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

[2024] SGHC 196

Originating Summons (Bankruptcy) No 14 of 2024

In the matter of the Bankruptcy Act (Cap 20, 2009 Rev Ed)

Between

Medora Xerxes Jamshid (in his capacity as the private trustee in bankruptcy of Tan Han Meng)

… *Applicant*

And

Planar One & Associates Pte Ltd (in liquidation)

… *Non-party*

GROUNDS OF DECISION

[Insolvency Law — Bankruptcy — Trustee in bankruptcy — Application for directions — Section 40(2) Bankruptcy Act (Cap 20, 2009 Rev Ed)
[Insolvency Law — Bankruptcy — Proof of debt — Whether claim against bankrupt for breach of fiduciary duty is a provable debt — Section 87(3) Bankruptcy Act (Cap 20, 2009 Rev Ed)]
[Insolvency Law — Bankruptcy — Proof of debt — Relevant date for valuation of proofs of debt]
[Trusts — Breach of trust — Remedies]
[Equity — Fiduciary relationships — Breach of fiduciary duty — Remedies]

[Equity — Fiduciary relationships — Breach of fiduciary duty — Time of accrual of cause of action for breach of fiduciary duty]
[Equity — Remedies — Account — Whether claim for an account is a claim for a liquidated or unliquidated sum]
[Equity — Remedies — Equitable compensation — Whether claim for equitable compensation is a claim for a liquidated or unliquidated sum]
[Equity — Remedies — Whether remedies for breaches of trust and fiduciary duty are restitutionary in character]

TABLE OF CONTENTS

Re Medora Xerxes Jamshid (in his capacity as the private trustee in bankruptcy of Tan Han Meng) (Planar One & Associates Pte Ltd (in liquidation), non-party)

[2024] SGHC 196

General Division of the High Court — Originating Summons (Bankruptcy) No 14 of 2024
Aedit Abdullah J
3 April, 2 May 2024

31 July 2024

Aedit Abdullah J:

1 HC/OSB 14/2024 was an application by Mr Medora Xerxes Jamshid (the "Private Trustee"), in his capacity as the private trustee in bankruptcy of Tan Han Meng ("THM"), for the court to determine certain questions that had arisen in the Private Trustee's administration of THM's estate.

2 Among other issues, this application raised an important question on the administration of bankruptcy estates that, somewhat surprisingly, had never arisen for consideration before the local courts: is a claim against a bankrupt for breach of fiduciary duty a provable debt in bankruptcy? The resolution of this issue requires a detailed consideration of the juridical nature and conceptual structure of such claims, against the backdrop of the applicable statutory framework.

3 Having considered the Private Trustee's submissions, I answered this question in the affirmative. These grounds of decision record my conclusion on this novel issue – and other matters of principle raised by the Private Trustee – and set out my reasons in detail, for the benefit of counsel and practitioners in the field of restructuring and insolvency.

Background to this application

4 THM was adjudicated bankrupt on 26 September 2019.[1] Prior to his bankruptcy, THM was the owner and director of a number of companies in the construction industry under the umbrella of the "Civil Tech" group, including Civil Tech Pte Ltd ("CTPL").[2] In addition, THM was also a director and the ultimate beneficial shareholder of Planar One & Associates Pte Ltd ("POA").[3]

5 CTPL[4] and POA[5] both fell into financial distress and were subsequently placed into compulsory liquidation by Ang Cheng Hock JC on 8 February 2019[6] (see the High Court decision of *Industrial Floor & Systems Pte Ltd v Civil Tech Pte Ltd* [2019] SGHC 50) and Dedar Singh Gill JC on 21 September 2018[7] respectively. As THM had taken on multiple personal guarantees for CTPL's and POA's debts, his default on these guarantees ultimately resulted in his bankruptcy, and the subsequent appointment of the Private Trustee as such.[8]

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1 Affidavit of Xerxes J Medora dated 31 Jan 2024 ("PTIB's Affidavit") at para 6.

2 PTIB's Affidavit at para 7.

3 PTIB's Affidavit at para 9.

4 HC/CWU 270/2018.

5 HC/CWU 203/2018.

6 HC/ORC 1075/2019.

7 HC/ORC 6547/2018.

8 PTIB's Affidavit at para 12.

6 The Private Trustee's application in the present case arose out of a proof of debt lodged in THM's bankruptcy by POA's liquidators for a sum of S$6,565,803.76 on 7 December 2023.[9] This sum represented the net value of money transfers from POA to certain companies in the Civil Tech group which POA's liquidators alleged that THM had procured in breach of his fiduciary duties to POA.[10]

7 On receipt of POA's proof of debt, the Private Trustee assessed that POA had indeed established a clear case of breach of fiduciary duty against THM.[11] The Private Trustee thus responded to POA's liquidators on 12 December 2023 communicating that he was prepared to accept POA's proof of debt in full on a provisional basis, subject to the court's directions on certain issues that were the subject of the present application.[12] The Private Trustee also consulted with the committee of creditors formed in respect of THM's bankruptcy estate, who communicated no objection to the Private Trustee's proposed course of action.[13]

8 At the hearing, counsel for the Private Trustee, Mr Chew Xiang ("Mr Chew"), explained that the Private Trustee had determined that an application to court was appropriate and necessary in light of the High Court's decision in *Wang Aifeng v Sunmax Global Capital Fund 1 Pte Ltd and another* [2023] 3 SLR 1604 ("*Wang Aifeng*"). Specifically, in that case, the court had cited with apparent approval a statement made by the English High Court in *Bristol &*

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9 PTIB's Affidavit at para 19.

