, given that the second plaintiff is not a foreign investor but is instead a PRC company, it would have faced no difficulty in paying a deposit to a vendor quickly and directly once the land had been identified.[123] There was therefore no need to engage a local intermediary like Mr Li in order for the second plaintiff to move quickly.

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120 Defence at para 25.

121 Mr Du's 1st Expert Report at paras 25–30 (6 BAEIC Tab 23, pp 4153–4154).

122 Mr Du's 1st Expert Report at para 25 (6 BAEIC Tab 23, p 4153).

123 Ms Yi Qian's Supplementary Expert Report dated 16 June 2022 at para 15 (3 BAEIC Tab 16, p 1288).

125 The defendant accepts this point. He admitted during cross-examination that the second plaintiff could have paid the deposit on its own.[124] However, he maintained that transferring the money to Mr Li in advance was still necessary in the interests of time, given that the price of land was rising on a daily basis.[125]

126 The second point that the second plaintiff relies on is that the loan agreements do not protect its interests. The loan agreements do not provide a mechanism for the second plaintiff to accelerate recovery of the RMB 14m in the event that Mr Li fails to identify land for the second plaintiff to acquire or if he does so but the transaction to acquire the land falls before it can complete. In either of those events, the loan agreements do not allow the second plaintiff to do anything to recover the RMB 14m from Mr Li. It would simply have to wait for the two-year tenor of each loan to expire.[126] Moreover, the 3% interest rate under the loan agreements is disadvantageous to the second plaintiff in that it was lower than the prevailing rate at which commercial banks in the PRC were then lending money.[127]

127 I accept that the arrangement to transfer the RMB 14m in advance under a *loan* agreement (as opposed to an escrow, custody or other similar agreement) is unusual. I accept also that the loan agreements could have gone further to protect the second plaintiff's interests given that I have found their purpose to be to assist the second plaintiff to act quickly in identifying and acquiring land for a sheet board plant.

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124 Transcript, 27 July 2022 at p 57 lines 17–19

125 Transcript, 27 July 2022 at p 57 line 17 to p 58 line 1.

126 PCS at para 140; Transcript, 5 August 2022 at p 29 lines 2–9.

127 PCS at para 142; SBS AEIC at para 162(c)(ii) (1 BAEIC Tab 1, p 96).

128 To my mind, however, these features are insufficient circumstantial evidence from which to draw an inference that Mr Li was an "interested party" as against the defendant for the purposes of Article 148(a). As Ms Yi said in cross-examination, issues of risk management – such as a buyer's contractual recourse to recover money either from a third-party intermediary such as Mr Li or from the vendor itself if a transaction to acquire land falls through before it completes – are ultimately a matter for negotiation and agreement between the buyer (*ie,* the second plaintiff), the vendor and the third party (*ie*, Mr Li).[128]

129 Indeed, the fact that the defendant chose to structure the second plaintiff's transfer of the RMB 14m to Mr Li as a loan could very well be said to be circumstantial evidence in support of the defendant's case, bearing in mind that I am here considering a duty of fidelity and not a duty of diligence. For example, the fact that it was a loan as opposed to an outright transfer at least ensured that the second plaintiff had some legally enforceable right to recover the RMB 14m from Mr Li. Even if this right was exercisable only after the two-year tenor of each loan had expired, it was better than nothing. And it may not be correct to view Mr Li's obligation to pay interest at only 3% per annum as a discount to the market rate. As the defendant testified, he saw the obligation to pay interest as an incentive to Mr Li to identify and acquire the land faster.[129] The defendant would be unlikely to vest these legal rights in the second plaintiff if he were so connected to Mr Li as to render Mr Li an "interested party" as against the defendant.

130 To my mind, neither the use of loan agreements (as opposed to an escrow, custody or other similar agreement) nor the terms of the loan

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128 Transcript, 26 July 2022 at p 12 line 13 to p 13 line 5.

129 Transcript, 27 July 2022 at p 82 lines 15–18.

agreements is sufficient circumstantial evidence to warrant drawing the inference that the defendant caused the second plaintiff to transfer RMB 14m to Mr Li for a purpose connected to the interests of Mr Li as an "interested party". These features may at best suggest a lack of diligence, but that is not the case against the defendant which I am now analysing.

(B) THE DEFENDANT'S RELATIONSHIP WITH MS LUO

131 As part of the circumstantial evidence connecting the defendant to Mr Li, the plaintiffs also rely on their allegation that the defendant is in an intimate personal relationship with Ms Luo. The defendant denies any such relationship.[130] He maintains that Ms Luo is merely his personal secretary.[131] I reject the plaintiffs' submission on this point for three reasons.

132 First, and most importantly, there is no admissible evidence that Ms Luo received any part of the RMB 14m, either from the second plaintiff or from Mr Li. There is only hearsay evidence suggesting that Mr Li transferred RMB 1m to Ms Luo. In the absence of any admissible evidence of such a transfer, Ms Luo's relationship to the defendant is irrelevant to whether Mr Li is an "interested party" as against the defendant.

133 Second, even if I assume in the second plaintiff's favour that Ms Luo did receive some part of the RMB 14m loan from Mr Li, the plaintiffs have failed to discharge their burden of proving a sufficiently close relationship between the defendant and Ms Luo to render either Mr Li or Ms Luo an "interested party" as against the defendant.

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130 CCK AEIC at para 72.

131 Transcript, 26 July 2022 at p 66 lines 6–7.

134 The second plaintiff's basis for asserting an intimate personal relationship between the defendant and Ms Luo is extremely thin. Mr Siong relies on certain photographs as evidence of a romantic relationship between the defendant and Ms Luo.[132] But on any reasonable and objective view, these photographs show at most only that the defendant and Ms Luo sometimes stood or walked next to each other.[133]

135 When AMBHK's and AMBDG's financial controller, Lock Man Pan ("Mr Lock") was asked about the allegation that the defendant and Ms Luo were in an intimate personal relationship, he said that if he were to speak "directly" and be "candid", these allegations were based on "rumours spreading in the company".[134] Even Mr Siong, the second plaintiff's principal witness, says only that it was his "understanding" that the defendant was in an intimate personal relationship with Ms Luo. Rumours and understandings are not evidence. They are no basis on which to invite a court to make a finding of fact. The second plaintiff has failed to discharge its burden of proving that the defendant was in an intimate personal relationship with Ms Luo.

136 Finally, if I am to have regard to inadmissible evidence to accept that Ms Luo received part of the RMB 14m advanced to Mr Li, there is equally inadmissible evidence that suggests that Ms Luo was acting in assisting the second plaintiff to set up a sheet board plant in a formal capacity, *ie,* in her capacity as the second plaintiff's duly appointed supervisor.[135] For example, in August and September 2018, Ms Luo and Mr Li exchanged a number of

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132 SBS AEIC at paras 19–20 (1 BAEIC at pp 15–16).

133 SBS AEIC at exhibit SBS-29; 8CB 5324–5334.

134 Transcript, 21 July 2022 at p 69 lines 15–16.

135 3 CB 1580.

WeChat messages discussing the most legally advantageous and tax efficient way to purchase land in Lilin Town for the second plaintiff.[136]

(C) NO ADVERSE INFERENCE

137 The plaintiffs submit that I should draw an adverse inference against the defendant under illustration (*g*) to s 116 of the Evidence Act (Cap 97, 1997 Rev Ed) for his failure to call Mr Li and Ms Luo as witnesses at trial.[137] For convenience, I shall refer to this provision as s 116(g).

138 Section 116(g) of the Evidence Act provides that the court may presume "that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it". In *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141, the Court of Appeal held (at [20]) that whether to draw an adverse inference depends in the final analysis on the circumstances of each case. It is not the position that an adverse inference must be drawn against every party who fails to call a witness who can give material evidence. No adverse inference may be drawn if there is a wholly satisfactory explanation for the absence of the witness (at [20(d)]). Even if the explanation is not wholly satisfactory but is at least reasonable and credible, the adverse inference to be drawn may be reduced or annulled (at [20(e)]).

139 Even when the court draws an adverse inference under s 116(g) of the Evidence Act, the adverse inference drawn must be evidence that would have been admissible if the absent witness had in fact been present and had given that evidence; and the adverse inference drawn must also have some basis in the admissible evidence that is before the court. When drawing an adverse

136 DCS at para 219; 3 CB 1786–1807.

137 PCS at para 214.

inference, the court must apply its mind to the *manner* in which the evidence that is not produced is said to be unfavourable (at [23]). Further, if the evidence that is not produced is the oral evidence of a witness who is outside the jurisdiction of the court for reasons that are not attributable to the relevant party, the presumption is either not raised or if raised, is rebutted (*Halsbury's Laws of Singapore* vol 10 and 10(2) (LexisNexis) at para 120.349).

140 I decline to draw an adverse inference against the defendant that the evidence of Ms Luo and Mr Li would have been unfavourable to his case if they had been called as witnesses. I come to that conclusion for three reasons.

141 First, it is undisputed that Mr Li and Ms Luo are resident in the PRC. They are therefore outside the jurisdiction of this court.[138] The defendant had no means by which to compel either of them to testify in person in this action. A subpoena cannot be served on any person outside Singapore (see O 38 r 18(2) of the Rules of Court (2014 Rev Ed)). I consider this in itself to be a wholly satisfactory reason for the defendant not producing evidence from Mr Li and Ms Luo at trial.

142 Second, the defendant did make attempts to secure evidence from Ms Luo and Mr Li at trial. But Ms Luo was unwilling to testify and Mr Li was uncontactable.[139] I accept these explanations.

143 Finally, and in any case, the defendant has produced some evidence of Ms Luo's and Mr Li's correspondence. I have referred to some of this correspondence at [136] above. This correspondence is contemporaneous with

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138 SOC at para 24; SBS AEIC at paras 19 and 21 (1 BAEIC 15–16).

139 Transcript, 26 July 2022 at p 32 lines 6–8; Transcript, 27 July 2022 at p 52 line 20 to p 53 line 14.

the material events. It is therefore unlikely to have been shaped after the fact to support any party's case. To the extent that this correspondence is admissible, it *supports* the defendant's case. In the absence of any allegation that this correspondence is not authentic, I consider it legitimate to have regard to this correspondence in deciding whether to draw an adverse inference, even if the correspondence is undoubtedly inadmissible in evidence on the merits of the substantive dispute between the parties.

