Dynasty Line Ltd (in liquidation) *v* Sukamto Sia and another [2015] SGHC 286

Case Number	: Suit No 256 of 2010
Decision Date	: 06 November 2015
Tribunal/Court	: High Court
Coram	: Lai Siu Chiu SJ
Counsel Name(s)	: Philip Jeyaretnam SC (instructed) and Andrea Gan (Rodyk & Davidson LLP) Siraj Omar and Alexander Lee (Premier Law LLC) for the plaintiff; Alvin Yeo SC, Joy Tan, Adeline Ong, Yin Juon Qiang (WongPartnership LLP) for the second defendant.
Parties	: Dynasty Line Ltd (in liquidation) — Sukamto Sia — Lee Howe Yong

Damages – Computation

Equity – Breach of fiduciary duty – Causation

Equity – Breach of fiduciary duty – Joint and several liability

Evidence – Admissibility of evidence – Foreign law

Civil Procedure – Proof of foreign law – Presumption of similarity of laws

Damages – Interest

Insolvency Law – Administration of insolvent estates

[LawNet Editorial Note: The plaintiff's appeal to this decision in Civil Appeal No 208 of 2015 was allowed in part while the second defendant's appeal in Civil Appeal No 223 of 2015 was dismissed by the Court of Appeal on 9 September 2016. See [2016] SGCA 55.]

6 November 2015

Lai Siu Chiu SJ:

Introduction

1 Dynasty Line Ltd ("Dynasty"), a company incorporated in the British Virgin Islands (BVI), the plaintiff in this action, was the personal investment vehicle of Sukamto Sia ("Sia"). Sia is the first defendant in this action. Together with Lee Howe Yong ("Lee") who is the second defendant in this action, Sia and Lee were the only two directors of Dynasty. Using Dynasty, Sia purchased significant quantities of shares in a company called China Development Corporation Limited ("CDC") from several vendors ("the Vendors"). The CDC shares were fully transferred to Dynasty but Dynasty only paid a fraction of the total purchase price. Dynasty then pledged all the CDC shares to various banks as security for loans to Sia and his associates, who subsequently defaulted on the loans. As a result, the CDC shares were sold by the banks to satisfy the debts owed to them.

2 The Vendors sued Dynasty in Hong Kong for the unpaid balance of the purchase price of the

CDC shares and succeeded. Using the judgment debt, one of the Vendors, Low Tuck Kwong ("Low"), applied for Dynasty to be wound up in the BVI.

3 By way of this action in Suit No 256 of 2010 ("the Suit"), the liquidators of Dynasty sued Sia and Lee for breach of fiduciary duties in pledging away the Shares without due consideration for the interests of Dynasty. The proceedings were bifurcated and the trial on liability took place first before this court. The liquidators' claims in the Suit (and Sia's counterclaim) were dismissed in *Dynasty Line Ltd (in liquidation) v Sia Sukamto* [2013] 4 SLR 253 ("the High Court judgment"). Both the liquidators and Sia appealed against the High Court judgment; Sia's appeal was dismissed but the liquidators' appeal was allowed. The Court of Appeal held in *Dynasty Line Ltd (in liquidation) v Sukamto Sia and another* [2014] 3 SLR 277 ("the CA Judgment") that Sia and Lee were both liable for breaching their fiduciary duties. Having succeeded in establishing liability against them, the liquidators come before this court again to assess the damages due to Dynasty for the two directors' breach of their fiduciary duties ("the Assessment Proceedings").

4 The parties' arguments raised a number of interesting issues regarding rules of causation and liability in equity, chief of which is whether a director can escape liability for a breach of fiduciary duty jointly and simultaneously committed with another director by arguing that had he not committed the breach, the other director would have carried out the wrongful act anyway.

Facts

5 The facts of the Suit have been sufficiently set out in the CA Judgment. I do not propose to repeat them in their entirety, but will instead highlight the salient facts that are germane to the Assessment Proceedings.

6 Sia was the sole shareholder of Dynasty. Lee (a Singaporean who resided in Hong Kong at the material time) was persuaded by Sia to join the latter in his business endeavours in the Chinese and Hong Kong markets. Lee became a co-director of Dynasty together with Sia. [note: 1] In return, Sia promised Lee 20% of Dynasty's profits. [note: 2] For all intents and purposes however, Sia was the moving force behind Dynasty. Most of Dynasty's business decisions were made by Sia alone without Lee's involvement.

7 Sia was interested in purchasing a substantial portion of the shareholding in CDC, a company then listed on the Hong Kong Stock Exchange. [note: 3] Using Dynasty as the investment vehicle, he acquired 29,537,367 shares [note: 4] in CDC ("the Shares") from the Vendors by way of seven separate sale and purchase agreements dated 5 February 1996. Dynasty agreed to pay HK$7.80 per share, [note: 5] giving rise to a total purchase price of HK$230,391,462.60. [note: 6] The Vendors transferred the Shares to Dynasty on or before the intended completion date of 2 May 1996 ("the Completion Date"). However, only a fraction of the purchase price was ultimately paid by Sia. The share acquisition represented 30.9% of CDC's issued share capital. [note: 7]

8 Between April 1996 and November 1997, Dynasty pledged the Shares to various financial institutions as security for loan facilities ("the Pledges") granted not to Dynasty but to Sia and his business associates ("the Borrowers"). Lee was not a recipient of the loan facilities. Details of the Pledges are as follows:

S/N	Date	Number of shares	Name of financial institution

1	23 April 1996	12,032,302	Commerzbank (South East Asia) Limited ("Commerzbank")
2	6 November 1996	5,600,000	Société Générale (Labuan branch)
3	29 August 1997	48,822,700	KG Investments Asia Limited
4	3 November 1997	10,702,625	Creditanstalt Bankverein

9 The Borrowers defaulted on the loans so the above financial institutions sold the Shares and applied the proceeds to satisfy the debts they were owed.

10 On 10 June 1999, the Vendors commenced proceedings in Hong Kong against Dynasty in HCA 9505 of 1999 for the unpaid balance of the purchase price. Dynasty filed a counterclaim, alleging that Low made various misrepresentations to Sia about CDC. On 6 April 2001, the Hong Kong High Court allowed the Vendors' claim and dismissed Dynasty's counterclaim ("the HK Judgment"). Judgment in the sum of HK$254,480,424.88 was awarded against Dynasty, of which HK$166,042,936.79 [note: 8] represented the unpaid balance of the purchase price and HK$88,437,488.09 [note: 9] represented pre-judgment interest.

11 Low commenced liquidation proceedings against Dynasty first in Hong Kong on 27 June 2007. The proceedings were stayed on the ground of *forum non conveniens* on Sia's application. On 29 October 2009, Low applied to the BVI courts for Dynasty to be wound up and succeeded on 22 December 2009. William Tacon and Lauren were appointed as joint liquidators of Dynasty ("the Liquidators").