10 PTIB's Affidavit at paras 14(b) and 20.

11 PTIB's Affidavit at para 20.

12 PTIB's Affidavit at para 22.

13 PTIB's Affidavit at para 24.

West Building Society v Trustee of the property of Back and another (bankrupts) [1998] 1 BCLC 485 ("*Bristol & West Building*") that a breach of trust claim "could only be resolved by court proceedings and [was] quite inappropriate to be decided by way of proof of debt in the bankruptcy proceedings" (see *Wang Aifeng* at [20(c)], citing *Bristol & West Building* at 490). This statement apparently caused the Private Trustee some concern and reservation as to whether it was permissible for him to accept POA's proof of debt in respect of a claim against THM for breach of fiduciary duty.

The present application

9 In the present application, the Private Trustee primarily sought the court's determination of two questions (collectively, "the Questions"):

(a) First, whether, in view of *Wang Aifeng*, POA's proof of debt against THM in respect of its claim for breach of fiduciary duty could be accepted by the Private Trustee under the proof of debt process in THM's bankruptcy ("Question 1").

(b) Second, if a positive answer was given to Question 1 above, whether THM's liability to POA for breach of fiduciary duty accrued as of 8 August 2018 (being the date of the final improper transfer of funds from POA to the Civil Tech companies),[14] in the sum of S$6,565,803.76 as claimed by POA in its proof of debt ("Question 2").

10 In the alternative, if the court were to answer Question 1 in the negative, the Private Trustee sought the court's leave, pursuant to s 76(1)(*c*) of the Bankruptcy Act (Cap 20, 2009 Rev Ed) (the "BA"), for POA and its liquidators

[14] PTIB's Affidavit at para 32.

to commence proceedings against THM in respect of POA's claim for breach of fiduciary duty as detailed in POA's proof of debt.[15]

Issues to be determined

11 Question 1 related to the permissibility of accepting and resolving POA's claim against THM for breach of fiduciary duty through the proof of debt regime, as opposed to through separate legal proceedings. In my view, Question 1 could be divided into the following two sub-questions:

(a) whether a claim for breach of fiduciary duty is a provable debt in bankruptcy; and

(b) if so, when a claim for breach of fiduciary duty can be resolved within the proof of debt regime.

12 Question 2 related to the date of the accrual of POA's cause of action against THM, as well as the quantum of POA's claim against THM. As I explain at [89] below, I did not consider Question 2 to be framed with sufficient precision to be answered as-is. Instead, I considered that Question 2 could be reframed and divided into the following two sub-questions, concerning:

(a) the relevant time when a cause of action for breach of fiduciary duty accrues; and

(b) the relevant time for the valuation of a claim for breach of fiduciary duty within the proof of debt regime.

13 However, before examining these issues as framed above, it was necessary to consider whether the court should, in the first place, entertain the

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15 PTIB's Affidavit at para 35.

Private Trustee's application for directions seeking the court's determination of the Questions. I shall address this as a preliminary issue before turning to the Questions (and the respective sub-questions therein) proper.

My decision

Whether the court should hear the Private Trustee's application for directions

The legal basis for the Private Trustee's application

14 I begin with a threshold question: was there a legal basis for the Private Trustee to seek the court's determination of the Questions through the present application?

15 Mr Chew submitted that the Private Trustee's application was made permissible by ss 31 and 36 of the BA.[16] Section 31(1A)(*a*) of the BA provides that "[t]he Official Assignee may apply to the court for directions in relation to any particular matter arising under the bankruptcy". In turn, s 36(1)(*a*) of the BA states that a private trustee in bankruptcy "shall have all the functions and duties of the Official Assignee in relation to the conduct of a bankrupt and the administration of his estate …", while s 36(1)(*b*) of the BA provides that a private trustee "shall exercise all the powers of the Official Assignee".

16 At the risk of sounding pedantic, while I was satisfied that the Private Trustee did have the requisite standing to make the present application, I did not quite agree that ss 31 and 36 of the BA were the correct provisions for the Private Trustee to rely upon. Rather, I considered the correct provision for the Private Trustee to bring this application to be s 40(2) of the BA, which provides

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[16] Applicant's Written Submissions dated 27 March 2024 ("AWS") at para 13.

that "[a] trustee may apply to the court for directions in relation to any particular matter arising under the bankruptcy".

17 The language of s 40(2) of the BA is identical to s 31(1A)(*a*) of the BA, save that the reference to the "Official Assignee" in s 31(1A)(*a*) is substituted with a reference to the "trustee" in s 40(2) of the BA. In my view, notwithstanding that s 36(2) of the BA does provide that any reference in the BA to the "Official Assignee" shall, unless the context otherwise requires, include a reference to a private trustee, the co-existence of ss 31(1A)(*a*) and 40(2) of the BA must necessarily mean that the reference to "Official Assignee" in s 31(1A)(*a*) does not extend to a private trustee; otherwise, s 40(2) of the BA would be rendered otiose and redundant.

18 I note also that these observations are not confined to the BA which has since been repealed. They continue to be of relevance to the current personal bankruptcy regime under the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (the "IRDA"), as ss 31(1A)(*a*) and 40(2) of the BA have been ported over as ss 33(2)(*a*) and 43(2) of the IRDA respectively.