144 For all of these reasons, I am satisfied either that no adverse inference should be drawn against the defendant under s 116(g) of the Evidence Act to support the second plaintiff's case that either Mr Li or Ms Luo is an interested party as against the defendant.

(6) Conclusion on Article 148(a)

145 On the balance of probabilities, weighing the available evidence and bearing in mind the inherent probabilities, I find that the second plaintiff has failed to discharge its burden of proving that the defendant breached his duty under Article 148(a) by causing the second plaintiff to enter into the loan agreements. The plaintiffs have failed to satisfy me that the loan agreements were a "sham" in the sense that they were merely a pretence for the defendant and Mr Li to conceal their illegitimate arrangement to siphon money out of the Group and into Mr Li's hands, contrary to the interests of the second plaintiff. The plaintiffs have also failed to satisfy me that the defendant caused the second plaintiff to enter into the loan agreements for a purpose which was not for the second plaintiff's benefit or for a purpose which was for the benefit of an interested party.

146 Accordingly, I find that the defendant did not breach the duty he owed to the second plaintiff under Article 148(a).

Article 148(c) of the PRC Company Law

147 I now turn to consider the plaintiffs' case against the defendant under Article 148(c) of the PRC Company Law.

148 Article 148(c) provides as follows:[140]

> [A] director…is prohibited from any of the following acts: without the consent of the shareholders' meeting, the general meeting or the board of directors, loaning the funds of the company to others … in violation of the company's articles of association.

The parties' experts disagree on the proper interpretation of Article 148(c).

(1) Interpretation

149 Dr Zhang, the plaintiffs' expert, takes the position that Article 148(c) prohibits a director from lending the company's funds to a third person *unless* the company's articles of association expressly permit him to do so. Where the company's articles are silent on such loans, the director must obtain shareholders' or directors' consent before making a loan.[141] In support of his view, Dr Zhang cites the decision of the PRC courts in *SUN Xiaochuan v WANG Lei (Case No.: 2020 Ji 01 Min Zhong No. 9470)* ("*SUN Xiaochuan*"). In that case, the court held that, because a company's articles did not provide that a director had the power to lend company funds to others, a director of the

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140 Mr Liu's 1st Expert Report at para 63 (6 BAEIC 3686).

141 PCS at para 225; Dr Zhang's 2nd Expert Report at para 25 (2 BAEIC 1057).

company should have obtained shareholders' consent before doing so. As the director failed to do so, the director was held to have breached Article 148(c).[142]

150 Mr Liu, the defendant's expert, takes the position that Article 148(c) does not prohibit a director from lending company funds to a third person. A director breaches Article 148(c) only if the loan is not extended in accordance with the provisions of the company's articles.[143] Mr Liu relies on *Interpretation of PRC Company Law*, which provides as follows:[144]

> … Loan the company's funds or provide any guaranty to any other person by using the company's property in violation of the articles of association without the consent of the shareholders' meeting, shareholders' assembly, or the board of director. Such acts have not been approved in accordance with the procedures specified in the articles of association, and may result in the damages to the interests of the company such as related-party transactions, therefore, such acts constitute the breach of the duty of fidelity to the company, and shall be prohibited.
>
> [emphasis added in underline]

151 I prefer Dr Zhang's interpretation of Article 148(c) for two reasons.

152 First, the interpretation is supported by the PRC case law that Dr Zhang cites. The PRC is, of course, a civil law jurisdiction. Cases are not precedent in a civil law jurisdiction as they are in a common law jurisdiction such as Singapore. Nevertheless, I accept that cases remain persuasive when the PRC courts interpret PRC law. In any event, and at the very least, cases are of value to a third party in predicting how the PRC courts will interpret PRC law.

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142 Dr Zhang's 2nd Expert Report at para 24 (2 BAEIC 1057).

143 PCS at para 226; Mr Liu's 1st Expert Report at para 65 (6 BAEIC 3686).

144 Mr Liu's 1st Expert Report at para 64 (6 BAEIC 3686); 6 BAEIC 3757.

153 Second, I consider that the extract in *Interpretation of PRC Company Law* that Mr Liu relies on in fact supports the approach in *SUN Xiaochuan*. The proposition set out in the extract is that a director breaches Article 148(c) if the company's articles expressly specify a procedure for obtaining approval for a loan to a third party and the director fails to comply with that procedure. It does not follow from that proposition that, if the articles do not expressly specify any such procedure, a director has a completely free hand in lending the company's funds to a third person without shareholders' or directors' consent.

(2) Approval of a sheet board plant

154 I turn now to consider the substance of the second plaintiff's claim that the defendant breached Article 148(c). It is common ground[145] that there is a "standard operating procedure" ("SOP") in place within the Group that requires any significant capital expenditure or disposal of monies by a company in the Group to be approved by the first plaintiff's directors.[146] It is the plaintiff's case that the defendant did not follow this SOP when he caused the second plaintiff to enter into the loan agreements.

155 I am prepared to assume, in the second plaintiff's favour, that Article 148(c) imposes upon the defendant an obligation which he owed to the *second* plaintiff not to cause the *second* plaintiff to incur capital expenditure or dispose of monies in connection with a sheet board plant without the approval of the *first* plaintiff's directors. The approval of the first plaintiff's directors means, in substance, the approval of Mr Siong and Mr Ching. Despite the changes in the composition of the first plaintiff's board of directors during this time, no group

145 Transcript, 26 July 2022 at p 82 lines 2–9.

146 PCS at para 94.

of directors could ever have formed a majority of the first plaintiff's directors unless Mr Siong and Mr Ching were part of that group.

156 The issue at hand, therefore, is whether Mr Siong and Mr Ching approved taking steps to set up a sheet board plant in general and the second plaintiff's entering into the loan agreements more specifically.

157 The plaintiffs' case on this issue is as follows. Mr Siong and Mr Ching never approved setting up a sheet board plant. All discussions about a sheet board plant (such as the discussions from February 2018 to July 2019) were informal and preliminary. Moreover, the defendant did not present any feasibility study, financial projections or capital requirements for setting up a sheet board plant. Therefore, Mr Siong and Mr Ching could not and would not have approved it.[147]

158 The defendant's case on this issue is that "knowledge is the same as approval".[148] Mr Siong and Mr Ching knew the steps that were being taken to set up a sheet board plant. They did not object to any of those steps at or even soon after the time they were taken. A sheet board plant was discussed and approved at the February 2018 Meeting. Mr Siong and Mr Ching were therefore fully aware of and approved a sheet board plant by the time of the February 2018 Meeting at the latest.[149] The decision to set up a sheet board plant was not itself a capital expenditure or a disposal of monies within the meaning of the SOP. Setting up a sheet board plant and approving the steps necessary to do so was a "process", not an event. And it is typical in the course of a complex

147 PCS at paras 30–33.

148 Transcript, 28 July 2022 at p 37 lines 15–18, p 73 lines 18–19.

149 DCS at paras 100–118.

investment like this that there will be many rounds or degrees of approval.[150] Following the February 2018 Meeting, therefore, various steps necessary to set up a sheet board plant were taken in anticipation of a final directors' meeting where the first plaintiff's directors would give their final approval for all of the necessary capital expenditure.[151]

159 To my mind, the resolution of this issue turns on what amounts to "approval" under the SOP and whether Mr Siong's and Mr Ching's knowledge and silence can amount to "approval" as the defendant claims. I find, in light of the unique circumstances of the Group and the interpersonal working dynamic underlying its management practices and conventions, Mr Siong's and Mr Ching's knowledge and silence *did* amount to their approval under the SOP.

160 I have already summarised the interpersonal working dynamic between the defendant on the one hand and Mr Siong and Mr Ching on the other (see [20]–[23] above). To recapitulate, Mr Siong and Mr Ching gave evidence that the defendant was a "domineering and oppressive" person[152] whose management style was to divide the other directors and thereby to rule over the Group.[153] Mr Tay gave evidence to the same effect. Thus, it is the plaintiffs' own case that the defendant "[took] advantage of his seniority in age and experience" to ensure the other directors' obedience[154] and that Mr Siong and Mr Ching were "conditioned to resign themselves to doing [the defendant's] bidding and

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150 DCS at paras 74 and 151.

151 DCS at para 74.

152 SBS AEIC at para 11 (1 BAEIC at p 11); CHH AEIC at para 11 (1 BAEIC at p 203).

153 SBS AEIC at para 16 (1 BAEIC at p 14); CHH AEIC at para 11 (1 BAEIC at p 205); TAKK AEIC at para 33 (1 BAEIC at p 146).

154 PCS at para 19; SBS AEIC at para 11 (1 BAEIC at pp 11–12); CHH AEIC at para 11 (1 BAEIC at p 203).

avoiding confrontation".[155] The plaintiffs themselves also assert that the defendant "drove a wedge" between Mr Siong and Mr Ching on the one hand, and Mr Tay on the other hand, and thereby convinced the former two men that Mr Tay would vote with the defendant to allow the defendant to do as he pleased with the first plaintiff and the Group and, if necessary, to remove Mr Siong and Mr Ching as directors of the first plaintiff.

161 I accept this evidence of the defendant's relationship with Mr Siong and Mr Ching and of his autocratic and domineering management style. But seen from the defendant's perspective, this means that Mr Siong and Mr Ching consented or, at the very least acquiesced, to the defendant's exercise of ultimate management control over the first plaintiff and the Group. Thus, Mr Siong and Mr Ching had resigned themselves to doing the defendant's bidding from the time the defendant first tabled a sheet board plant for discussion until the defendant caused the second plaintiff to enter into the loan agreements and to advance the RMB 14m to Mr Li.

162 As I have foreshadowed, the critical event in the analysis of the plaintiffs' case on Article 148(c) is the February 2018 Meeting. In attendance were the defendant, Mr Siong and Mr Ching. The February 2018 Minutes record the key points about the discussion of a sheet board plant as follows:[156]

> (a) The defendant said that the Group needed to set up a sheet board plant if the Group was to grow and aim for an initial public offering of its shares, even though running a sheet board plant was materially different from its current business running box plants.

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155 PCS at para 19.

156 1CB 294–295.