12 The Liquidators brought the Suit against Sia and Lee for breaches of fiduciary duties under BVI law as directors of Dynasty. They ultimately succeeded before the Court of Appeal. Germane to the Assessment Proceedings are the following findings made in the CA Judgment:

(a) At the time the Pledges were entered into, there were ample grounds for the directors of Dynasty to have concerns that Dynasty would be in a position approaching insolvency if it went ahead with those transactions. Dynasty had significant liabilities at the time the Pledges were entered into. Dynasty had no other means of meeting those liabilities as the Shares were its only asset. By pledging away its sole asset, Dynasty essentially imperilled its ability to satisfy its liabilities. In pledging away the Shares, Sia disregarded the interest of Dynasty's creditors and was therefore in breach of his fiduciary duty as director of Dynasty (at [36] and [39]–[41]).

(b) Lee was also in breach of his fiduciary duty as director of Dynasty. It was incumbent upon Lee to know what the assets and liabilities of Dynasty were. Lee must have been aware of the nature of the pledge granted to Commerzbank ("Commerzbank Pledge") since he signed the documents relating to the pledge. He must at least at that point have made the necessary inquiries as a director of Dynasty. Had he done so, he would have known that Dynasty was pledging a significant portion of the Shares as security for a loan facility to Sia (at [46]–[48]).

(c) However, Lee's liability was only limited to the Commerzbank Pledge as his signature was not found on the subsequent three pledges. There was also no evidence that Lee knew about those pledges (at [49]).

13 In the Assessment Proceedings, Dynasty requested for damages against Sia and Lee to be assessed.

Parties' arguments

14 Sia did not appear at the trial to defend the Assessment Proceedings; only Lee did.

Dynasty's arguments

15 Dynasty's case against Lee can be summarised as follows:

(a) Lee is precluded from re-opening the issue of causation. The Court of Appeal has already determined that Lee's breach caused Dynasty's loss.

(b) Even if the causation issue has not already been determined, the "but-for" test would be satisfied. Lee bears the burden of proving but for the breach, Dynasty would still have suffered the loss and Lee failed to discharge that burden.

(c) The loss suffered by Dynasty should be measured with reference to the share price of HK$5.40 per share. Underlying this valuation is the assumption that but for the pledging away of the Commerzbank shares, Dynasty would have sold that quantity of shares on or around the date of the Commerzbank Pledge and would have used the proceeds of the sale to satisfy the balance payment of the sale and purchase of the Shares.

(d) Pre-liquidation interest on the damages should be awarded. Dynasty agrees that the six-year cap applies to the award of pre-judgment interest. The Hong Kong pre-judgment interest rate should apply.

(e) Post-judgment interest rates should be awarded. The Hong Kong pre-judgment interest rate should apply.

(f) Dynasty's overall debt owed to the Vendors in liquidation is computed by adding the HK Judgment Sum of HK$254,480,424.88 and the six years' pre-liquidation interest sum of HK$138,030,956.35 to the post-liquidation interest sum of HK$114,007,230.35, giving a total sum of HK$506,518,611.58 ("Dynasty's Total Loss"). Dynasty computes the loss resulting from the Commerzbank pledge by multiplying the percentage of the HK Judgment Sum caused by the Commerzbank Pledge (*ie*, 39.13%) by Dynasty's Total Loss, giving a sum of HK$198,200,732.71.

(g) Sia and Lee should be made jointly and severally liable for the loss occasioned by the Commerzbank Pledge. As Sia did not appear to defend the Assessment Proceedings, Dynasty can claim HK$198,200,732.71 from Lee, leaving him to sue Sia for contribution/indemnity.

Lee's arguments

16 Lee's case against Dynasty is as follows:

(a) Causation is not made out on two levels. But for Lee's signing of the Commerzbank Pledge, Sia would still have gone ahead with pledging away the Commerzbank Shares. In any case, the Commerzbank Pledge had nothing to do with Dynasty's debt to the Vendors. The loss was a result of Dynasty's failure to pay the balance purchase price, not Lee's breach.

(b) Even if the "but for" test is satisfied in favour of Dynasty, Dynasty's valuation is calculated on the false premise of Dynasty selling the Commerzbank shares on 23 April 1996, *ie*, the date of the Commerzbank Pledge. Dynasty would not have realised the Commerzbank shares on that date

to satisfy the balance payment for the purchase of the Shares for two reasons. First, Sia was battling one Oei Hong Leong ("Oei") to take control of the board of CDC from February 1996 onwards. It was inconceivable that he would have sold the Commerzbank shares when he needed them to wrest control of CDC from Oei. He would not have sold the Commerzbank shares any earlier than 29 December 1997 when he finally gained control of CDC. Second, Dynasty would not have paid the Vendors, in particular Low, until the date of the HK Judgment of 6 April 2001 because it evidently took the position that it was not liable to make payment.

(c) Even if Dynasty would have sold the Commerzbank shares and applied the proceeds towards the balance payment for the purchase of the Shares in April 1996, Dynasty's valuation methodology is flawed and unreliable.

(d) The award of pre-liquidation interest should be capped at six years, and the applicable interest rate should be the BVI rate of 5%.

(e) Post-liquidation interest should only be awarded if there is a surplus of assets after paying all the claims in Dynasty's liquidation. It is inconceivable that Dynasty would have any surplus assets after distribution to its members, and thus no award in this regard should be made.

(f) Interest should be awarded on a simple and not compound basis.

(g) The court should reduce the amount of interest payable given the prolonged delay in bringing the action against Dynasty's directors.

(h) Sia and Lee should be severally liable for equitable compensation payable.

(i) If Sia and Lee are jointly and severally liable, the *pari passu* value ascribed to the loans made by Sia to Dynasty should be credited as an equitable allowance and deducted from Dynasty's claim against Lee.

Issues

17 The broad, overarching issue is whether Sia and Lee are liable to make equitable compensation for Dynasty's debts owed to the Vendors flowing from the HK Judgment. This raises the following sub-issues:

(a) Should Sia and Lee be jointly and severally liable for Dynasty's loss arising from the Commerzbank Pledge?

(b) Whether a causal nexus exists between Sia's and Lee's breach of fiduciary duties in signing the pledges and Dynasty's debts owed to the Vendors.

(c) If there is a causal nexus, at which date should the Shares be valued to measure the loss suffered by Dynasty?

(d) Should interest be awarded in respect of the losses and if so, at what rate?

(e) If Sia and Lee are jointly and severally liable, should the *pari passu* value ascribed to the loans made by Sia to Dynasty be credited as an equitable allowance and deducted from Dynasty's claim against Lee?

Preliminary observations

18 As a preliminary point, I observe that as Dynasty is a BVI company, the relevant law to be applied in determining whether its directors are liable for breaches of fiduciary duties, and if so to what extent, will be BVI law: *Focus Energy Ltd v Aye Aye Soe* [2009] 1 SLR(R) 1086 at [31]. The content of foreign law is an issue of fact which must be proved. A party who wishes to prove foreign law can do so in two ways: either by adducing the opinion of an expert in foreign law; or by adducing raw sources of foreign law as evidence (*Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [54]). Where foreign law is not proved, the content of the foreign law will be presumed to be the same as the law of the forum (*EFT Holdings, Inc v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 ("*EFT Holdings*") at [58]).