19 The above said, however, I considered the fact that the Private Trustee's application had been brought under the wrong provision (*viz*, s 31(1A)(*a*) of the BA) to be inconsequential given that the correct provision (*viz*, s 40(2) of the BA) was substantively identical. I was thus satisfied in the final analysis that the Private Trustee had a legal basis to bring the present application and proceeded accordingly.

The requirements in an application for directions under s 40(2) of the BA

20 The requirements for the court to grant the directions sought by an insolvency officeholder were recently set out by the High Court in *Yap Cheng*

Ghee Bob (in his capacity as the joint and several interim judicial manager of Envy Asset Management Pte Ltd) and others v Envy Asset Management Pte Ltd and other matters [2024] 4 SLR 746 ("*Bob Yap*"). Although *Bob Yap* was strictly a case involving corporate insolvency officeholders – *viz*, liquidators – seeking directions under s 145(3) of the IRDA, I agreed with Mr Chew that there was no reason why the same principles ought not to apply in the personal bankruptcy context.[17]

21 Following the decision in *Bob Yap*, two requirements had to be satisfied by the Private Trustee (at [17]):

(a) First, the court had to consider whether the Private Trustee could rely on s 40(2) of the BA to obtain the directions sought.

(b) Second, the court had to consider whether the directions sought by the Private Trustee should be granted.

I consider each of these requirements in turn.

Whether the Private Trustee could rely on s 40(2) of the BA to obtain the directions sought

22 In *Bob Yap*, Goh Yihan J considered that the court's power to grant directions sought by an officeholder was largely confined to five classes of cases: (a) guidance to the officeholder on matters of law; (b) questions involving legal procedure (such as whether an officeholder should settle curial proceedings); (c) whether an officeholder should act on his commercial judgment to postpone a sale because he recognises his legal duty ordinarily requires him to reduce the company's assets into cash as soon as possible and

[17] AWS at paras 15–16.

to distribute; (d) where there are two or more competing purchasers for the company's property and the officeholder can see that it may be alleged that he has acted *mala fide* or in an absurd or unreasonable or illegal way; and (e) in general, where the liquidator's decision-making may be subject to criticism and is likely to be contested (especially where the officeholder's decision involves a balancing of the creditors' competing interests) (at [22], citing the Supreme Court of New South Wales decision of *Re AE&E Australia Pty Ltd (in liquidation)* [2017] NSWSC 950).

23 Mr Chew submitted that the Private Trustee's present application fell squarely within the first and last of these categories. First, in framing the Questions for the court's determination, the Liquidator was seeking guidance from the court on issues of law that did not appear to have been settled in the local context. Second, as the quantum of POA's claim against THM was substantial such that it would, if accepted, significantly impact the recovery of THM's other creditors, there was the potential for a decision by the Private Trustee to accept POA's proof of debt to become contested.[18]

24 I accepted Mr Chew's submission. In this regard, I also bore in mind the guidance in the recent Court of Appeal decision of *Kyen Resources Pte Ltd (in compulsory liquidation) and others v Feima International (Hongkong) Ltd (in liquidation) and another matter* [2024] 1 SLR 266 that, if an issue arising before an officeholder is substantially or factually complex, it may be inappropriate for the officeholder to summarily deal with it in the proof of debt adjudication process as opposed to seeking directions from the court on the resolution of the

[18] AWS at para 26.

issue (at [53]).[19] I considered this observation to be applicable to the present case.

Whether the court should grant the directions sought by the Private Trustee

25 In *Bob Yap*, Goh J held that, in determining whether the directions sought by the officeholder should be granted, the relevant question was whether it was advantageous to the liquidation (or bankruptcy) for the court to do so (at [33], citing the Supreme Court of New South Wales decision of *In the matter of Octaviar Limited (in liq) and Octaviar Administration Pty Ltd (in liq)* [2017] NSWSC 1005 at [8]).

26 Mr Chew submitted that it would be advantageous to THM's bankruptcy for the court to determine the Questions framed by the Private Trustee in this application. In this respect, Mr Chew emphasised that a determination as to the legal position by the court prior to the Private Trustee's decision on whether to accept POA's proof of debt would significantly reduce the risk of any subsequent dispute between THM's creditors and the Private Trustee.[20] It was in the interest of THM's creditors that THM's already insufficient assets not be expended on possible satellite litigation down the line challenging the Private Trustee's decision.

27 In addition, Mr Chew pointed to the fact that the Private Trustee had, prior to bringing this application, already laid his suggested course of action before the creditors and faced no objection.[21] This indicated that even if the creditors did not necessarily agree with the Private Trustee's provisional

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19 AWS at para 21.

20 AWS at para 29.

21 AWS at para 27.

acceptance of POA's proof of debt, they could be taken as having supported – or at least, not opposed – the utility of the present application.[22]

28 I was satisfied that the reasons advanced by Mr Chew provided a sufficient basis for the court to exercise its power to grant the directions sought by the Private Trustee. It was clearly in the interests of THM's creditors for the court to provide guidance at this stage as to the legal position *vis-à-vis* the Private Trustee's proposed course of action to accept POA's proof of debt.

29 For these reasons, I agreed with the Private Trustee that the present application for directions had been appropriately brought. I thus turned to consider the two Questions put before the court by the Private Trustee for determination.