(b) The defendant suggested that the Group should set up a subsidiary under its current box plant business in China, *ie,* under AMBDG, to run a sheet board business. This would make it easier for the vehicle for the new business to be incorporated in China. The total estimated funds required to finance the new business was around RMB 200m including working capital. Of this RMB 200m, the defendant expected Mr Ching to free up RMB 100m from the Group's existing business.

(c) The defendant asked Mr Siong and Mr Ching to discuss how to finance the new business by freeing up cash and by securing low-cost bank financing.

(d) It was agreed that all capital expenditure and disposal of monies must be approved by the first plaintiff's directors on its own merits, before any assets were purchased or monies paid out.

163 The defendant drew up the February 2018 Minutes and circulated them to Mr Siong, Mr Ching and Mr Tay. They each replied to acknowledge receipt. Mr Tay in particular indicated that the plan was "well written" and looked "clear enough for execution".[157] I therefore find that as at February 2018, the first plaintiff's directors were aware of the defendant's intention to set up a sheet board plant and consented or, at a bare minimum, acquiesced to the defendant taking the initial steps to do so.

164 The decision to set up a sheet board plant was further crystallised at the April 2018 Meeting. Mr Siong, Mr Ching, Mr Tay, the defendant and Mr Kenneth Chan Kwok Wei ("Mr Kenneth Chan") attended this meeting.

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157 1 CB 297.

Mr Kenneth Chan is the defendant's son. At that time, only Mr Siong and Mr Ching were *de jure* directors of the first plaintiff.[158] The defendant, Mr Kenneth Chan and Mr Tay were appointed directors of the first plaintiff only later, in June 2018.[159]

165 The parties gave differing accounts of the nature of the April 2018 Meeting and the events at that meeting.

166 The plaintiffs' account is as follows. The April 2018 Meeting was not a meeting of the first plaintiff's directors. It was not convened by a director of the first plaintiff. No agenda was circulated ahead of the meeting. No minutes were taken of the meeting. The meeting was nothing more than an informal discussion amongst the five men in attendance upon Mr Ching's return to Singapore from the PRC.[160] An investment in a sheet board plant was discussed at the meeting, but only informally. Although the defendant presented a few slides at the meeting on the PRC market, those slides are not the same as the detailed set of slides entitled "Hector Finance Group 5-Year Strategic Plan" which the defendant has produced in discovery in this action.[161]

167 The defendant's account is as follows. The April 2018 Meeting was a meeting of the first plaintiff's directors. At the meeting, the defendant presented a detailed set of slides entitled "Hector Finance Group 5-Year Strategic Plan".[162] The slides addressed, among other things, the Group's plan to set up two sheet

158 Transcript, 28 July 2022 at p 129, line 21.

159 KC AEIC at para 7.

160 SBS AEIC at paras 83–84; CHH AEIC at paras 66–67.

161 CHH AEIC at para 68(a).

162 CCK AEIC at para 39.

board plants in China. The defendant also presented the advantages and disadvantages of an investment in sheet board plants and of the projected financial returns.[163] Following the defendant's presentation, the first plaintiff's directors unanimously resolved to approve a sheet board plant.[164] Their resolution is recorded in the minutes of the April 2018 meeting taken by Mr Kenneth Chan ("the April 2018 Minutes").[165]

168 I accept the defendant's submission that the April 2018 Meeting was a meeting of the directors of the first plaintiff. I further accept that the first plaintiff's directors approved a sheet board plant at this directors' meeting. I arrive at these findings for three reasons.

169 First, the contemporaneous evidence supports a finding that the April 2018 Meeting was convened as a meeting of the first plaintiff's directors. On 10 April 2018, the defendant sent an email ("the 10 April Email") addressed to Mr Siong, Mr Ching, Mr Tay and Mr Kenneth Chan. The 10 April Email notified the addressees that "Hector Finance Group", *ie,* the first plaintiff, would hold "the first official meeting" of the directors. The meeting was to be held at 10.00 am on 14 April 2018 in the boardroom of AMB Packaging Pte Ltd, a Group company incorporated in Singapore. The defendant also informed the addressees that they, together with the defendant, were the first plaintiff's directors and were to attend the meeting. Mr Siong, Mr Ching and Mr Tay all responded by email, noting or agreeing to the contents of this email without taking any objection.[166]

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163 CCK AEIC at para 40.

164 CCK AEIC at para 41.

165 DCS at para 144; 2 CB 1090–1094.

166 CCK AEIC at paras 35–36; 1 CB 782–787.

170 Second, even though the defendant, Mr Tay and Mr Kenneth Chan had not been formally appointed as directors of the first plaintiff when they attended the April 2018 Meeting, I accept that they attended the meeting as *de facto* directors within the extended definition of the term "director" in the Companies Act 1967 (2020 Rev Ed). Section 4 of the Act defines the word "director" as including "any person occupying the position of director of a corporation by whatever name called and includes *a person in accordance with whose directions or instructions the directors or the majority of the directors of a corporation are accustomed to act* …." [emphasis added]. It is the plaintiffs' own case that Mr Siong and Mr Ching were accustomed to act as directors of the first plaintiff in accordance with the defendant's instructions.[167] Indeed, it is the plaintiffs' own case that the defendant held himself out as the *de facto* Chairman of the Group even before he was appointed a *de jure* director of the first plaintiff and gave instructions and orders to Mr Siong and Mr Ching concerning their management of the Group's business.[168] Mr Siong and Mr Ching accepted all of this without question. I am therefore satisfied that the defendant was a *de facto* director of the first plaintiff at all times.

171 I am equally satisfied that both Mr Tay and Mr Kenneth Chan were *de facto* directors of the first plaintiff at and after the April 2018 Meeting. As the defendant submits, a person who is not a *de jure* director is nevertheless a *de facto* director of a company if he undertakes functions in relation to the company which can properly be discharged only by a director. This includes participating in directing the affairs of the company on an equal footing with the other directors and exercising a real influence in the corporate governance of the company (*Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others (Tung*

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167 SBS AEIC at paras 11 and 12; CHH AEIC at para 11.

168 SBS AEIC at para 10 (1 BAEIC p11).

Yu-Lien Margaret and others, third parties) [2010] SGHC 163 at [58]; *Evotech (Asia) Pte Ltd v Koh Tat Lee and another* [2018] SGHC 252 at [75]). In the 10 April Email, the defendant asserted that Mr Tay and Mr Kenneth Chan were directors of the first plaintiff. Mr Siong and Mr Ching acquiesced in this characterisation. Mr Tay and Mr Kenneth Chan attended April 2018 Meeting in the capacity stipulated in the 10 April Email, *ie,* as directors of the first plaintiff. Mr Siong and Mr Ching acquiesced in this also. Mr Tay and Mr Kenneth Chan were therefore *de facto* directors of the first plaintiff at and after the April 2018 Meeting.

172 Third, the first plaintiff's directors, both *de jure* and *de facto*, approved a sheet board plant at the April 2018 Meeting. This approval is recorded in the April 2018 Minutes. The defendant produced in this action two different versions of the April 2018 Minutes. The first version was produced contemporaneously. This version was attached to two emails, one dated 25 April 2018 and one dated 2 July 2018, from Mr Kenneth Chan to the defendant.[169] The second version of the April 2018 Minutes was regrettably the result of Mr Kenneth Chan amending the soft copy of the first version.[170] He made these amendments only in August 2019. He did so specifically for the purpose of producing the second version as evidence in litigation.[171] According to him, the only changes he made in the second version of the April 2018 Minutes were to correct inaccuracies in the first version of the minutes.[172] It is the second version of the April 2018 Minutes which the defendant and Mr Kenneth Chan chose to

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169 PCS at paras 73–74; 2 CB 1405–1419.

170 Transcript, 2 August 2022 at p 78 lines 4–23, p 80 lines 2–11.

171 Transcript, 28 July 2022 at p 112 lines 7–13; Transcript, 2 August 2022 at p 80 lines 2–11.

172 Transcript, 2 August 2022 at p 78 lines 4–23.

exhibit to their affidavits of evidence in chief. They did so without offering any explanation in the affidavit of how this version was produced.[173]

173 There are three key differences between the first and second versions of the April 2018 Minutes: (a) first, the description of those in attendance; (b) second, the deletion of a section on "Notice and Quorum"; and (c) third, the amendment of the word "containerboard" to "sheet board". These key differences are apparent from a side-by-side comparison of the relevant parts of the two versions:

First version of the April 2018 Minutes[174]	**Second version of the April 2018 Minutes**[175]
Present: Mr. Chan Chew Keak, Billy (***Executive Chairman and CEO***) Mr. Siong Beng Seng (Executive Director) Mr. Ching Hui Huat, Edward (Executive Director) Mr. Tay Ah Kee, Keith (Non-Executive Director) Mr. Kenneth Chan Kwok Wei (Non-Executive Director) …	Present: Billy Chan – ***Non-Executive Chairman and Non-Executive Director***, and Representative for Caldicott Worldwide Kenneth Chan – Non-Executive Director and Representative for Caldicott Worldwide Keith Tay – Non-Executive Director and Representative for Springfield Investments Siong Beng Seng – Executive Director and Shareholder, and Director of AMB Packaging Singapore Edward Ching Hui Huat – Executive Director and Shareholder, and Director of AMB Interpac Containers (Guangdong)

173 CCK AEIC at para 41; KC AEIC at para 14; 2 CB 1090–1094.

174 2 CB 1415–1419.

175 2 CB 1090–1094.