19 Expert testimony was tendered by both Dynasty and Lee to prove BVI law. Both experts agree that the BVI legal system is founded on the English legal system. By virtue of s 11 of the West Indies Associated States Supreme Court (Virgin Islands) Act (Cap 80), English common law and equitable principles are integrated into the BVI legal system. The provision reads as follows:

> The jurisdiction vested in the High Court in civil proceedings, and in probate, divorce, and matrimonial causes, shall be exercised in accordance with the provisions of this Ordinance and any other law in operation in the Territory and rules of court, and where no special provision is therein contained such jurisdiction shall be exercised as nearly as may be in conformity with the law and practice administered for the time being in the High Court of Justice in England.

20 Both experts also agree that the doctrine of judicial precedent applies in the BVI. Decisions emanating from BVI higher courts and from the Privy Council on appeal from BVI courts are binding on BVI lower courts. English decisions are considered as highly persuasive and decisions from other Commonwealth jurisdictions are considered as persuasive.

21 The second point I preface at the outset is that in the course of my analysis, guidance will be drawn from case authorities concerning the breach of trustee's duties, which on the face of it may appear different from the breach of fiduciary duties by directors of a company. While directors of a company and trustees of a trust perform different functions in practice, as a matter of law, they are regarded as persons occupying similar positions where trust and confidence are reposed in them to control assets on behalf of the principal or beneficiary. Equity therefore applies similar standards to both when determining whether fiduciary duty has been breached and if so, the remedies that follow. A number of cases have given effect to this approach. In *Bairstow & Ors v Queens Moat Houses Plc* [2002] BCC 91 at 105, Robert Walker LJ held:

> There is ample authority, spanning well over a century, establishing that although company directors are not strictly speaking trustees, they are in a closely analogous position because of the fiduciary duties which they owe to the company.

22 Similar remarks were made by Nourse LJ in *Duckwari plc v Offerventure Ltd & Anor (No. 2)* [1999] BCC 11 at 17:

> The assets of a company being vested in the company, the directors are not accurately described as trustees of those assets. Nevertheless, they have always been treated as trustees of assets which are in their hands or under their control.
>
> …
>
> 'Although directors are not properly speaking trustees, yet they have always been

considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint stock companies were invented directors have been held liable to make good moneys which they have misapplied upon the same footing as if they were trustees.'

Should Sia and Lee be jointly and severally liable for losses arising from the Commerzbank Pledge?

23 The Commerzbank Pledge was the only pledge signed by Lee out of the four. The subsequent three pledges were executed solely by Sia. Given that the Commerzbank Pledge was executed by both Sia and Lee, the question that arises is whether both of them should be made jointly and severally liable for losses arising from the Commerzbank Pledge. Lee argues that his liability should be several since Sia was the moving force behind Dynasty. He relies on the difference in their levels of culpability in his bid to persuade this court to apportion his liability with that of Sia in the proportion of 33.3% in his favour. The issue is where two directors of a company are in breach of their fiduciary duties, one of whom may be more culpable than the other, should their liability in respect of the loss suffered by the company as a result of their breach be joint and several or several?

24 The starting point is that fiduciaries are liable only for their own breaches of trust (*Townley v Sherborne* (1634) J Bridg 35). However, where several fiduciaries are liable for a breach of their fiduciary duty, they can be made jointly and severally liable. The implication of imposing joint and several liability is that the principal can recover the entire loss suffered by reason of the breach from any one of the fiduciaries.

25 Both parties cited the case of *Re Carriage Co-operative Supply Association* (1884) 27 ChD 322 ("*Re Carriage*") and both accept this case to stand for the proposition that liability will be joint and several where the breach took place in concert or where they jointly participated in the act leading to the breach of fiduciary duty. [note: 10]

26 Guidance can also be drawn from *Bishopsgate Investment Management Ltd v Maxwell (No 2)* [1993] B.C.C. 120 ("*Bishop*"), the facts of which are broadly analogous to the facts in this case. Bishopsgate Investment Management Ltd ("the company") was trustee of the assets of a number of pension schemes for employees of companies controlled by the late Robert Maxwell ("Maxwell"). After the death of Maxwell, it was found that assets worth hundreds of millions of pounds held on behalf of the pension funds had been wrongfully sold or pledged for the benefit of Maxwell's other companies with no consideration given to the company. The company was unable to meet its liabilities to the pension funds and was compulsorily wound up on 4 March 1992. The company commenced proceedings against two of its directors, namely, Ian Maxwell and his brother Kevin, claiming that they were liable to make good the loss caused by a number of specified misappropriations on the ground that they had been caused by the breaches of fiduciary duty owed to the company. The English Court of Appeal held that the two directors who both signed transfers misappropriating assets held on trust were jointly and severally liable for their breaches (per Ralph Gibson LJ at 143). Hoffmann LJ said at 140:

> … If a director chooses to participate in the management of the company and exercises powers on its behalf, he owes a duty to act bona fide in the interests of the company. He must exercise the power solely for the purpose for which it was conferred. To exercise the power for another purpose is a breach of his fiduciary duty. It is no answer that he was under no duty to act in the first place. *Nor can Mr Maxwell be excused on the ground that he blindly followed the lead of his brother Kevin. If one signature was sufficient, the articles would have said so. The company was entitled to have two officers independently decide that it was proper to sign the transfer.* Mr

> Maxwell was in breach of his fiduciary duty because he gave away the company's assets for no consideration to a private family company of which he was a director. This was prima facie a use of his powers as a director for an improper purpose and in my judgment the burden was upon him to demonstrate the propriety of the transaction.
>
> [emphasis added]

27 While *Bishop* was not a case cited by the two law experts, the Court of Appeal in *Pacific Recreation* (at [57]–[60]) observed that foreign court decisions "contained in a book purporting to be a report of the rulings" can be admitted as evidence under s 40 of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA"). *Bishop*, a UK decision, is a foreign court decision that satisfies the admissibility requirements in s 40. Section 40 provides as follows:

> When the court has to form an opinion as to a law of any country, any statement of the law contained in a book purporting to be printed or published under the authority of the government of the country, and to contain any such law, and *any report of a ruling of the courts of the country contained in a book purporting to be a report of the rulings*, is relevant.
>
> [emphasis added]

28 I regard *Bishop* as being representative of the position under English law, and in turn, BVI law. I say this because the principle enunciated by *Bishop* is consonant with the principle that *Re Carriage* stands for – that directors or trustees who jointly participate in perpetrating a breach of fiduciary duty can expect to be made jointly and severally liable for losses suffered as a result of the breach. Indeed, *Bishop* illustrates and fortifies the principle in *Re Carriage* which has been sufficiently proved by the experts, and as such due weight should be accorded to this authority.