Question 1

30 To recapitulate, Question 1 called for a determination on whether POA's claim against THM for breach of fiduciary duty could, in principle, be resolved through the proof of debt regime in light of the apparently adverse view expressed in *Wang Aifeng* (see [8] above). I found that this required me to determine the following two sub-questions (see [11] above):

(a) first, whether a claim for breach of fiduciary duty is a provable debt in bankruptcy; and

(b) second, when a claim for breach of fiduciary duty can be resolved within the proof of debt regime.

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22 PTIB's Affidavit at para 24.

Whether a claim for breach of fiduciary duty is a provable debt in bankruptcy

31 For the reasons set out below, I concluded that a claim for breach of fiduciary duty is a provable debt in bankruptcy.

(1) The proof of debt regime generally

32 It is apposite to start with a brief overview of the proof of debt regime. The relevant provision is s 87 of the BA:

> **Description of debts provable in bankruptcy**
>
> **87.**—(1) Subject to this section and section 90, the following are provable in bankruptcy:
>
> (*a*) any debt or liability to which a bankrupt —
>
> (i) is subject at the date of the bankruptcy order; or
>
> (ii) may become subject before the bankrupt's discharge by reason of any obligation incurred before the date of the bankruptcy order;
>
> (*b*) any interest payable by the bankrupt on any debt or liability referred to in paragraph (*a*) for any period before the date of the bankruptcy order.
>
> …
>
> (3) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, breach of trust, tort or bailment, or an obligation to make restitution, are not provable in bankruptcy.
>
> …

33 It is clear from a plain reading of s 87 that, in order for a claim against a bankrupt to be provable, it must be in the nature of:

(a) a liquidated claim under s 87(1); or

(b) an unliquidated claim arising by reason of one of the following categories of legal event stated in s 87(3):

(i) contract;

(ii) promise;

(iii) breach of trust;

(iv) tort;

(v) bailment; or

(vi) an obligation to make restitution.

34 Thus, whether a claim for breach of fiduciary duty is a provable debt in bankruptcy turns on whether it fits within one of these categories above.

(2) Provability of a claim for breach of fiduciary duty

35 As a starting point, given that this issue has hitherto not been the subject of local consideration, Mr Chew helpfully identified a couple of Australian authorities that had considered the matter.[23] These authorities indicated that there was a general consensus established under Australian law that a claim for breach of fiduciary duty is a provable debt in bankruptcy, but there was a divergence in opinion as to the mechanics supporting this conclusion in so far as different courts had, over the years, found such claims to be provable under different limbs of the equivalent provision to s 87 of the BA under Australian legislation. These different positions were recently outlined in the Supreme Court of Queensland decision of *NGI Savannah Living Communities Pty Ltd v Dunne & Ors* [2023] QSC 273 ("*NGI Savannah*") (at [241]–[278]), and can be shortly summarised as follows:

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[23] Applicant's Letter to Court dated 4 April 2024.

(a) as a liquidated claim under s 87(1) of the BA (*Auto Group Ltd v England* [2008] NSWSC 402 ("*Auto Group*"));

(b) as an unliquidated claim arising by reason of a contract under s 87(3) of the BA (*Auto Group*; *Cummings v Claremont Petroleum NL and another* (1996) 137 ALR 1 ("*Cummings*"); *NGI Savannah*);

(c) as an unliquidated claim arising by reason of an obligation to make restitution under s 87(3) of the BA (*Auto Group*);

(d) as an unliquidated claim arising by reason of a breach of trust under s 87(3) of the BA (*Cummings*; *NGI Savannah*).

36 Mr Chew submitted that Singapore law should, at the very least, adopt the same conclusion as the Australian courts by recognising that a claim for breach of fiduciary duty is a provable debt in bankruptcy. As for the mechanics for reaching this conclusion, he preferred the last of the four options above, namely, to recognise a claim for breach of fiduciary duty as an unliquidated claim arising by reason of a breach of trust under s 87(3) of the BA.[24]

37 Having considered the matter thoroughly, I agreed with Mr Chew's submissions. In the paragraphs that follow, I shall first explain the reasons for my conclusion that a claim for breach of fiduciary duty should be provable as an unliquidated claim arising by reason of a breach of trust under s 87(3) of the BA (see [38]–[49] below), before turning to explain my reasons for preferring this option over the other potential candidates in the Australian authorities set out at [35] above (see [50]–[75] below). Finally, I consider the implications of the High Court's decision in *Wang Aifeng* (see [78]–[80] below).

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[24] Applicant's Letter to Court dated 4 April 2024 at para 6.

(A) UNLIQUIDATED CLAIM ARISING BY REASON OF A BREACH OF TRUST?

38 In my judgment, the close historical linkage between a claim for breach of fiduciary duty and a claim for breach of trust supported the conclusion that, for the purposes of s 87(3) of the BA, a claim for breach of fiduciary duty should be included within the scope of the reference to "breach of trust" in the provision.

39 It is trite that fiduciary relationships and trust relationships are analogous to one another. There is, of course, disagreement between learned commentators as to the correct historical account for the interrelation between these two categories: while some have argued that fiduciary obligation was exported by analogy from trustee-like obligations (see Peter Birks, "The Content of Fiduciary Obligation" (2002) 1 TLI 34 at 36), others have advanced the contrary account that the former preceded the latter (see Joshua Getzler, "Rumford Market and the Genesis of Fiduciary Obligations" in *Mapping the Law: Essays in Memory of Peter Birks* (Andrew Burrows & Lord Rodger of Earlsferry eds) (Oxford University Press, 2006) at pp 590–597). Interesting as these may be, it was unnecessary for the court to resolve this question. What matters is that the two types of relationship are analogous.