	…
2. NOTICE AND QUORUM (A) It was noted that due notice of the meeting had been given to all the directors of the Company in accordance with the articles of association of the Company. (B) It was further noted that a quorum necessary for the convening of the meeting was present. The Chairman declared the meeting had been duly convened and constituted in accordance with the articles of association of the Company. A quorum was present throughout the meeting. …	[***This section is omitted***]
[The defendant] reflected back on the past ***six*** years of operations, and noted that it was not satisfactory for shareholders in terms of financial performance and growth … … On the proposed expansion into ***containerboard*** production in the Pearl River Delta, Mr. Keith Tay inquired about the downside to this investment. [The defendant] replied that if the selling prices for ***containerboard*** declined, the payback could be stretched to six years instead of the currently projected three and a half years. ***It was unanimously RESOLVED that the Board***	[The defendant] reflected back on the past ***ten*** years of operations, and noted that it was not satisfactory for shareholders in terms of financial performance and growth … … On the proposed expansion into ***sheet board*** production in the Pearl River Delta, Mr. Keith Tay inquired about the downside to this investment. [The defendant] replied that if the selling prices for the ***sheet board*** declined, the payback could be stretched to six years instead of the currently projected three and a half years. ***It was unanimously RESOLVED that the Board***

approved the expansion and investment into containerboard production in the Pearl River Delta. [emphasis in original omitted; emphasis added in bold italics]	***approved the expansion and investment into sheet board production in the Pearl River Delta.*** [emphasis in original omitted; emphasis added in bold italics]

174 The plaintiffs castigate Mr Kenneth Chan for tampering with evidence by amending the first version of the April 2018 Minutes.[176] The presentation of evidence in litigation is undoubtedly a most serious matter. Deliberately altering evidence for the purpose of presenting it in anticipated litigation is an even more serious matter. Actually tendering the altered evidence in litigation without explaining how it was produced is an infinitely more serious matter. But I do not accept the plaintiffs' characterisation of what the defendant or Mr Kenneth Chan did as tampering with evidence. Neither the defendant nor Mr Kenneth Chan made any attempt to suppress the first version of the April 2018 Minutes in this litigation. Nor did they misrepresent the second version of the April 2018 Minutes as a document created contemporaneously with the April 2018 Meeting, *eg* by surreptitiously attaching it – whether in discovery, in an affidavit of evidence in chief or for inclusion in the agreed bundle – to a contemporaneous email.

175 It is, of course, a matter of serious regret that Mr Kenneth Chan did not voluntarily disclose that he produced the second version of the April 2018 Minutes only in August 2019 by amending the first version and for the specific purpose of presenting the second version as evidence in anticipated litigation. He did so only under cross-examination. But I accept the defendant's submission that the amendments are immaterial to the essential meaning of the April 2018 Minutes in so far as they are relevant to my disposal of this action.

176 PCS at paras 73–75.

The amendments do not detract from the evidential value of the first version of the April 2018 Minutes for that purpose. In particular, although the second version records that the directors approved expanding into "containerboard" production, it is common ground that the only business discussed at the April 2018 Meeting was sheet board production. I therefore accept that the first version of these minutes stands as a contemporaneous record in writing that the first plaintiff's directors unanimously approved a sheet board plant at the April 2018 Meeting. The nature and consequences of Mr Kenneth Chan's conduct outside this context is an entirely separate matter on which I express no view.

176 Having regard to the totality of the evidence, therefore, I am satisfied that, at the April 2018 Meeting, the first plaintiff's directors approved a sheet board plant and agreed to take steps to advance it. The steps which I have found at [98] were taken to set up a sheet board plant from December 2017 to May 2018 are consistent with the discussions recorded both in the February 2018 Minutes (see [162] above) and in the April 2018 Minutes. They include:

(a) the defendant and Mr Ching arranging visits to sheet board plants in China;

(b) Mr Siong obtaining quotations for corrugator machines for a sheet board plant between December 2017 and May 2018;

(c) Mr Siong's correspondence with DBS Bank in March 2018 seeking financing;[177] and

(d) the incorporation of Huizhou SJ and the second plaintiff as subsidiaries of AMBDG in August 2018.

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177 1 CB 765.

177 All of the above accords with the defendant's case that setting up a sheet board plant and the approval to do so was a process and not an event. Once the first plaintiff's directors had agreed and approved the general direction, the details would be worked out and approved along the way. Viewing the evidence in totality, I therefore accept that the first plaintiff's directors did approve setting up a sheet board plant, and did so at the April 2018 Meeting.

(3) Approval of the loan agreements

178 I now turn to consider whether the first plaintiff's directors approved the second plaintiff's entering into the loan agreements. It is not the defendant's case that the second plaintiff's directors approved entering into the loan agreements expressly, whether orally or in writing, *eg* by way of a director's resolution. But having regard to the totality of the evidence *and* the management practices within the Group and the first plaintiff, I accept the defendant's submission that the directors nevertheless approved the second plaintiff's entering into the loan agreements because they were aware of them and acquiesced in the second plaintiff entering into them.

179 In his defence, the defendant makes two pleas which are relevant to this branch of the analysis. First, that in or around February 2018, he, Mr Siong and Mr Ching orally agreed to engage Mr Li as the Group's consultant.[178] Second, that in or around December 2018, the defendant, Mr Siong and Mr Ching orally agreed that the second plaintiff should transfer money to Mr Li to ensure that Mr Li could move quickly in assisting the second plaintiff to identify and acquire land for a sheet board plant.[179] However, in cross-examination, the

178 Defence at para 26.

179 Defence at para 33.

defendant admitted that there was no agreement to appoint Mr Li as the Group's consultant.[180] Considering this inconsistency between his pleadings and his evidence together with the lack of contemporaneous evidence supporting any such oral agreement, I find that the directors of the first defendant did not agree expressly and orally to engage Mr Li as the Group's consultant or to transfer money to Mr Li.

180 Even though there was no *express* oral agreement to engage Mr Li as a consultant or to transfer money to Mr Li, I accept that there was nevertheless approval in the form of Mr Siong's and Mr Ching's knowledge and silence. I reiterate that the management practices within the Group and the first plaintiff must be borne in mind when considering what "approval" means. I have found at [159] above that in the unique circumstances of the Group, Mr Siong's and Mr Ching's knowledge and silence of the defendant's conduct did amount to approval. It is the plaintiffs' own case that Mr Ching and Mr Siong resigned themselves to doing the defendant's bidding to avoid confrontation.[181] Shareholders of a company are entitled to expect that directors will perform their duties with reasonable mental fortitude. The minority shareholders who hold 7% of the first plaintiff's shares are entitled to no less. A director who has resigned himself to doing another person's bidding and who acquiesces in that other person's conduct in order to avoid confrontation or removal as a director must intend his knowledge and silence or acquiescence to be taken as approval. So too, that other person is entitled to take the director's knowledge and silence or acquiescence as approval. That is precisely what I find happened here as between the defendant on the one hand and Mr Siong and Mr Ching on the other.

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180 Transcript, 26 July 2022 at p 73 line 24 to p 74 line 3.

181 SBS AEIC at para 13 (1 BAEIC p 13); CHH's AEIC at para 11 (1 BAEIC p 203).

181 I therefore find that the directors of the first plaintiff did approve the second plaintiff moving forward to identify and acquire land for a sheet board plant. By doing so, they also approved the actions that had to be taken to advance that purpose. This includes causing the second plaintiff to enter into the loan agreements.

182 Apart from the evidence I have set out at [162]–[176] above, I find that Mr Siong and Mr Ching knew of and approved the specific step of identifying and acquiring land for a sheet board plant.

183 Mr Siong's approval can be seen from the following. On 30 May 2018, the defendant sent an email to Mr Siong and Mr Ching informing them that (a) he had been looking for land in Huizhou without success, (b) an opportunity had come up to buy land in Huizhou, (c) he had suggested to the Group's lawyers that the Group set up an escrow account to be managed by the lawyers for the land purchase, and (d) Mr Ching needed to get RMB 130m in cash ready within the next month for the land purchase.[182] On 1 June 2018, Mr Siong replied, agreeing to an escrow account being set up and said that he was "for moving forward".[183] I accept that this email is evidence that Mr Siong approved moving forward with identifying and acquiring land, given that the escrow account was intended to hold money for purchasing land for a sheet board plant.[184]

184 As for Mr Ching, apart from the evidence at [117]–[119] above regarding his knowledge of Mr Li's involvement, he also exchanged various

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182 2 CB 1187–1195.

183 2 CB 1206.

184 DCS at para 215.

instant messages with the defendant between 7 June 2018 and 15 June 2018 discussing the purchase of land in Huizhou.[185] While these messages do not mention a sheet board plant specifically, Mr Ching accepted in cross-examination that at the time he exchanged these messages with the defendant, he knew that the defendant was searching for land in connection with a sheet board plant.[186]

185 I also accept that from October 2018 to December 2018, the defendant, together with other representatives of the plaintiffs, attempted to identify alternative tracts of land. For example, Mr Wu gave evidence that he, the defendant and Mr Ching met the mayor of Xiegang town to ask if there was land there available for purchase.[187]

186 In January 2019, the pace at which the defendant was taking steps to set up a sheet board plant picked up. The defendant continued to keep Mr Siong and Mr Ching informed. Thus, on 10 January 2019, the defendant messaged Mr Ching telling him that they needed to get started on the operations of the second plaintiff and asking Mr Ching to transfer RMB 30m to him to repay AMBDG for the corrugator and "to start moving the land". The defendant also said that he would follow up with an email to avoid miscommunication.[188]

187 Later that day, the defendant emailed Mr Ching and Mr Siong telling them that: (a) he had "fix[ed]" the land in Huizhou; (b) they would need to start operating the second plaintiff; and (c) AMBDG should transfer RMB 30m to

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185 2 CB 1228–1240, 1261–1269.

186 Transcript, 19 July 2022 at p 33 lines 3–8.

187 WCM AEIC at para 21.

188 4 CB 2564.

the second plaintiff, out of which RMB 10m would be used as deposit for the land.[189] The defendant also asked Mr Siong and Mr Ching to let him know if they had any doubts or questions. Both Mr Ching and Mr Siong replied to acknowledge the email.[190] Mr Ching in particular stated that he "[would] act as per instruction accordingly".[191] Mr Siong and Mr Ching in their capacity as directors of AMBDG signed a resolution dated 12 January 2019 approving the transfer of RMB 30m to the second plaintiff.[192]

188 On 15 January 2019, Mr Siong, Mr Ching, the defendant and Mr Kenneth Chan signed a resolution approving and ratifying, among other things: (a) the incorporation of the second plaintiff and Huizhou SJ in August 2018, each with a long-term share capital injection of RMB 30m; (b) the registration of the second plaintiff and Huizhou SJ as subsidiaries of AMBDG; and (c) the purchase by the second plaintiff of a piece of land of about 100 Mu located around Huiyang city near Shenzhen ("the 15 January Resolution").[193] In relation to the steps taken in August 2018, this resolution was passed after the fact. But Mr Siong and Mr Ching signed this resolution in January 2019 with knowledge that steps had been taken in August 2018 without formal prior approval. And there is no record of any criticism of the defendant in January 2019 for not seeking approval for these steps, whether formal or informal, in August 2018. This shows that it was not the invariable management practice within the Group or the first plaintiff that all approvals must be sought and obtained in advance and by way of a formal directors' resolution.