29 The imposition of joint and several liability on persons breaching their fiduciary duties is driven by the interest of encouraging trustees and directors to take responsibility for the decisions they make in connection with the control of the property under their care and control. Alastair Hudson, *Equity and Trusts* (Routledge, 7th Ed, 2013) at p 864 observed as follows:

> The reason for all of the trustees being held to be jointly and severally liable for the breach of trust is that to do otherwise would encourage trustees to take no responsibility for the decisions made in connection with their trusteeship. That is, it would be attractive to individual trustees to take no part in the management of the trust so that they could claim later not to have been responsible for any decision or action. It has been held that encouraging trustees to act in this way would be an 'opiate on the consciences of the trustees', whereas it is in the interests of the beneficiaries to have all the trustees taking an active part in the management of the trust so that they exercise control over one another. …

30 Sia and Lee both signed off on the Commerzbank Pledge. Their joint participation gave rise to the Commerzbank Pledge. In my judgment, this factual scenario falls squarely within the principle that *Re Carriage* stands for.

31 Lee made much about Sia being the main perpetrator of the Commerzbank Pledge. He relies on this fact to urge the court to apportion the liability between him and Sia. I am unable to agree with Lee for the simple reason that Lee as well as his BVI law expert, Mr Prudhoe ("Prudhoe"), provided no authority to support his proposition that the court must apportion liability between directors where it is possible to differentiate their levels of culpability. In other words, he has not discharged the burden of proving that his proposition is part of BVI law.

32 If anything, *Bishop* suggests that Lee's proposition is misguided. The English Court of Appeal in *Bishop* found both directors jointly and severally liable notwithstanding the fact that one director was evidently more culpable than the other. On the facts, one director blindly followed the other director in transferring away the company's assets without consideration, just as Lee foolishly trusted Sia when he signed off the Commerzbank Pledge without making inquiries. [note: 11] No meaningful distinction can be drawn between the facts in this case and the facts in *Bishop*. In these premises, their liability in respect of the Commerzbank Pledge would be joint and several. Lee is entitled to seek contribution and/or indemnity from Sia once Dynasty's claim has been satisfied.

Is causation made out in respect of Dynasty's losses arising out of the Commerzbank Pledge?

Did the CA Judgment decide on causation?

33 Before examining the merits of causation, the logically anterior question of whether the issue has already been decided in the CA Judgment merits a brief discussion. Dynasty argues that the CA had found this issue in favour of Dynasty and therefore this court is precluded from re-adjudicating the same issue. In support of this argument, Dynasty draws the court's attention to the Court of Appeal's comment at [72] as follows:

> The damages available to Dynasty to the extent that we have found these are claimable against Sia and Lee for their breaches of fiduciary duty will be assessed by a High Court judge.

Dynasty's argument touches on the doctrine of issue estoppel. The question of whether issue estoppel applies is governed by the law of the forum, which in this case is Singapore law. *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 (recently endorsed by the Court of Appeal in *The Royal Bank of Scotland NV and others v TT International Limited and others* [2015] SGCA 50 at [98]) is the leading authority on this doctrine, in which Menon JC (as he then was) reiterated the four requirements for issue estoppel set out in *Lee Tat Development Pte Ltd v MCST Plan No 301* [2005] 3 SLR(R) 157 as follows:

(a) there must be a final and conclusive judgment on the merits;

(b) that judgment must be of a court of competent jurisdiction;

(c) there must be identity between the parties to the two actions that are being compared; and

(d) there must be an identity of subject matter in the two proceedings.

34 Dynasty has no difficulty meeting requirements (a)-(c). Requirement (d) is where Dynasty's argument fails. The subject matter that the Court of Appeal was tasked to adjudicate is evidently different from the subject matter before this court. The issue before the Court of Appeal was whether Sia and Lee were in "breach" of their fiduciary duties as directors of Dynasty. This is borne out by the header above [15] of the CA Judgment. None of the parties canvassed arguments in respect of causation and the Court of Appeal evidently made no holding or observation whatsoever on causation. It is trite law that the issue of breach is conceptually distinct from the issue of causation. It therefore follows that the Court of Appeal's findings on breach should not preclude a subsequent determination on causation.

Is causation made out?

35 I now move on to discuss whether the breach of fiduciary duty is causally connected to the loss. The parties do not dispute that causation is made out for the remaining three pledges which Sia signed off on his own. Indeed, Lee had no reason to challenge these three pledges as his liability is limited to the Commerzbank Pledge.

36 It is in relation to the Commerzbank Pledge that Lee strenuously argues that causation is not made out. He argues that even if he did not participate in the signing of the Commerzbank Pledge, Sia would have done so on his own accord anyway. This is evidenced by the fact that Sia was able to arrange for the subsequent three pledges – without having to involve Lee. A company resolution executed by Sia on 29 March 1996 authorised himself to pledge CDC shares to Commerzbank. [note: 12] Buttressed by the fact that Sia, as the Court of Appeal found, was the "moving force" behind Dynasty, whether or not Lee supported him in the Commerzbank Pledge was immaterial.

37 The experts on both sides agree that proving a causal connection between the breach of fiduciary duties and the loss suffered by the principal/beneficiary is required before equitable compensation may be recovered. The position in BVI follows that of England insofar as English courts apply the "but for" test to determine whether causation is made out. That the "but for" test is the touchstone for establishing causation in England is borne out by the seminal decision of *Target Holdings Ltd v Redferns* [1996] AC 421, in which Lord Browne-Wilkinson held at 432E as follows:

> … At common law there are two principles fundamental to the award of damages. First, that the defendant's wrongful act must cause the damage complained of. Second, that the plaintiff is to be put 'in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation:' *Livingstone v. Rawyards Coal Co.* (1880) 5 App.Cas. 25, 39, *per* Lord Blackburn. Although, as will appear, in many ways equity approaches liability for making good a breach of trust from a different starting point, *in my judgment those two principles are applicable as much in equity as at common law*. Under both systems liability is fault-based: the defendant is only liable for the consequences of the legal wrong he has done to the plaintiff and to make good the damage caused by such wrong. He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong. The detailed rules of equity as to causation and the quantification of loss differ, at least ostensibly, from those applicable at common law. But the principles underlying both systems are the same. On the assumptions that had to be made in the present case until the factual issues are resolved (i.e. that the transaction would have gone through even if there had been no breach of trust), the result reached by the Court of Appeal does not accord with those principles. Redferns as trustees have been held liable to compensate Target for a loss caused otherwise than by the breach of trust.
>
> [emphasis added]

38 Apart from the "but for" test, there is a stricter alternative rule of causation exemplified in the decision of the Privy Council on appeal from the Supreme Court of Canada in *Brickenden v London Loan & Savings Company of Canada* [1934] 3 DLR 465 ("*Brickenden*"). *Brickenden* is widely-recognised as authority for the proposition that a claim for equitable compensation arising from a breach of fiduciary duty is not premised on proving a causal connection between the breach and the loss (*Quality Assurance Management Asia Pte Ltd v Zhang Qing and others* [2013] 3 SLR 631 at [43]). A fiduciary is liable to the principal/beneficiary even if the loss would have been sustained had the fiduciary not breached his duty. Prudhoe (Lee's BVI law expert), opines that the *Brickenden* rule is not part of BVI law. Dynasty's expert in BVI law, Raymond Folpp ("Folpp") does not controvert this proposition. Therefore, for present purposes, I will apply the "but for" test to determine whether

causation is made out.