40 In the present case, THM was a company director, which is a well-established category of fiduciary obligation (see, *eg*, the English High Court decision of *Ultraframe (UK) Ltd v Fielding and others* [2005] EWHC 1638 (Ch) at [1252]–[1253]). It is particularly clear in the context of company directors that their fiduciary position *vis-à-vis* their companies is analogous to that of a trustee *vis-à-vis* beneficiaries of the trust (see generally, *Company Directors: Duties, Liabilities and Remedies* (Mark Arnold KC ed) (Oxford University Press, 4th Ed, 2024) ("*Company Directors*") at paras 10.18–10.24).

For example, in the English Court of Appeal decision of *In re Lands Allotment Company* [1894] 1 Ch 616 ("*Lands Allotment Co*"), Lindley LJ said that (at 631):

> 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.

In a similar vein, in the English Court of Appeal decision of *J J Harrison (Properties) Ltd v Harrison* [2002] 1 BCLC 162, Chadwick LJ said that "directors owe fiduciary duties to the company in relation to [their] powers and a breach of those duties is treated as a breach of trust" (at [25]).

41 As Chadwick LJ alludes to, one consequence of the analogy between trust and fiduciary relationships is that the remedies for breach of trust are structurally analogous, if not identical, to the remedies for breach of fiduciary duty. Thus, in *In re West of England and South Wales District Bank, ex parte Dale & Co* (1879) 11 Ch D 772, Fry J said as follows (at 778):

> Does it make any difference that instead of trustee and *cestui que trust*, it is a case of fiduciary relationship? What is a fiduciary relationship? It is one in respect of which if a wrong arise, the same remedy exists against the wrong-doer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust*.

42 Although this statement was made over a century ago, it remains the law today. The learned authors of *Underhill and Hayton: Law Relating to Trusts and Trustees* (Paul Matthews *et al* eds) (LexisNexis, 20th Ed, 2022) ("*Underhill and Hayton*") have helpfully identified "two types of compensation claims against trustees", being "substitutive performance claims" and "reparation claims", which they explain as follows (at para 91.11):

(a) *Substitutive performance claims* are claims for a money payment as a substitute for performance of the trustees' obligation to produce trust assets *in specie* when called upon to do so. Claims of this sort are apposite when trust property has been misapplied in an unauthorised transaction, and the amount claimed is the objective value of the property which the trustees should be able to produce.

(b) *Reparation claims* are claims for a money payment to make good the damage caused by a breach of trust, and the amount claimed is measured by reference to the actual loss sustained by the beneficiaries. Claims of this sort are often brought where trustees have carelessly mismanaged trust property, but they lie more generally wherever a trustee has harmed his beneficiaries by committing a breach of duty.

43 Remedies for breach of fiduciary duty follow the same classification of substitutive and reparative claims. Mr Chew referred to the leading decision of the Court of Appeal in *Sim Poh Ping v Winsta Holding Pte Ltd and another and other appeals* [2020] 1 SLR 1199 ("*Sim Poh Ping*"). In that case, the court recognised the same distinction between substitutive monetary awards (which follow a custodial breach of fiduciary duty) and reparative monetary awards (which follow a non-custodial breach of fiduciary duty) (see *Sim Poh Ping* at [125]–[126]).

44 Given that the remedies for breach of fiduciary duty are materially identical to those for breach of trust, it seemed to me to make eminent sense that a claim for breach of fiduciary duty should be a provable debt in bankruptcy in the same way that a claim for breach of trust is. A putative creditor who lodges proof of debt with a trustee in bankruptcy does not *per se* prove his cause of action for breach of fiduciary duty or breach of trust against the bankrupt; rather,

the claimant is proving a monetary sum that represents the remedy that follows from his cause of action. In the absence of a clear indication from the legislature that "breach of trust" in s 87(3) is intended to be read to specifically exclude "breach of fiduciary duty", it would be a rather arbitrary conclusion that, despite being assessed on identical principles, a remedy for breach of trust is a provable debt while a remedy for breach of fiduciary duty is not.

45 Another manifestation of the close analogy between trust and fiduciary relationships, and one that is particularly apposite to the present case, can be found in the law of limitation. It is settled law that, by virtue of a director's trustee-like position, the statutory provisions on limitation for breach of trust apply either directly or by analogy to claims for breach of fiduciary duty against directors (see *Company Directors* at para 19.100). In the UK Supreme Court decision of *Burnden Holdings (UK) Ltd v Fielding and another* [2018] AC 857, Lord Briggs JSC explained the position as follows (at [18]–[19]):

> 18 It is necessary to bear in mind that section 21 [of the UK Limitation Act 1980] is primarily aimed at express trustees, and applicable to company directors by what may fairly be described as a process of analogy. An express trustee, such as a trustee of strict settlement, might or might not from time to time, or indeed at all, be in possession or receipt of the trust property. The property might consist of land in the possession of a tenant for life.
>
> 19 By contrast, in the context of company property, directors are to be treated as being in possession of the trust property from the outset. It is precisely because, under the typical constitution of an English company, the directors are the fiduciary stewards of the company's property, that they are trustees within the meaning of section 21 at all. …

I note, as well, that in *Lands Allotment Co*, in dealing with an argument that a director could not rely on the limitation defence available to trustees, Lindley LJ had emphatically articulated his refusal to "be party to any decision so supremely absurd" (at 631).