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189 4 CB 2561.

190 4 CB 2563.

191 4 CB 2562.

192 4 CB 2587.

193 4 CB 2656.

189 Mr Siong and Mr Ching say that they signed this resolution only because the defendant presented them with a *fait accompli*.[194] I do not accept this explanation. As I have previously found, both Mr Siong and Mr Ching approved steps to set up a sheet board plant by their knowledge and silence. They also took steps themselves to set up a sheet board plant. In any event, there was nothing to prevent them in January 2019 from refusing to approve the *fait accompli* of August 2018, or from approving it while recording their objection to the defendant's conduct in not seeking prior approval before taking those steps in August 2018.

190 The plaintiffs submit that a background paper circulated by Mr Kenneth Chan on 26 July 2019 advocating that the Group invest in a sheet board plant,[195] *ie,* prospectively, shows that the defendant and Mr Kenneth Chan were aware that no such investment had been approved even as late as July 2019.[196] But this background paper must be seen in the context of the consistent management practice within the Group. That practice was for directors to give in-principle approval before a formal directors' resolution was passed and, if necessary, later to ratify the steps that had already been taken in connection with that in-principle approval.

191 It is true that there is no contemporaneous evidential support that Mr Siong or Mr Ching orally agreed that the second plaintiff should engage Mr Li as a consultant and advance RMB 14m to Mr Li *in those terms*. But Mr Siong and Mr Ching well knew that the defendant had engaged Mr Li to assist the

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194 SBS AEIC at paras 115 and 148 (1 BAEIC pp 67 and 87); CHH AEIC at paras 97 and 118 (1 BAEIC pp 238 and 248).

195 SBS AEIC at para 181 (1 BAEIC p 108); 5 CB 3747.

196 PCS at paras 172–173.

second plaintiff in identifying and acquiring land for a sheet board plant and that there would have to be a sizable outflow of money to pay a deposit for the land. I find that Mr Siong and Mr Ching acquiesced to this as part of their pattern of "avoiding confrontation" with the defendant. I find therefore that both Mr Siong and Mr Ching knew that the defendant intended to cause the second plaintiff to purchase land purchase for a sheet board plant, remained silent despite that knowledge, and thereby, given the context of how the first plaintiff was managed, approved it.

192 Mr Siong and Mr Ching knew that the second plaintiff would make loans to Mr Li to facilitate the purchase of land for a sheet board plant. The plaintiffs' pleaded case is that they first discovered that the defendant had caused the second plaintiff to transfer RMB 14m to Mr Li as loans when Mr Lock received copies of the loan agreements from Ms Luo by email on 3 July 2019 at 3.15 pm.[197] Within the hour, Mr Lock forwarded the loan agreements to Mr Siong and Mr Ching at 4.09 pm.[198] Mr Siong, Mr Ching and Mr Lock all claim that they had no knowledge of the loan agreements before Ms Luo's email on 3 July 2019.

193 Their claim is contradicted by substantial contemporaneous evidence. This shows that Mr Ching already knew before 3 July 2019 that the second plaintiff had entered into loan agreements with Mr Li, even if he may not have seen the actual loan agreements. On 3 July 2019 at 11.10 am, Mr Lock sent Mr Ching an email attaching documents relating to AMBDG's RMB 30m capital

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197 Particulars of the Statement of Claim (Amendment No. 1) Served Pursuant to Order of Court dated 6 April 2021 at paras 2(a)–2(b) (Bundle of Pleadings ("BOP") Tab 7); PRS at para 132(c).

198 5 CB 3371; PRS at para 132(e).

injection into the second plaintiff and Huizhou SJ.[199] The attachments did not include the loan agreements. Yet, in Mr Ching's email reply at 11.52 am, Mr Ching asked Mr Lock if he had "[t]he loan contracts of [the second plaintiff] with the individual … two in total, one of 10 million and one of 5 million".[200]

194 Mr Ching attempted to explain his request as follows. First, regarding the "10 million", Mr Ching testified that Mr Lock had told him that the defendant had transferred the sum to an individual in January 2019.[201] Second, regarding the "5 million", he derived that figure through backward reasoning based on the January 2019 Email (see [29] above). Out of the RMB 30m capital injection, he deducted the RMB 10m payment to BHS under the BHS Contract, the RMB 5m transferred to Huizhou SJ and the RMB 10m transferred to the individual that Mr Lock had told him about.[202] The plaintiffs submit that "[o]n that basis, [Mr Ching] figured that RMB 5 million remained unaccounted for and could possibly be transferred to an individual. In that regard, it is common practice in China to consider funds transferred to an individual as a loan to that individual".[203]

195 I have considerable difficulty with Mr Ching's evidence. I do not see how Mr Ching could have concluded that the RMB 5m unaccounted for was also transferred to the *same* individual and as second loan if he did not know beforehand that the second plaintiff had entered into loan agreements with that individual. To my mind, if Mr Ching truly knew nothing about any loan

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199 12 AB 8940–8974.

200 12 AB 8975–8976.

201 Transcript, 20 July 2022 at p 6 line 13 to p 7 line 8.

202 Transcript, 20 July 2022 at p 7 lines 9–15.

203 PRS at para 132(b).

agreements, he would have asked "what happened to the RMB 5m?" instead of immediately assuming the money had been transferred to the same individual and as a second loan.

196 On 3 July 2019 at 3.36pm, Mr Siong sent Mr Ching and Mr Tay a draft letter setting out his and Mr Ching's grievances regarding the defendant.[204] The letter alleged that the defendant had instructed Mr Lock to remit RMB 30m to the second plaintiff and that RMB 15m of that sum had been "given out as under table money or loan to unknown person, purporting to help to buy land for the new factory".[205] The plaintiffs submit that this draft letter does not assist the defendant because it does not refer to any loan agreements. The plaintiffs further submit that the letter is consistent with Mr Ching's evidence and that if Mr Siong had known about the loan agreements before he drafted this letter, he would not have guessed that RMB 15m "was given out as under table money".[206]

197 Again, I find it strange that Mr Siong would immediately guess that RMB 15m "was given out as under table money". To my mind, the plaintiffs' argument that Mr Siong and Mr Ching did not know that the defendant had caused the second plaintiff to enter into the loan agreements is contrary to the inherent probabilities. Mr Siong and Mr Ching may not have known the *terms* of the loan agreements, such as the total amount lent being RMB 14m. But on the evidence before me, I am satisfied that they knew of the *fact* of the loan agreements, *ie*, that the defendant had caused the second plaintiff to pay money as a loan to a third party to facilitate the third party in identifying and acquiring land for the second plaintiff for a sheet board plant. Seen in the context of the

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204 5 CB 3542–3544.

205 5 CB 3543–3544 at paras 19 and 21.

206 PRS at para 132(d).

management practices within the Group and the first plaintiff, this knowledge and silence constitutes approval of the loan agreements.

198 As I stated previously, and as the plaintiffs submit, Mr Siong and Mr Ching resigned themselves to doing the defendant's bidding in order to avoid confrontation.[207] It may be that the first plaintiff's directors were required formally and expressly to approve the Group's expansion strategy. But Mr Siong and Mr Ching did the defendant's bidding as to *how* this broad strategy was to be implemented. And these two directors: (a) knew what these plans were; (b) were conditioned and had resigned themselves not to raise doubts or contradict the defendant; and (c) did not in fact raise any doubts or contradict the defendant. In these circumstances, it was entirely reasonable for the defendant to consider that Mr Siong and Mr Ching approved of the steps he was taking. I find that there was the necessary and sufficient approval by the first plaintiff's directors of the defendant causing the second plaintiff to enter into the loan agreements.

199 The plaintiffs have therefore failed to prove their case that the first plaintiff's directors did not approve the defendant taking steps to set up a sheet board plant, including by causing the second plaintiff to enter into the loan agreements. Accordingly, I find that the defendant did not act in breach of Article 148(c).

(4) The BHS Contract

200 Finally, I turn to deal with the plaintiffs' allegation that the defendant did not follow the SOP when he caused AMBDG to enter into the BHS

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[207] SBS AEIC at para 17; CHH AEIC at para 16.

Contract.[208] To my mind, neither of the plaintiffs in this case have a cause of action against the defendant which can yield any relief for this alleged breach of duty. As I have said at [66]–[68] above, AMBDG's losses are not the first plaintiff's losses and cannot be transformed in law into the first plaintiff's losses. Neither did the second plaintiff suffer any loss, given that the money the second plaintiff paid to AMBDG in connection with the BHS Contract originated from AMBDG itself (see [29(a)] above).

201 The proper plaintiff to bring a claim for breach of director's duties arising from the BHS Contract is AMBDG, not the first plaintiff. There is therefore no need for me to consider the BHS Contract further.

Article 148(h) of the PRC Company Law

202 I now turn to consider the plaintiffs' case against the defendant under Article 148(h) of the PRC Company Law.

203 This article provides that a director shall not commit "any other acts that violate the duty of fidelity to the company".[209] Mr Liu explains that Article 148(h) is "a catchall clause made to prevent a leak". The phrase "other acts in violation of the duty of fidelity" includes the following actions:[210]

(a) improper consumption resulting in company assets being wasted;

(b) purchase or replacement of high-end transportation vehicles;

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208 PCS at para 96.

209 6 BAEIC 3686.

210 Mr Liu's 1st Expert Report at para 67 (6 BAEIC 3686–3687).

(c) luxurious decoration of offices;

(d) use of company funds for high-end consumption; and

(e) payment of travel and business hospitality expenses overly in excess of standards.

204 Dr Zhang does not address Article 148(h) in his expert reports.

205 The plaintiffs do not suggest that the defendant committed any of the acts I have listed at [202] above. I therefore find that there is no breach of Article 148(h).

206 In any event, Mr Liu also expresses the view that the same analysis in relation to Articles 148(a) and 148(c) applies to Article 148(h).[211] In that sense, reliance on Article 148(h) adds nothing to the plaintiffs' case. Since I have found that there is no breach of either Article 148(a) or Article 148(c), there is no need for me to consider separately whether there is a breach of Article 148(h).