39 Is causation made out on the present facts? While Lee's argument that Sia would have signed the Commerzbank Pledge anyway had he not done so is superficially attractive, it wrongly presupposes there being two separate, independent causes when in reality there was only a single cause, which is the Commerzbank Pledge. This is not a case where Sia and Lee had signed a separate pledge by themselves – Lee's assumption that Sia would have signed one is purely *hypothetical*. All we know is that both Sia and Lee penned their signatures on the Commerzbank Pledge document and it was this single document that led to the loss. In this regard, Lord Toulson JSC's astute remarks in the recent UK Supreme Court decision of *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] 3 WLR 1367 is apposite to our discussion: [note: 13]

> 58 This argument has the approval of Edelman J in *Agricultural Land Management Ltd v Jackson (No 2)* [[2014] WASC 102], and there are statements in the authorities cited by him which support that approach, for example, by Lord Halsbury LC in *Magnus v Queensland National Bank* (1888) 37 ChD 466, 472, although the issue in that case was different. The defendant advanced an argument which Bowen LJ, at p 480, likened to a case where:
>
> > "A man knocks me down in Pall Mall, and when I complain that my purse has been taken, the man says, 'Oh, but if I had handed it back again, you would have been robbed over again by somebody else in the adjoining street.'"
>
> It is good sense and good law that if a trustee makes an unauthorised disbursement of trust funds, *it is no defence to a claim by the beneficiary for the trustee to say that if he had not misapplied the funds they would have been stolen by a stranger. In such a case the actual loss has been caused by the trustee. The* ***hypothetical loss*** *which would have otherwise have occurred through the stranger's intervention would have been a differently caused loss, for which that other person would have been liable.* …
>
> [emphasis added in italics and bold italics]

40 Even accepting Lee's argument as it is, there is a further reason why it would fail. Dynasty has shown that but for the Commerzbank Pledge, the loss would not have occurred. The burden is now on Lee to prove that the *hypothetical* situation postulated by him would have happened – that but for his signature, Sia would have signed the Commerzbank Pledge anyway. [note: 14] Lee failed to discharge the burden of proof. While Sia could have executed the Commerzbank Pledge on his own, there is no evidence that he would have done so. Lee did not point to any evidence on the part of Sia saying he would have done it anyway even if Lee was not unwilling. And even if Sia would have done it, could it be that Commerzbank required two signatories for the facility? Unfortunately, Commerzbank was not called to give evidence on this aspect. Without any evidence, the court is not entitled to speculate on what would have happened (John McGhee, *Snell's Equity* (Sweet & Maxwell, 33rd Ed, 2015) at para 7-059). [note: 15] For these reasons, I find sufficient causal link between Lee's breach and Dynasty's loss.

To what extent are Sia and Lee liable for Dynasty's losses in the HK Judgment?

41 Having established causation, the next step of the inquiry is to measure the extent of Dynasty's losses in the HK Judgment caused by the two defendants' respective breaches of fiduciary duties. If Dynasty had not pledged away the Shares, it would probably have sold them to satisfy the balance of the purchase price of the Shares. Viewed from this perspective, Dynasty's loss can thus be

characterised as having lost its ability to reduce its overall indebtedness to the Vendors by selling the Shares.

42 Both Dynasty and Lee are *ad idem* that Dynasty would have sold the Shares had they not been pledged away. The bone of contention centres on the date at which Dynasty would have sold the Shares for this purpose. Dynasty's case is that the shares would have been sold in or around April 1996, the date at which the Pledges were entered into. If Dynasty is correct on this, it submits that the share price valuation of HK$5.40 per share would apply to measure Dynasty's loss. Lee's case is that it was inconceivable that Dynasty would have sold the Shares so early; the more realistic date of sale would be the HK Judgment date of 6 April 2001. If Lee is correct, he submits that the share price valuation of HK$0.557 per share would apply to measure Dynasty's loss.

43 Lee gave two reasons why it was inconceivable for Dynasty to have sold the Commerzbank Shares in April 1996. The first reason was that Sia was trying to gain control of CDC. This was the primary motive behind Sia's purchase of a substantial quantity of CDC shares. His objective was finally achieved only on 29 December 1997 when he assumed the role of Executive Director of CDC. Thus, it made no sense for Dynasty to have sold the Commerzbank Shares before Sia achieved his objective. To substantiate this argument, Lee pointed to an announcement made by CDC dated 8 February 1996, which reads as follows:

> Also on 5th February, 1996, the Directors were informed that Dynasty Line Limited ('Dynasty'), a British Virgin Islands Company owned by Mr Sukamto Sia and Mr Lee Howe Yong had agreed to purchase 29,831,016 shares (representing 30.9% of the Company's issued share capital). In addition, Mr Sukamto Sia already holds a further '290,000' shares (representing 0.3% of the Company's issued shares).
>
> Dynasty has advised it intends to hold the shares it has agreed to purchase as long term investment and does not at present intend to make a general offer for the other shares in the Company.

44 While the contents of the CDC announcement appear to support Lee's contention, it is inadmissible as evidence by reason of being hearsay. The maker of the statement has not been called to attest to the truth of its contents. For the same reason, his reference to articles in the Business Times that similarly describes Sia's attempt to attack CDC's Board of Directors is also inadmissible.

45 What is however admissible are the testimonies of Sia, Lee and Low. At the trial on liability, Sia explained that his primary motivation in purchasing a substantial portion of CDC's shareholding was to take control of the CDC Board of Directors. [note: 16] Consistent with Sia's testimony, Lee also said that Sia invited him to become an Executive Director at CDC, which he accepted, and the plan to achieve that goal was to purchase a controlling stake in CDC. [note: 17] Even Low agreed that Sia "needed to gain control of [CDC]". [note: 18]

46 Despite the share acquisition, Sia failed in his first two attempts to take over CDC's Board of Directors, first on 6 February 1996 and the second time on 30 April 1996. [note: 19] It was only on 29 December 1997 that he finally succeeded. Lee was appointed Chairman of CDC. Sia nominated 7 persons to the board of CDC. Thus, I find it difficult to believe that Sia would have made Dynasty sell off the Commerzbank Shares before 29 December 1997. Dynasty contends that it is inconceivable that Dynasty would hold onto the Commerzbank Shares as that would mean Sia (and Lee) disregarding the interests of Dynasty's creditors, putting them in breach of their fiduciary duties. I am unable to accept Dynasty's argument. Quite the contrary, acting against the interests of Dynasty's

creditors was exactly what Sia and Lee did, as found in the CA Judgment. In hypothesizing what would have transpired had the breach not taken place, a commonsensical view of causation dictates that the question to be answered is not what a reasonable man would have done, but rather what a person *in the position of Sia and Lee* would have done. The question of causation cannot be considered in vacuum, devoid of its relevant context. The inference is drawn based on what the parties in question intended at the material time. Thus, when one appreciates the objective behind the share acquisition, it becomes abundantly clear that Sia would not have made Dynasty sell off the Commerzbank Shares as it represented a substantial portion of Dynasty's portfolio of the Shares.