46 The approach taken to the limitation statutes provides a clear illustration that the existing law has already recognised as legitimate the taking of a broad interpretation to "breach of trust" in statutory language as inclusive of breach of fiduciary duty. Bearing in mind the policy underlying the bankruptcy regime, I considered that the same approach ought to be taken to s 87(3) of the BA.

47 The *raison d'être* of the bankruptcy regime is to enable a bankrupt to obtain a fresh start. It is consistent with this policy that the scope of provable debts in bankruptcy ought to be read as expansively as possible, as Lord Neuberger of Abbotsbury PSC explained in the UK Supreme Court decision of *In re Nortel GmbH (in administration) and related companies* [2014] AC 209 (at [93]):

> The notion that all possible liabilities within reason should be provable helps achieve equal justice to all creditors and potential creditors in any insolvency, and, in bankruptcy proceedings, helps ensure that the former bankrupt can in due course start afresh. …

48 His Lordship's statement is applicable to the local context and is also borne out by the historical development of s 87(3) of the BA. Prior to the Bankruptcy (Amendment) Act 2015 (Act 21 of 2015), the equivalent provision to s 87(3) that existed at that time had only enumerated three categories of provable unliquidated claims (*viz*, contract, promise and breach of trust). The amendments introduced three new categories of claims that are currently found in s 87(3) (*viz*, tort, bailment and an obligation to make restitution), and in recommending these additions, the Insolvency Law Reform Committee expressly stated that "there is no reason why a claim against an individual … that is valid and enforceable under the general law should not be provable under the insolvency law" (see Ministry of Law, *Report of the Insolvency Law Reform Committee: Final Report* (2013) (Chairperson: Lee Eng Beng SC) at para 22). This statement clearly endorses an inclusionary, rather than exclusionary,

approach to the interpretation of s 87(3) of the BA, which justifies reading "breach of trust" expansively, as has already been done in the context of limitation of actions.

49 For these reasons, I concluded that a claim for breach of fiduciary duty is a provable debt under s 87(3) of the BA as a claim "in the nature of unliquidated damages arising … by reason of a breach of trust".

50 For completeness, I shall go on to explain why I did not agree with the other potential routes to recognising a claim for breach of fiduciary duty as a provable debt that have been charted in the Australian authorities (see [35] above).

(B) LIQUIDATED CLAIM?

51 First, I did not agree that a claim for breach of fiduciary duty should be a provable debt as a liquidated claim under s 87(1) of the BA. The sole authority cited to me that had taken this view was the Supreme Court of New South Wales decision of *Auto Group*. In that case, Bryson AJ held that a claim for breach of fiduciary duty could be characterised as a liquidated claim in equity (at [23]).

52 Central to Bryson AJ's decision was the proposition that a claim for breach of fiduciary duty is in the nature of "equitable debt", which he explained as follows (see *Auto Group* at [4]):

> But Equity has its own approach where there are fraudulent misappropriations of money in breach of trust. The trustee's obligation to make good the breach of trust is treated as "a species of equitable debt": see *Re Vassis: Exparte Leung* (1986) 9 FCR 518 (Burchett J) and texts and authorities cited by Burchett J at 526–527. In my opinion the liability incurred by Mr England for breach of fiduciary duty in misdirecting payments of the plaintiffs' funds is an equitable debt in this case, where the plaintiffs' claim although in form a claim for

> tort damages is in substance a claim for restitution of the misappropriated money, as they do not seek any wider inquiry into the loss.

53 Although Bryson AJ's decision is certainly not the first decision in which the characterisation of a claim for breach of fiduciary duty as a claim for an "equitable debt" has featured (see the English Court of Appeal decision of *Ex parte Adamson, In re Collie* (1878) 8 Ch D 807 at 819), I considered the principal difficulty with this approach to be that it tended to render the express reference to "breach of trust" in s 87(3) of the BA otiose. The "equitable debt" characterisation is equally applicable to both claims for breach of trust and breach of fiduciary duty, and given that the remedies for both types of claim are identical (see [43] above), no distinction could be drawn between the two types of claim to justify categorising breach of fiduciary duty as a liquidated claim while breach of trust is categorised as an unliquidated claim. It makes no sense for the same type of remedy to be classifiable as both a liquidated claim and an unliquidated claim, since both categories are mutually exclusive as a matter of logic.

54 Moreover, I considered that the underlying premise of characterising a claim for breach of fiduciary duty or breach of trust as a "debt" claim required qualification. The House of Lords decision of *Target Holdings Ltd v Redferns (a firm) and another* [1996] 1 AC 421 ("*Target Holdings*") is instructive, as the court there made clear that a claim for breach of trust (and by extension, a claim for breach of fiduciary duty) would remain of an unascertained quantum until liquidated by, and on the date of, the court's judgment (at 437):

> A trustee who wrongly pays away trust money, like a trustee who makes an unauthorised investment, commits a breach of trust and comes under an immediate duty to remedy such breach. If immediate proceedings are brought, the court will make an immediate order requiring restoration to the trust fund of the assets wrongly distributed or, in the case of an

> unauthorised investment, will order the sale of the unauthorised investment and the payment of compensation for any loss suffered. But the fact that there is an accrued cause of action as soon as the breach is committed does not in my judgment mean that the quantum of the compensation payable is ultimately fixed as at the date when the breach occurred. The quantum is fixed at the date of judgment at which date, according to the circumstances then pertaining, the compensation is assessed at the figure then necessary to put the trust estate or the beneficiary back into the position it would have been in had there been no breach. I can see no justification for "stopping the clock" immediately in some cases but not in others: to do so may, as in this case, lead to compensating the trust estate or the beneficiary for a loss which, on the facts known at trial, it has never suffered.