Duty of diligence under PRC law

207 I now turn to consider whether the defendant breached his duty of diligence to the second plaintiff under Article 147 of the PRC Company Law (see [72] above) by causing it to enter into the loan agreements. I accept the second plaintiff's case that the inadequacies in the terms of the loan agreements are sufficient to warrant a finding that the defendant breached his duty of

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211 Mr Liu's 1st Expert Report at para 71 (6 BAEIC 3687); Transcript, 3 August 2022 at p 84 line 19 to p 85 line 3.

diligence to the second plaintiff under PRC law by causing the second plaintiff to advance RMB 14m to Mr Li on those terms.

208 Both experts agree that to discharge his duty of diligence to the second plaintiff under Article 147, the defendant must exercise reasonable care in handling the affairs of the company measured against the standard of a good administrator. In other words, the defendant must carry out his tasks while exercising the same prudence and care that a reasonable administrator in the same or a similar position would have exercised in the same or similar circumstances.[212]

209 The expert witnesses disagree on the extent to which the PRC courts will consider the business judgment rule when considering whether a director has breached his duty of diligence. Mr Liu takes the position that the PRC courts may consider the business judgment rule. He relies on the following extract from Jiang Bixin and He Dongning, *The Understanding and Application of Judging Rules in Guidance Cases of the Supreme Peoples' Court (Volume of Corporation Law)* (China Legal Publishing House, 2nd Ed) ("*Corporation Law*"):[213]

> In terms of duties of diligence, it is necessary to determine the standard for diligence. On the one hand, where the standard is too loose, that will weaken the duty of diligence and it would not help to enhance business competence. If indulgence is given to the director at fault, it will ultimately harm the interest of the company and shareholders. On the other hand, the standard cannot be too strict. It is impossible for directors to ensure that they make no mistakes during the company's operations and that all operations bring profits to the company. *Therefore, the reasonable risks in the directors' management should be*

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212 Mr Liu's 1st Expert Report at para 74 (6 BAEIC 3688); Dr Zhang's 1st Expert Report at paras 23–24 (2 BAEIC 930).

213 Mr Liu's 1st Expert Report at para 78 (6 BAEIC 3689).

> *acknowledged and* ***the business judgment rule should be applied****.*
>
> [emphasis added in italics and bold italics]

210 Dr Zhang disagrees. He explains that *Corporation Law* is not an official source of PRC law and is not enforceable as law.[214] Moreover, reading the extract of *Corporation Law* in context shows that the authors admit that the business judgment rule has yet to be accepted into PRC law. This extract is therefore nothing more than an allusion to the business judgment rule as it exists in the United States, with the authors going on to express their view that "how to absorb and use the rule for reference to improve legislation and guide juridical practice in China has become an important topic".[215]

211 I put it to Mr Liu during his cross-examination that *Corporation Law* goes beyond merely describing PRC Company Law and makes normative or predictive statements about how PRC Company Law should or will develop in light of company law in other jurisdictions.[216] Mr Liu accepted this point.

212 I accept that Mr Liu has overstated the extent to which PRC law recognises the business judgment rule. This is also evident in the extract at [209] above. Rather than using the descriptive "is", the authors' use the normative "should" and the conditionality that that word implies when discussing whether business judgment rule applies under PRC law.

213 Therefore, when determining whether the defendant has acted in breach of his duty of diligence to the second plaintiff, I do not consider the business

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214 Dr Zhang's 2nd Expert Report at para 27 (2 BAEIC 1058).

215 Dr Zhang's 2nd Expert Report at paras 28–29 (2 BAEIC 1058–1059).

216 Transcript, 4 August 2022 at p 9 lines 17–23.

judgment rule. The inquiry on this duty is confined to whether the defendant carried out his tasks while exercising the same prudence and care that a reasonable administrator in the same or a similar position would have exercised in the same or similar circumstances.

214 I find that the defendant breached his duty of diligence to the second plaintiff by causing it to enter into the loan agreements without taking reasonable steps to ensure that the terms of the loan agreements afforded reasonable protection for the second plaintiff's legal and economic interests. I say that for three reasons.

215 First, the defendant himself admitted that the loan agreements[217] gave the second plaintiff no control over Mr Li's use of the money, allowing him to "do whatever he [wanted] with the money for two years".[218] The loan agreements do not oblige Mr Li to apply the RMB 14m solely for the purpose of "[l]and purchase at industrial park". They do not give the second plaintiff any contractual or practical mechanism to police the purpose to which Mr Li applies the RMB 14m once he has received it. They make no provision for security or for a third-party guarantee for the second plaintiff to recourse to if Mr Li uses the RMB 14m for a different purpose or fails to repay it after two years. As I observed at [126] above, they do not allow the second plaintiff to accelerate Mr Li's repayment obligation. They also do not oblige Mr Li to attempt to secure a refund of the deposit if negotiations with a potential seller fail. As the second plaintiff points out, its only right to recover the RMB 14m is by waiting for the

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217 4CB 2653 and 2829.

218 Transcript, 27 July 2022 at p 70 line 17 to p 71 line 18.

two-year tenor of the loan agreements to expire.[219] All of this makes the loan agreements unreasonably inadequate to protect the second plaintiff's interests.

216 Second, as I observed at [127] above, and as was common ground between the parties' experts, it is unusual in the PRC to secure land for purchase there by lending the money intended for the deposit to an intermediary such as Mr Li. Both experts testified that these transactions are typically done through an escrow, custody or other similar agreement.[220] Causing the second plaintiff to enter into agreements of this type would have been reasonably adequate to protect the second plaintiff's interests.

217 Third, it is undisputed that the defendant did not seek legal advice when he caused the second plaintiff to enter into the loan agreements.[221] Legal advice would have made the defendant aware of the alternatives of an escrow, custody or other similar agreement. At the very least, legal advice would have made the defendant aware of the shortcomings in the terms of the loan agreement. Instead, the defendant's evidence is that he approached the loan agreements as an entirely commercial matter, not as a legal matter requiring legal advice to ensure that the second plaintiff's legal interests were reasonably adequately protected.[222]

218 In cross-examination, the defendant accepted, when it was put to him, that his decision to advance RMB 14m to Mr Li on the terms set out in the loan

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219 PCS at para 140; Transcript, 5 August 2022 at p 29 lines 2–9.

220 Mr Du's 1st Expert Report at para 25 (6 BAEIC p 4153); Ms Yi Qian's 1st Expert Report at para 13 (3 BAEIC p 1225).

221 PRS at para 114; DCS at para 266.

222 Transcript, 27 July 2022 at p 120, line 22 to p 121 line 14.

agreements "was totally ill advised".[223] As a result of this "ill advised" decision, the second plaintiff is now unable to recover the RMB 14m from Mr Li.[224]

219 For the foregoing reasons, I am satisfied that a reasonable administrator in the defendant's position would not have advanced the RMB 14m to Mr Li as a loan. The defendant thereby breached the standard of diligence expected of him as a director of the second plaintiff.

Mitigation

220 Causation is not disputed, *ie,* it is not disputed that the second plaintiff lost RMB 14m because the defendant caused the second plaintiff to advance the RMB 14m to Mr Li as a loan rather than through an escrow, custody or other similar agreement.

221 The next question which arises on the defendant's pleaded case is whether the second plaintiff took reasonable steps to mitigate its loss.[225] Despite taking this point in its pleadings, the defendant does not pursue this point in his closing submissions. I therefore need not analyse mitigation as an issue.

222 In any event, I find that the second plaintiff did take reasonable steps to mitigate its loss. In December 2019, the second plaintiff lodged a police report in the PRC reporting the defendant's alleged wrongdoings and requesting assistance to obtain compensation for its losses.[226] I also accept that the plaintiffs face considerable difficulty in enforcing the loan agreements against Mr Li,

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223 Transcript, 27 July 2022 at p 120 lines 22–24.

224 Transcript, 27 July 2022 at p 120 lines 14–21.

225 Defence at para 55(h).

226 PL AEIC at para 111 (1 BAEIC 323–324).

considering that the loan agreements do not contain any background information or proof of identification of Mr Li.[227] The damages recoverable by the second plaintiff are therefore not to be diminished in any way by reason of any failure to mitigate its loss.

223 I also note that the plaintiffs adduced evidence of steps taken by AMBDG in mitigation, namely, that AMBDG's lawyers invited the defendant to resolve the issues and sent letters of demand to Mr Li seeking repayment of the loans.[228] However, AMBDG is not a plaintiff. AMBDG's acts are therefore not relevant in my consideration of whether the second plaintiff acted reasonably to mitigate its loss.

Both plaintiffs' claim in conspiracy

224 I now turn to consider the plaintiffs' claim against the defendant in the tort of conspiracy.

225 To establish liability for an unlawful means conspiracy, a plaintiff must prove the following (*EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 ("*EFT Holdings*") at [112]):

(a) that two or more persons engaged in a combination to do certain acts;

(b) that those persons intended to cause damage or injury to the plaintiffs by those acts;

(c) that the acts were unlawful;

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227 PCS at para 289; SBS at para 162(c)(iv) (1 BAEIC 96).

228 PCS at para 281.

(d) that the acts were performed in furtherance of the agreement; and

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

226 The elements of a lawful means conspiracy are the same as the elements of an unlawful means conspiracy save that element (c) requires the plaintiffs to establish that the conspirators carried out lawful acts with the *predominant* purpose of causing injury or damage to the plaintiffs, and that this purpose was in fact achieved (*Quah Kay Tee v Ong and Co Pte Ltd* [1996] 3 SLR(R) 637 at [45]).

227 The plaintiffs' pleaded case on conspiracy is as follows. Mr Li is a known close associate of the defendant. The defendant signed the loan agreements on the second plaintiff's behalf without the knowledge and consent of the first plaintiff or of AMBDG as part of a conspiracy with Mr Li to cause loss to the second plaintiff.[229] The defendant and Mr Li have shared business interests in the PRC: the defendant is a shareholder of Hong Kong Xinlong International Holdings ("HK Xinlong"), Mr Li is a shareholder of Zhenyushan International Holdings Co., Ltd ("Zhenyushan"). HK Xinlong and Zhenyushan own shares in China HX, where the defendant is also a director.[230] The plaintiffs rely on this as circumstantial evidence that Mr Li and the defendant are close associates.

228 Both plaintiffs' claims in conspiracy must fail. I take each plaintiff's claim in turn.

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229 SOC at paras 33–34.