47 Would Dynasty have sold the Commerzbank Shares immediately after achieving his goal of taking over the CDC board and applied the proceeds of sale towards the balance payment owed to the Vendors? I do not think so. While the balance payment of the Shares was due much earlier on 2 May 1996, the Vendors did not demand for payment until 23 May 1998. Even after Low commenced proceedings in HK against Dynasty for the balance payment, Dynasty actively contested Low's claim, arguing and counterclaiming that the Vendors had misrepresented to Sia about him being able to secure control of the CDC board immediately after purchasing the Shares and about the profitability of CDC. [note: 20] While its counterclaim for misrepresentation was eventually dismissed in the HK Judgment, the fact remains that Dynasty evidently did not wish to pay the Vendors. Further, Sia took the view that there had been a collateral agreement for him to make payment to Low on an *ad hoc* basis. [note: 21] Again, the fact that the Court of Appeal dismissed this defence in the CA Judgment (at [17]–[26]) is distinct from Sia's intention not to pay the Vendors because he thought that a collateral agreement existed. In these circumstances, I find it difficult to believe that Sia would have made Dynasty sell off the Commerzbank Shares any earlier than the date of the HK Judgment of 6 April 2001, even assuming the Commerzbank Pledge never took place.

48 Given my finding that Sia and Dynasty would not have sold the Commerzbank Shares before the date of the HK Judgment of 6 April 2001, it follows that Dynasty's proposed valuation (through its valuation expert, James Searby ("Searby")) must be rejected as it proceeds on the erroneous footing that Dynasty would have sold the Commerzbank Shares in April 1996. How much could a CDC share fetch in the market in April 2001? Lee's expert witness, Tam Chee Chong ("Tam"), opined that the average daily price of the share between 9 April 2001 and 17 April 2001 was HK$0.1136 and the volume-weighted average price ("VWAP") over the same period was HK$0.1092. [note: 22] Using the latter figure, he computed that the estimated value of the Commerzbank Shares would have been HK$6,569,636.89. [note: 23] Neither Dynasty nor Searby submitted on what would have been the share price of CDC shares in April 2001. In fact, not only did Dynasty not challenge Tam's valuation of the share price in April 2001, those figures were accepted as "reasonable valuation" in the Lead Counsel's Statement on Trial Proceedings, [note: 24] a document filed by the lead counsel of both sides before the commencement of the Assessment Proceedings, recording points which are common ground between them. I will therefore use the VWAP of HK$0.1092 to calculate the value of the Shares in the period between 9 April 2001 and 17 April 2001.

49 Using the VWAP of HK$0.1092 as the multiplier, Dynasty's losses arising from the Pledges can be computed as follows after taking into account a 5:1 stock-split implemented by CDC on 25 June 1997:

S/N	Name of financial institution	Number of shares	Value of shares (HK$)
1	Commerzbank (South East Asia) Limited	60,161,510	6,569,636.89
2	Société Générale (Labuan branch)	28,000,000	3,057,600.00

3	KG Investments Asia Limited	244,113,500	26,657,194.20
4	Creditanstalt Bankverein	53,513,125	5,843,633.25

50 Thus, Dynasty's losses arising from the Commerzbank Pledge amounts to HK$6,569,636.89 and its aggregate losses arising from the subsequent three pledges come to HK$35,558,427.45. In arriving at these figures, I have not overlooked the fact that they pale in comparison to the unpaid balance purchase price of HK$166,042,936.79. [note: 25] I am also aware that in addition to the unpaid balance, Dynasty was further made liable by the Hong Kong High Court to pay the Vendors pre-judgment interest of HK$88,437,488.09 in respect of the principal loss. [note: 26] In my view, the disparity stems not from the pledging of the Shares, but rather the failure on the part of Sia and Lee to pay the Vendors in good time.

51 It bears emphasising that the task before me is to assess losses arising from the act of pledging away the Shares only, as that was the only conduct amounting to a breach of fiduciary duty in the CA Judgment. There is no finding in the CA Judgment that Sia and Lee breached their fiduciary duties on the separate count of failing to pay the Vendors in good time. Viewed from this perspective, the remaining losses suffered by Dynasty which were not caused by the pledges themselves are not claimable against Sia and Lee in this action.

52 I mentioned at [50] above that Dynasty was also made liable for pre-judgment interest in respect of the HK Judgment sum. However, the pre-judgment interest in respect of the HK Judgment sum is not claimable against Sia and Lee since the loss caused by them only accrued after the issuance of the HK Judgment. This is so given my finding that Sia and Lee would only have sold the Shares after the delivery of the HK Judgment.

Post-HK Judgment interest

53 On top of the portion of the HK Judgment sum caused by their breach of fiduciary duties, Dynasty is also claiming against Sia and Lee for interest accruing after the issuance of the HK Judgment ("post-judgment interest"). The extent of post-judgment interest claimable against Sia and Lee should be pegged to the extent of post-judgment interest claimable against Dynasty in liquidation, since had the portion of the HK Judgment sum Sia and Lee were liable for been paid immediately, post-judgment interest would not have accrued in respect of that portion and would not be claimable in Dynasty's liquidation.

54 BVI law draws a distinction between interest accruing before the commencement of liquidation ("pre-liquidation interest") and interest accruing after the commencement of liquidation ("post-liquidation interest"). I will therefore analyse these two components separately.

Pre-liquidation interest

Whether pre-liquidation interest is an admissible claim in liquidation and if so what is the applicable rate

55 Under BVI law, pre-liquidation interest is an admissible debt in liquidation if the requirements in either s 153(2) or s 153(3) of the BVI Insolvency Act are satisfied.

Section 153(2) provides as follows:

> If it was *agreed* between the debtor and a creditor that the debt on which the creditor's claim is based would bear interest, the claim may include interest, at the agreed rate, up to the relevant time.
>
> [emphasis added]

This can be contrasted with section 153(3)(a) which states:

> A claim made by a creditor other than one referred to in subsection (2) may include interest up to the relevant time if
>
> > (a) the debt on which the claim is based is due by virtue of a *written instrument* and was payable at a certain time before the relevant time …
>
> [emphasis added]

56 There is no dispute that "relevant time" as defined in s 149(c) means the commencement of a company's liquidation. The dispute is over whether s 153(2) or s 153(3) should apply to the facts.

57 Folpp opines that the relevant provision applicable is s 153(2) of the BVI Insolvency Act and not s 153(3)(a) and that the HK courts' rate of 7.49% per annum as the "agreed rate" under s 153(2) would apply. I disagree. Section 153(2) requires there to be an agreement between the debtor and the creditor that the debt on which the creditor's claim is based would bear interest and that the claim may include interest at the "agreed rate". No such agreement exists on the facts before me. Dynasty's argument would lead to a strained interpretation of the word "agree".