In my view, the notion of "equitable debt" had to be seen in the context of the remedial structure and process for claims for breach of trust or fiduciary duty.

55 Historically, equity approached a trustee's liability for breach of trust through the mechanism of taking an account of the trust (see generally, Matthew Conaglen, "Equitable Compensation for Breach of Trust: Off *Target*" (2016) 40 MULR 126 at 128–146). It has thus often been said that an "account" – save for in the context of the remedy of an account of profits – is not a remedy, but a process in identifying the proper remedy (see the High Court decisions of *Lalwani Shalini Gobind and another v Lalwani Ashok Bherumal* [2017] SGHC 90 at [26] and *Cheong Soh Chin and others v Eng Chiet Shoong and others* [2019] 4 SLR 714 at [74]). It is only after the account is taken, and a discrepancy discovered, that the court may make consequential orders against the trustee to remedy the discrepancy. All this was lucidly explained by Lord Millett NPJ in the leading Hong Kong Court of Final Appeal decision of *Libertarian Investments Ltd v Hall* (2013) HKCFAR 681 ("*Libertarian*") (at [167]–[170]), in the following oft-cited passage (including by the Court of Appeal in *UVJ and others v UVH and others and another appeal* [2020] 2 SLR 336 at [27]) that, once again, merits setting out in full:

167 It is often said that the primary remedy for breach of trust or fiduciary duty is an order for an account, but this is an abbreviated and potentially misleading statement of the true position. In the first place an account is not a remedy for wrong. Trustees and most fiduciaries are accounting parties, and their beneficiaries or principals do not have to prove that there has been a breach of trust or fiduciary duty in order to obtain an order for account. Once the trust or fiduciary relationship is established or conceded the beneficiary or principal is entitled to an account as of right. Although like all equitable remedies an order for an account is discretionary, in making the order the court is not granting a remedy for wrong but enforcing performance of an obligation.

168 In the second place an order for an account does not in itself provide the plaintiff with a remedy; it is merely the first step in the process which enables him to identify and quantify any deficit in the trust fund and seek the appropriate means by which it may be made good. Once the plaintiff has been provided with an account he can falsify and surcharge it. If the account discloses an unauthorised disbursement the plaintiff may falsify it, that is to say ask for the disbursement to be disallowed. This will produce a deficit which the defendant must make good, either *in specie* or in money. Where the defendant is ordered to make good the deficit by the payment of money, the award is sometimes described as the payment of equitable compensation; but it is not compensation for loss but restitutionary or restorative. The amount of the award is measured by the objective value of the property lost determined at the date when the account is taken and with the full benefit of hindsight.

169 But the plaintiff is not bound to ask for the disbursement to be disallowed. He is entitled to ask for an inquiry to discover what the defendant did with the trust money which he misappropriated and whether he dissipated it or invested it, and if he invested it whether he did so as at a profit or a loss. If he dissipated it or invested it at a loss, the plaintiff will naturally have the disbursement disallowed and disclaim any interest in the property in which it was invested by treating it as bought with the defendant's own money. If, however, the defendant invested the money at a profit, the plaintiff is not bound to ask for the disbursement to be disallowed. He can treat it as an authorised disbursement, treat the property in which it has been invested as acquired with trust money, and follow or trace the property and demand that it or its traceable proceeds be restored to the trust *in specie*.

170 If on the other hand the account is shown to be defective because it does not include property which the defendant in breach of his duty failed to obtain for the benefit of the trust,

> the plaintiff can surcharge the account by asking for it to be taken on the basis of 'wilful default', that is to say on the basis that the property should be treated as if the defendant had performed his duty and obtained it for the benefit of the trust. Since *ex hypothesi* the property has not been acquired, the defendant will be ordered to make good the deficiency by the payment of money, and in this case the payment of 'equitable compensation' is akin to the payment of damages as compensation for loss.

56 It is apposite to mention that the "falsification" (based on a common account) and "surcharging" orders (following an account on the basis of wilful default) referred to by Lord Millett above are more archaic expressions of the two categories of "substitutive performance claims" and "reparation claims" set out at [42] above (see *Underhill and Hayton* at para 97.11; Yip Man & Goh Yihan, "Navigating the Maze: Making Sense of Equitable Compensation and Account of Profits for Breach of Fiduciary Duty" (2016) 28 SAcLJ 884 ("*Navigating the Maze*") at paras 40–42).

57 Contextualised into the traditional accounting rules, a claim for "equitable debt" refers to the consequential order that follows the taking of the account (see Lusina Ho, "An Account of Accounts" (2016) 28 SAcLJ 849 ("*An Account of Accounts*") at para 11). Put the other way, prior to the taking of the account, a claim for breach of trust or fiduciary duty would remain a claim for an unliquidated sum, as it is through the account that the process of liquidation or ascertainment occurs. It is thus a contradiction in terms to speak of a claim for an account as a claim for a "liquidated sum", even if the claimant professes to be able to calculate his claim "down to the last penny" (see the English High Court decision of *Dusoruth v Orca Finance UK Ltd (in liquidation)* [2023] 1 All ER (Comm) 1075 at [123]–[124]).