230 PCS at paras 149, 296 and 298; SBS AEIC at paras 23 and 26.

Unlawful means conspiracy

The first plaintiff

229 The first plaintiff's claim in unlawful means conspiracy fails for two reasons.

230 First, I do not accept that there was any combination between the defendant and Mr Li. I reach that conclusion for the same reasons that I have given for rejecting the plaintiffs' case that Mr Li is an "interested party" as against the defendant for the purposes of Article 148(a) of the PRC Company Law.

231 Second, the defendant did not breach any of his duties to the first plaintiff under BVI law. There is virtually no disagreement between the parties' BVI law experts that the defendant owed two duties to the first plaintiff under BVI law.

232 The defendant owed a duty of care, skill and diligence to the first plaintiff under s 122 of the BVI Business Companies Act 2004:

> A director of a company, when exercising powers or performing duties as a director, shall exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances taking into account, but without limitation, (a) the nature of the company; (b) the nature of the decision; and (c) the position of the director and the nature of the responsibilities undertaken by him.

233 The defendant also owed the following fiduciary duties to the first plaintiff under sections 120 to 125 of the BVI Business Companies Act 2004

(omitting section 122, which governs the duty of diligence) and the common law on those sections:[231]

(a) a duty to act honestly and in good faith and in what he believes to be in the first plaintiff's best interests;

(b) a duty to exercise each of his powers for the purposes for which they were conferred;

(c) a duty to act in a way that he considered in good faith would promote the first plaintiff's success for the benefit of its shareholders as a whole;

(d) a duty to avoid a situation in which he had or could have a direct or indirect interest that conflicted or could possibly be in conflict of the first plaintiff's interest;

(e) a duty not to profit from his position of trust as a fiduciary;

(f) a duty to act for the proper purpose of the first plaintiff in relation to all of its affairs, which includes acting with proper authorisation from the first plaintiff's directors;

(g) a duty to ensure that the first plaintiff's affairs are properly administered and that its assets and property are not dissipated or exploited to its prejudice;

(h) a duty to serve the first plaintiff faithfully and dutifully and not to advance and promote his own or other external interests to the

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231 PCS at para 247; DCS at para 57; SOC at para 8.

prejudice of or contrary to or in conflict with the corporate and/or commercial interests of the first plaintiff;

(i) a duty to ensure that each contract or transaction entered into is done so at arm's length in fulfilment of the first plaintiff's corporate objectives to maximise profits and to advance and promote the first plaintiff's business;

(j) a duty to promptly account for and to pay to the first plaintiff all moneys or property received by him on behalf of or for the credit or the account of the first plaintiff;

(k) a duty to manage and deal with the first plaintiff's property in a trustee-like manner; and

(l) a duty to disclose to the first plaintiff any of his breaches of any of the aforesaid or other duties.

234 The plaintiffs' pleaded case is that the defendant breached these duties when he:[232]

(a) failed to apply the RMB 30m transferred by AMBDG to the second plaintiff towards the purposes set out in the January 2019 Email (see [29] above); and

(b) caused the first plaintiff to take steps to set up a sheet board plant despite the fact that doing so had not been approved by the first plaintiff's directors.

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232 SOC at para 31; PCS at paras 249 and 258.

235 I do not accept that the defendant breached either his duty of diligence or his fiduciary duties to the first plaintiff.

236 First, I accept that the defendant did apply the RMB 30m for the purposes set out in the January 2019 Email. It is undisputed that the second plaintiff (a) repaid AMBDG the sum of RMB 10m for the deposit that AMBDG had paid to BHS; and (b) paid Huizhou SJ the sum of RMB 5m as a deposit for an automation system required for a sheet board plant.[233] I have also found that the RMB 14m advanced to Mr Li was applied towards setting up a sheet board plant. This is broadly consistent with the January 2019 Email. In that email, the defendant said that RMB 10m was required as a deposit for the purchase of land in Huizhou and RMB 5m was required for "some minor expenses" for the second plaintiff.

237 Second, I have found at [159] and [177] above that the first plaintiff's directors approved the steps which the defendant took to set up a sheet board plant.

238 Third, the defendant did no act as against the *first* plaintiff which was a breach of his duty of diligence to the first plaintiff. To the extent that a loan agreement – as opposed to an escrow, custody or other similar arrangement – was unreasonably inadequate to protect the second plaintiff's interests, the proper plaintiff for any such claim is the second plaintiff and only the second plaintiff.

239 Therefore, I find that the defendant did not breach either the duty of diligence or the fiduciary duties that he owed to the first plaintiff under BVI

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233 SBS AEIC at paras 134(b) and 134(c) (1 BAEIC 78).

law. There is therefore no unlawful act on which the *first* plaintiff can base a claim in unlawful means conspiracy.

The second plaintiff

240 The second plaintiff's claim in unlawful means conspiracy also fails.

241 For the reasons I set out at [242]–[247] below, I find that the second plaintiff has failed to prove that the defendant acted with any intention to cause it loss.

Both plaintiffs' claim in lawful means conspiracy

242 Both plaintiffs' claims against the defendant in lawful means conspiracy must fail.

243 I have already found that the defendant caused the second plaintiff to enter into the loan agreements and to advance RMB 14m to Mr Li as a step in setting up a sheet board plant and not for any collateral purpose. Implicit in that finding is a finding that the first defendant acted with the predominant intention of benefitting the Group and not of causing loss to either plaintiff. That finding excludes any possibility of finding that the defendant caused the second plaintiff to enter into the loan agreements with the predominant intention of causing loss to either of the plaintiffs.

244 Two further features of this case support my finding that the defendant did not have the predominant intention of causing loss to either plaintiff. First, the defendant made no attempt to conceal the loans. The loans were not a secret within the Group.[234] It is undisputed that Mr Lock witnessed the first transfer of

[234] Transcript, 21 July 2022 at p 49 lines 21–25.

RMB 10m from the second plaintiff to Mr Li on 15 January 2019.[235] Moreover, the advance is contemporaneously recorded in the second plaintiff's bank statements[236] and the loan is contemporaneously recorded in the second plaintiff's management reports.[237] Second, the defendant has an interest in at least 20% of the shares in the first plaintiff through Caldicott. It is not part of the plaintiffs' case that the defendant derived any personal gain from causing the second plaintiff to advance RMB 14m to Mr Li. Therefore, any loss that he intended to cause to the first plaintiff would rebound as to at least 20% upon himself. For these two additional reasons, I find that the plaintiffs' case that the defendant acted with any intention, predominant or otherwise, of causing loss to either of the plaintiffs to be contrary to the inherent probabilities.

245 The plaintiff submits that the defendant incorporated China HX and HK Xinlong in May 2019 in furtherance of his conspiracy with Mr Li.[238] The defendant's evidence is that he incorporated China HX and HK Xinlong at Mr Li's suggestion as an alternative method to acquire land in the PRC for a sheet board plant. The defendant claims that Mr Li suggested that using a foreign owned company, like HK Xinlong, to apply for land from the local government to build an industrial park would lend weight to the application.[239] The plaintiffs submit, however, that this explanation does not make sense because the first plaintiff and AMBHK are also foreign-owned companies. If the defendant's

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235 PL at para 65 (1 BAEIC 305).

236 5 CB 3641–3642; Transcript, 21 July 2022 at p 48 line 22 to p 49 line 25.

237 13 AB 9433–9434.

238 CWS at para 146.

239 CCK AEIC at para 144 (1 BAEIC 399–400).

evidence is true, they could equally have been used to lend weight to an application for land from the local government.[240]

246 Having regard to all the facts, I am unable to conclude that the defendant incorporated China HX and HK Xinlong in furtherance of a conspiracy with Mr Li. While the defendant *could* have used the first plaintiff or AMBHK to apply for land from the local government instead, this possibility does not warrant the inference that China HX and HK Xinlong were *not* incorporated for this purpose.

247 The plaintiffs also rely on the defendant's insistence on deregistering the second plaintiff with unseemly haste after executing the loan agreements. This, they say, was the defendant's attempt to cover up his wrongdoing by ensuring that the second plaintiff could not take any steps to recover the RMB 14m from Mr Li.[241] I do not accept this submission. Mr Ching knew about the defendant's intention to deregister the second plaintiff and worked with the defendant to implement it. On 30 May 2019, the defendant and Mr Ching discussed the deregistration of the second plaintiff and Huizhou SJ on WeChat. During the exchange, Mr Ching advised the defendant that the second plaintiff had to agree with its debtors to assign "all the loan and investment matters between the original Huizhou Company and any person or company" to a new company before deregistration.[242] Mr Ching testified that he was referring to other loan agreements, including a RMB 5m loan that the second plaintiff had given to Huizhou SJ.[243] However, considering the surrounding context and Mr Ching's

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240 PRS at para 126.

241 PCS at para 307.

242 5 CB 3230.

243 PRS at para 132(a); Transcript, 20 July 2022 at p 12 lines 19–23.

choice of words as "between the original Huizhou Company *and any person or company*", I accept that Mr Ching *also* had in mind the loan agreements with Mr Li. There is no evidence of other loans the second plaintiff had with other natural persons. This further reinforces my view that the loan agreements were not a step in a conspiracy, but part of setting up a sheet plant business.

Conclusion on conspiracy

248 Having regard to all the evidence, I dismiss both plaintiffs' claims against the defendant in both varieties of the tort of conspiracy. It appears to me that the plaintiffs' case theory of a conspiracy is nothing but a conspiracy theory of a case.

Relief

249 I now turn to consider the relief that the second plaintiff is entitled to as a result of the defendant's breach of his duty of diligence to the second plaintiff. That is the only claim in which I have found the defendant liable to either plaintiff.

250 The plaintiffs submit that the defendant should be ordered to pay damages to the second plaintiff in the sum of: (a) RMB 14m being the amount irrecoverable from Mr Li by reason of the defendant's breach of duty; (b) RMB 1.26m being the interest due but unpaid under the loan agreements as at 30 September 2022; and (c) RMB 5.77m being expenses incurred to investigate and mitigate the effects of the defendant's wrongful acts.[244] The plaintiffs also ask for an order that the defendant account to the second plaintiff for the sum of RMB 14m and all profits he has earned with that money, and pay to the second

[244] PCS at para 275.

plaintiff all sums found to be due to the second plaintiff upon taking the account.[245]

251 There is no dispute that the defendant's breach of his duty of diligence caused the second plaintiff to suffer loss of RMB 14m, being the sum advanced to Mr Li under the loan agreements. I have also found that there is no basis on which to reduce the second plaintiff's damages by reason of a failure to take reasonable steps to mitigate its loss. The second plaintiff is therefore entitled to judgment against the defendant for the sum of RMB 14m.