58 The applicable provision is 153(3)(a) of the BVI Insolvency Act. The HK Judgment, as Prudhoe correctly opines, is a "written instrument". Therefore, interest accruing between the date of HK Judgment and the date of commencement of liquidation may be admissible on top of the HK Judgment sum. The applicable interest rate for an interest founded upon s 153(3)(a) is "the court rate" (s 153(4)(a) of the BVI Insolvency Act). The "court rate" is defined in s 2 to mean the rate of interest specified in section 7 of the Judgements Act 1907 (Cap 35). Both experts agree that the interest rate under s 7 of the Judgements Act 1907 is 5% per annum. [note: 27]

Should pre-liquidation interest be discounted for delay in enforcing HK Judgment?

59 Having decided that the Vendors' claim *may* include pre-liquidation interest and that the applicable rate is 5% per annum, the next question is how long should pre-liquidation interest run? Should it run over the entire period between the date of the HK Judgment of 6 April 2001 to the date of commencement of Dynasty's liquidation of 22 December 2009, or should it be discounted to account for the delay in enforcing the HK Judgment against Dynasty?

60 The Vendors did not enforce the HK Judgment against Dynasty immediately. The HK Judgment was rendered on 6 April 2001 and it took Low over six years to commence winding-up proceedings against Dynasty in Hong Kong and a further two years to do so in the BVI. The delay was examined in detail by the CA Judgment as follows:

> 62 On 23 August 2007, Lauren and Kennic Lai Hang Hui were appointed as the Provisional Liquidators of Dynasty pursuant to a petition by Low in HCCW 382 of 2007. Shortly after this, on 27 September 2007, the Provisional Liquidators commenced proceedings on behalf of Dynasty against Sia and Lee in HCA 2057 for, among other things, breaches of fiduciary duties in relation

to the Shares. Sia applied to stay Dynasty's action on the ground that Hong Kong was not the appropriate forum. This application was initially dismissed by the Hong Kong Court of First Instance on 13 June 2008. However, on 25 May 2009, this was reversed by the Hong Kong Court of Appeal. Dynasty's appeal to the Hong Kong Court of Final Appeal in FAMV 39 of 2009 was dismissed on 14 September 2009. On 22 December 2009, Low's application to wind up Dynasty and appoint the Liquidators was granted by the BVI High Court and on 14 April 2010, the Liquidators commenced the present suit.

63 There was a delay of just over six years between April 2001 (when Low obtained judgment in HCA 9505) and August 2007 (when Low commenced winding up proceedings against Dynasty). We do not think that this was so unreasonable a delay given Low's explanation that he had some health issues and financial difficulties, as well as the fact that he would have needed time to: (a) take legal advice on the way forward and as to whether he needed also to commence proceedings against Sia and Lee for breach of fiduciary duties; (b) commence winding up proceedings against Dynasty; (c) select liquidators; and (d) settle his personal and financial issues. As for the delay between August 2007 and April 2010 (when the present suit was commenced), this was mainly due to the protracted litigation (including two rounds of appeals) over Sia's application to stay the proceedings in Hong Kong on the ground of *forum non conveniens*.

64 In addition, we do not think that there were any circumstances in this case that made it practically unjust to grant a remedy. While Sia has asserted that the lapse of time has severely prejudiced and impaired his ability to deal with the claims made against him, he has failed to explain exactly how he has been prejudiced by the delay.

61 While the Court of Appeal found that the delay in enforcing the HK Judgment against Dynasty was neither substantial nor prejudicial enough as to invoke the defence of laches, the delay is nevertheless a relevant consideration in determining whether to reduce the pre-liquidation interest claimable against Dynasty in liquidation, and in turn, against Sia and Lee.

62 No evidence was led by the law experts of both sides to prove the content of BVI law on this issue. Where foreign law is not proved in respect of an issue, Singapore courts will generally apply Singapore law (*EFT Holdings* at [58]; *Dicey, Morris and Collins, The Conflicts of Laws (Sweet & Maxwell, 15th Ed, 2012)* at paras 9-002 to 9-004; *Goh Chok Tong v Tang Liang Hong* [1997] 1 SLR(R) 811 at [84]). The presumption that Singapore law applies rests on the notion that the court lacks knowledge of foreign law and must be informed of its content by evidence from the parties (*EFT Holdings* at [57]). The exception is where it is unjust or inconvenient to apply Singapore law to resolve the dispute. As the Court of Appeal in *D'Oz International Pte Ltd v PSB Corp Pte Ltd and another appeal* [2010] 3 SLR 267 explained at [25]:

25 Turning to the second issue which pertains to the presumption of similarity of laws, it is only necessary to observe that the presumption is a rule of convenience which the courts may resort to unless it is unjust and inconvenient to do so. It is a rule that is not free from exceptions. Whether a common law court will presume foreign law to be the same as the *lex fori* in any case where foreign law is not pleaded or not proved (if pleaded) depends on the circumstances of each case. The question that is ordinarily asked when the presumption is invoked is whether, in the circumstances of the case, it would be unjust to apply it against a party so as to make him liable on a claim subject to foreign law when the claimant has failed to prove what the foreign law is and how liability is established under that foreign law (see Richard Fentiman,*Foreign Law in English Courts* (Oxford University Press, 1998) at pp 60–64 and 143–153, cited in *Tamil Nadu Electricity Board v ST-CMS Electric Company Private Ltd* [2008] 1 Lloyd's Rep 93 at 113). In the

New South Wales Court of Appeal case of *Damberg v Damberg* (2001) 52 NSWLR 492, Heydon JA examined extensively, *inter alia*, case law from Australia, England, Canada and South Africa, and academic writings on the subject, and concluded that "[t]o state exhaustively when a court would not assume that the unproved provisions of foreign law are identical with those of the *lex fori* would be a difficult task" (at 522). In the present case, it is just as well that it is not necessary for me to undertake this arduous task.

63 While neither party tendered authorities directly on point, the court's discretion in awarding interest under s 12(1) of the Civil Law Act (Cap 43, 1999 Rev Ed) may provide an instructive parallel as to whether interest is an admissible claim in liquidation. In *Robertson Quay Investment Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR(R) 623 ("*Robertson Quay*"), the plaintiff who commenced the action more than five years after its loss accrued with no good reason was awarded pre-judgment interest not from the date when the cause of action arose but rather the date of service of the statement of claim. Although *Robertson Quay* is a case on pre-judgment interest, the principle that emerges from the decision is nevertheless relevant for present purposes. A creditor who delays enforcing its debt against a company should not be able to claim the full amount of interest accruing during the period of delay. This is all the more so where Low's delay in initiating the winding up proceedings caused the pre-liquidation interest against Dynasty, and in turn Sia and Lee, to snowball. Had Low enforced the HK Judgment against Dynasty earlier, Dynasty would have been put into liquidation at a much earlier date, and the pre-liquidation interest accrued would have been of a smaller sum.