252 I now consider the second plaintiff's claim for the interest and the investigation expenses.

Interest on the loans amounting to RMB 1.26m

253 The defendant submits that the second plaintiff is not entitled to recover the RMB 1.26m in interest due but unpaid under the loan agreements because that is a form of special damage and the second plaintiff failed to plead it in its statement of claim as the rules of pleading require.[246] The first time that the plaintiff has ever advanced a claim for the unpaid interest was in the plaintiff's written closing submissions.[247]

254 The first point I make is that I have found the defendant liable to the second plaintiff for a wrong and not for a breach of contract or for a breach of the duty of fidelity. The defendant's breach of his duty of diligence renders him

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245 PCS at para 276.

246 Defendant's Reply Closing Submissions dated 16 November 2022 ("DRS") at para 168.

247 DRS at para 169; PCS at para 275.

liable to put the second plaintiff in the position it would have been in if that breach of duty had never occurred. The defendant is not liable to put the second plaintiff in the position it would have been in if the defendant had, in breach of his duty of diligence, nevertheless caused the second plaintiff to enter into the loan agreements with Mr Li *and* if Mr Li had performed his obligation under the loan agreements to pay interest to the second plaintiff at 3% per annum. In my view, therefore, the defendant's only liability to the second plaintiff is to compensate it for the actual loss it has suffered, and not to compensate it for any benefit under the loan agreements that it expected to receive from Mr Li but has failed to receive. The defendant's breach of his duty of diligence to the second plaintiff does not render him a guarantor to the second plaintiff of Mr Li's obligations under the loan agreements.

255 This result is clear from considering the second plaintiff's case against the defendant more closely. The second plaintiff's case is that the defendant breached his duty of diligence to the second plaintiff by causing the second plaintiff to enter into the loan agreements instead of a escrow, custody or other similar agreement. That raises two alternative counterfactuals to consider in assessing damages: (a) the defendant *not* causing the second plaintiff to enter into any agreement with Mr Li at all; or (b) the defendant causing the second plaintiff to enter into an escrow, custody or other similar agreement with Mr Li. On the first alternative, the second plaintiff would still have the RMB 14m but would have no right to receive interest from Mr Li. The second plaintiff's loss would be simply the RMB 14m. On the second alternative, the result would be the same. If the defendant had caused the second plaintiff to enter into a escrow, custody or other agreement with Mr Li, the second plaintiff would not have put the RMB 14m at Mr Li's unqualified disposal but would have retained control over it. If the RMB 14m was not at Mr Li's unqualified disposal, there would

have been no commercial basis whatsoever for the second plaintiff to receive any interest on the RMB 14m from Mr Li. On the alternative counterfactual too, the second plaintiff would have the RMB 14m but would have no right to receive interest from Mr Li.

256 That suffices in itself to render the RMB 1.26m irrecoverable from the defendant.

257 Further, in the context of an action for breach of a duty of diligence (as opposed to an action for breach of contract or in debt) and given the counterfactuals in this case, I accept that the loss of interest at 3% per annum which the defendant claims it suffered is special damage. Special damage is a type of loss which the law will not presume is the natural or probable consequence of a defendant's wrongful act (*Crest Capital Asia Pte Ltd and others v OUE Lippo Healthcare Ltd (formerly known as International Healthway Corp Ltd) and another and other appeals* [2021] 1 SLR 1337 at [211], citing *The "Shravan"* [1999] 2 SLR(R) 713 at [77]). The defendant's wrongful act in this case is causing the second plaintiff to enter into the loan agreement with Mr Li. Mr Li's breach of his contractual obligation to pay interest under the loan agreements is not a natural or a probable consequence of the defendant's breach of his duty of diligence. The second plaintiff's claim for interest is therefore special damage and ought to have been pleaded in order to avoid taking the defendant by surprise.

258 For both these reasons, I dismiss the plaintiffs' claim to recover the interest of RMB 1.26m.

The investigation expenses

259 I reject the second plaintiff's claim for the RMB 5.77m in investigation expenses. The second plaintiff did not incur the investigation expenses. It cannot therefore recover this alleged loss from the defendant.

260 At trial, Mr Lock testified that these investigation expenses were incurred by AMBDG, the sole shareholder of the second plaintiff.[248] The plaintiffs are bound by this evidence, coming from the plaintiffs' own witness.

261 To support its claim for the investigation expenses, the second plaintiff relies on two directors' resolutions, one passed by the directors of AMBDG and the other by the directors of the second plaintiff. The effect of both resolutions is to record: (a) that AMBDG paid the investigation expenses for and on behalf of the second plaintiff; and (b) that the second plaintiff is to pay the investigation expenses to AMBDG upon recovery.[249]

262 It could be argued that these two directors' resolutions render the second plaintiff subject to an obligation to reimburse AMBDG in the sum of RMB 5.77m. It could be further argued that this legal obligation suffices in law to transform the expenses which AMBDG incurred into a loss which the second plaintiff has suffered, *ie,* a liability to reimburse AMBDG in the amount of RMB 5.77m.

263 I do not accept that these resolutions give the second plaintiff the right to recover the investigation expenses as damages for the defendant's breach of his duty of diligence. I say that for five reasons.

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248 Transcript, 21 July 2022 at p 66 lines 16–18; PL AEIC at para 113 (1 BAEIC 324).

249 PL AEIC at para 113 (1 BAEIC 324); Exhibit PL-55.

264 First, in so far as the plaintiffs argue that the effect of these two resolutions is to transform expenses incurred by AMBDG into a loss suffered by the second plaintiff in the form of a legal obligation to reimburse AMBDG,[250] no such obligation is anywhere pleaded. Neither can the plaintiffs rely on Mr Lock's affidavit of evidence in chief as a backdoor pleading (*Tuitiongenius Pte Ltd v Toh Yew Keat and another* [2021] 1 SLR 231 at [67]). This is not a mere technicality. The second plaintiff's failure to plead that it suffered loss in the form of an obligation to reimburse AMBDG for these expenses deprived the defendant of the opportunity to cross-examine the plaintiffs' witnesses on the existence and scope of this alleged obligation.

265 Second, even on the plaintiffs' own case, the effect of the resolutions is not to create an immediate obligation, binding on the second plaintiff, to reimburse AMBDG in the sum of RMB 5.77m. The only effect of the resolutions is to create a conditional obligation: one which will bind the second plaintiff if and only if the second plaintiff succeeds in recovering RMB 5.77m from the defendant. Given the conditionality of this obligation, it is apparent that even today, the judgment date, the second plaintiff is <u>not</u> obliged to reimburse AMBDG in the sum of RMB 5.77m. On the clear wording of the resolution, the second plaintiff will become obliged to do so only if it recovers that sum from the defendant in this action. But it can recover that sum from the defendant in this action only if it is legally obliged to reimburse AMBDG in that sum. There is no way to break the circularity. The resolutions therefore do not have the effect of transforming expenses incurred by AMBDG into a loss suffered by the second plaintiff in the form of an obligation to reimburse AMDG for those expenses.

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250 PRS at para 85.

266 Third, the two resolutions were passed in June 2021. The second plaintiff commenced this action in March 2020.[251] Even taking the second plaintiff's case at its highest and assuming that the resolutions created an immediate and binding legal obligation on the second plaintiff to reimburse AMBDG in the sum of RMB 5.77m in June 2021, it could not have been subject to any such obligation when the second plaintiff commenced this action in March 2020. AMBDG was the only proper plaintiff to seek to recover the RMB 5.77m in March 2020.

267 Fourth, it is unclear what proportion of the investigation expenses were expenses that AMBDG incurred on behalf of the second plaintiff. The breakdown of the investigation expenses shows that the RMB 5.77m includes, among other expenses, professional and operational expenses "of AMBDG's subsidiaries".[252] It is undisputed that the second plaintiff is not AMBDG's sole subsidiary.[253] These expenses may well have been incurred on behalf of other subsidiaries of AMBDG, not on behalf of the second plaintiff. It is the second plaintiff's burden to prove this.

268 Fifth, the plaintiffs seek to rely on the second plaintiff's income statement for 2019 ("the Income Statement") to support this claim.[254] I received the Income Statement by way of a supplemental affidavit of evidence in chief as part of Mr Lock's evidence in chief.[255]

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251 Exhibit PL-56; Writ of Summons filed in HC/S 233/2020 on 13 March 2020.

252 PL AEIC at para 112.

253 SBS at para 4.

254 18 AB 12915; 17 AB 12408.

255 Transcript, 21 July 2022 at p 12 line 25 to p 13 line 15.

269 The Income Statement does not assist the plaintiffs. It does not show that the second plaintiff can be said to have incurred the investigation expenses by having reimbursed AMBDG or by having come under an immediate and unqualified obligation to do so at any time, and in any event before the second plaintiff commenced this action.

270 For all of the foregoing reasons, I find that any right to recover the investigation expenses from the defendant lies with AMBDG and not with the second plaintiff. The second plaintiff's claim to recover the investigation expenses must be dismissed.

Account of profits

271 The second plaintiff's claim for an account of profits requires a finding that the RMB 14m was in fact paid to the defendant and his associates.[256]

272 I have declined to make any such finding. The second plaintiff's claim for an account of profits must also dismissed.

Conclusion

273 For all of the foregoing reasons, I find that the plaintiffs have proven that the defendant breached his duty of diligence to the second plaintiff and that the second plaintiff is entitled to enter judgment against the defendant in the sum of RMB 14m in damages. That sum will carry interest at the usual rate of 5.33% per annum from the date of the writ in this action to the present date.

274 All of the plaintiffs' other claims against the defendant have been dismissed.

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[256] PCS at para 276.

275 I will now hear from the parties on two issues: (a) the form of the judgment to be entered against the defendant; and (b) the issue of costs.

Vinodh Coomaraswamy
Judge of the High Court

Cavinder Bull SC, Daniel Cai, Lea Woon Yee, Chua Xyn Yee and Nicholas Chng (Drew & Napier LLC) for the plaintiffs;
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