64 In these premises, I find that the appropriate period for which interest is claimable is four years even though more than eight years have elapsed between the date of the HK Judgment and the commencement of Dynasty's liquidation in BVI. Both parties agree that interest awarded should be on a simple and not compound basis. [note: 28]

Post-liquidation interest

65 Both parties do not controvert the basic proposition that post-liquidation interest is admissible in the event that there is a surplus of assets after paying all claims in the liquidation of a company (s 215(2) of the BVI Insolvency Act). The dispute is over whether there would in fact be a surplus. Lee's case is that there would in practical terms be no surplus because if so a company would not be insolvent to begin with.

66 I acknowledge Lee's point but in my view, while Dynasty's chances of having a surplus are slim, the fact remains that there is a statutory provision providing a contingent claim to post-liquidation interest. Therefore, post-liquidation interest should also be claimable against Sia and Lee in the (unlikely) event that Dynasty has a surplus.

The rule in *VGM Holdings*

67 Sia paid the Vendors a portion of the purchase price in the form of an alleged loan to Dynasty. Relying on this and the fact that Sia and Lee are jointly and severally liable in respect of loss arising from the Commerzbank Pledge, Lee argues that the *pari passu* value of the loan should be set off against his liability towards Dynasty applying the rule in *Re VGM Holdings, Ltd* [1942] Ch 235 ("*Re VGM Holdings*").

68 *Re VGM Holdings* stands for the proposition that a trustee beneficiary (including a director of a company who is also a shareholder or creditor of the company) held liable to pay a sum to his trust fund, and those jointly and severally liable with him, should not be ordered to pay that part of it which would come to him as a beneficiary on the distribution. The rule in *Re VGM Holdings* is qualified

in *Selangor United Rubber Estates Ltd v Cradock (a bankrupt) and Others (No 4)* [1969] 3 All ER 965 ("*Selangor*") to apply only after costs and expenses relating to the litigation which fall on the trust fund have been deducted from the trust fund (*per* Ungoed-Thomas J at 970). The rule in *Re VGM Holdings* is designed to achieve the same result as going through the futile operation of payment to the trust fund in full by the defaulter, followed by payment out to him of that part of the payment to which he is entitled as beneficiary (*Selangor* at 973).

69 It is important to recognise that the rule in *Re VGM Holdings* is merely a rule of convenience. It is not a mandatory, blanket rule that the court must immutably apply in every case whenever a director of a company is found to have occupied a separate role as the company's beneficiary or creditor. [note: 29] The court has the overriding discretion whether to apply the rule in each given case. In deciding whether to apply the rule, impracticalities or uncertainties that may arise from an application of the rule are relevant considerations. On the present facts, the rule does not avail itself to Lee because it is not clear whether Sia's payment towards the purchase price constitutes a loan to Dynasty or part of his equity in Dynasty. While Dynasty pleaded that it had borrowed from Sia to make part payment of the purchase price, the quantum of the loan remains unresolved. [note: 30] To that extent, Sia's potential claim may not even be fully provable in liquidation.

70 There are also issues of practicality. Where the costs of liquidation proceedings are unclear, as is the case here, it would be impractical to set off Sia's share of a *pari passu* distribution of Dynasty's assets against his alleged loan to Dynasty. Ungoed-Thomas J's following remarks in *Selangor* (at 973) aptly bear out this point:

> An anticipatory payment to himself on account of his share … would be subject to adjustment in the final accounts in the impending distribution, so as to make him bear the same fraction of the total costs and expenses falling on the fund as his share (including the amounts treated as paid in anticipation) is of the trust fund. *If the fund is not held for distribution in which such adjustment can be made then, as I have said, the VGM principle does not apply.*
>
> [emphasis added]

71 In these circumstances, I prefer not to apply the rule in *Re VGM Holdings* in favour of Lee.

Conclusion

72 For the above reasons, Sia's and Lee's joint and several liability in respect of the Commerzbank Pledge is assessed at HK$6,569,636.89. Lee's liability does not extend to the remaining three pledges. Sia's liability in respect of the three pledges is assessed at HK$35,558,427.45. Pre-liquidation interest of 5% per annum over four years is awarded in respect of both sums. Post-liquidation interest will only be claimable if Dynasty has surplus of assets after paying all claims in its liquidation.

73 By virtue of O 35 r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), this judgment is also against Sia notwithstanding his absence from the Assessment Proceedings.

74 I will hear the parties on costs on a date to be fixed by the Registrar.

[note: 1] NE 23/01/13, p 702 at 11 AB 5641 (lines 12-15).

[note: 2] The CA Judgment at [4].

[note: 3] NE 21 Jan 2013; p 345 (lines 21-23), 10 AB 5281.

[note: 4] Statement of Claim (Amendment No. 1) ("SOC") at para 9.

[note: 5] 2nd Defendant's Bundle of Documents ("2DBD") at 3, 10, 16, 22, 29, 36 and 43.

[note: 6] High Court Judgment at [5].

[note: 7] NE 23 Jan 2013, p 671 (lines 8-22), 11 AB 5609.

[note: 8] HK Judgment at 1 AB 93.

[note: 9] HK Judgment at 1 AB 93.

[note: 10] Prudhoe's report at para 85.

[note: 11] NE 31 Jan 2013, pp 1069-1070, 11 AB 6011-6012.

[note: 12] 1 AB 18.

[note: 13] NE 23 July 2015, p 361 (lines 4-25) to p 362 (lines 1-12).

[note: 14] NE 22 July 2015, p 261 (line 25) to p 262 (line 1).

[note: 15] Mr Folpp's report at para 76.

[note: 16] NE 23 Jan 2013, p 676 (lines 8-25); p 677 (lines 10-12), 11 AB 5615-5616.

[note: 17] NE 31 Jan 2013, p 1077 (lines 10-16), 11 AB 6019.

[note: 18] NE 21 Jan 2013, p 383 (lines 8-9), 10 AB 5319.

[note: 19] NE 31 Jan 2013, p 1129 (line 25) to p 1130 (lines 1-9), 11 AB 6071-6072.

[note: 20] NE 24 Jan 2013, p 738 (lines 10-17), 11 AB 5678.

[note: 21] NE 24 Jan 2013, p 791 (lines 21-23), 11 AB 5731.

[note: 22] Tam Chee Chong's ("Mr Tam") report at 25, 9 AB 4296.

[note: 23] Mr Tam's report at 27, 9 AB 4298.

[note: 24] Lead Counsel's Statement on Trial Proceedings at Part III titled "Common Ground between Parties ("Non-issues") (Agreed as between [Dynasty] and [Lee]), s/n 2.

[note: 25] HK Judgment at 1 AB 93.

[note: 26] HK Judgment at 1 AB 93.

[note: 27] Mr Prudhoe's report at para 182 and Mr Folpp's report at para 85.

[note: 28] Dynasty's subs at para 99; Lee's subs at p 74.

[note: 29] NE 22 July 2015, p 243 (lines 8-9).

[note: 30] SOC at para 14(a).