58 To close off, two related points of clarification are apposite. The first relates to the use of the "debt" characterisation by some commentators and

courts as referring only to the substitutive measure of a trustee's or custodial fiduciary's liability pursuant to a falsification order, and not the reparative measure under a surcharging order. It is necessary to appreciate that the use of "debt" in this sense is for a different purpose and meaning than the use of "debt" as a synonym for "a claim for a liquidated sum". In the latter usage, the quality of a "debt" that is being emphasised is that "the process of quantification is already complete", this being the "decisive hallmark of a liquidated claim" (see Ian Fletcher, *The Law of Insolvency* (Sweet & Maxwell, 5th Ed, 2017) at para 6-047). But, in the former usage, the description of a substitutive performance claim as analogous to "debt" is in contradistinction to "damages" as describing a reparation claim, in order to connote that only reparation claims are in the nature of compensation for loss properly so-called, such that the usual rules limiting recoverability of damages – *eg*, doctrines of causation and remoteness of damage – apply to reparation but not substitutive performance claims (see, *eg*, the Supreme Court of Western Australia decision of *Agricultural Land Management Ltd v Jackson and others (No 2)* (2014) 98 ACSR 615 at [334]–[349]; *Navigating the Maze* at para 42).

59 Crucially, however, while a substitutive performance claim is *analogous* to a "debt" by not being subject to rules of causation, remoteness and scope of duty, it is not an *actual* claim for a debt because it is a ultimately a remedy for a wrong that remains unascertained until liquidated by a court order or judgment (see James Edelman, "Equitable Damages" in *Equity Today: 150 Years After the Judicature Reforms* (Ben McFarlane & Steven Elliott eds) (Hart Publishing, 2023) at p 158). This distinction is straightforwardly illustrated by using an unpaid debt as an example. An unpaid creditor may recover arrears by bringing either (a) an action for an agreed sum (which is a claim for a liquidated sum); or (b) a claim for damages for breach of contract (which is a claim for an unliquidated sum). The fact that the quantum of both types of claims might

potentially be the same does not change the fact that the latter is unliquidated prior to the court's pronouncement, in the result that an action for an agreed sum would be provable as a liquidated claim under s 87(1) of the BA, and a claim for damages for breach of contract provable as an unliquidated claim arising by reason of a contract under s 87(3) of the BA.

60 The second point relates to the modern terminology of "equitable compensation" as a catch-all descriptor for monetary awards for breaches of trust and fiduciary duty (see *Sim Poh Ping* at [123]–[126]; *Navigating the Maze* at para 43; *An Account of Accounts* at para 26). Rather than pleading claims for an account and consequential orders, claims for breach of trust and fiduciary duty are now often pleaded as *direct* claims for "equitable compensation" (see Matthew Conaglen, "Judicature and Accounts" in *Equity Today: 150 Years After the Judicature Reforms* (Ben McFarlane & Steven Elliott eds) (Hart Publishing, 2023) ("*Judicature and Accounts*") at pp 131–135). As Patten LJ observed in the English Court of Appeal decision of *Barnett and another v Creggy* [2017] Ch 273 (at [22]):

> … the normal way of proceeding against a trustee would be for the cestui que trust to proceed in the Court of Chancery for an account. This could in appropriate cases take the form of an account on the footing of wilful default but either this or an account in common form would result in the identification of the losses caused to the trust estate by the trustee's breach of duty. An account would not of itself result in a judgment for a recoverable sum against the trustee. After making any necessary allowances it would be necessary to obtain a further judgment for the balance found to be due on the taking of the account. From the 19th century onwards one finds an increasing use of the Court of Chancery's power to entertain actions based on particular breaches of trust for which compensation would be awarded without going through the cumbersome and often extremely lengthy process of taking an account. The modern term for this is equitable compensation but it has its roots in a much older jurisdiction and practice.

61 The point of clarification is that this modern approach of making direct claims for substitutive or reparative compensation (outside of the accounting mechanism) entails only a change in procedure and not substance (see *Judicature and Accounts* at pp 136–137). Even under the modern approach, a claim for breach of trust or fiduciary duty is ascertained by the court's judgment on the trustee or fiduciary's liability. Hence, even on the modern approach, a claim for breach of trust or fiduciary duty would remain an unliquidated claim that is provable in bankruptcy under s 87(3) of the BA.

(C) UNLIQUIDATED CLAIM ARISING BY REASON OF CONTRACT?

62 The Australian authorities have also recognised the possibility that a claim for breach of fiduciary duty can be provable as an unliquidated claim arising by reason of contract. In the High Court of Australia decision of *Cummings*, Brennan CJ, Gaudron and McHugh JJ observed in their joint judgment that "a claim arising from breach of fiduciary duty is classified as a claim arising by reason of contract or breach of trust … the damages for which the judgment was entered against the appellants are a provable debt in their bankruptcies" (at 8).

63 As a preliminary observation, in so far as the court in *Cummings* considered that a claim for breach of fiduciary duty was provable as a breach of trust, this is consistent with the conclusion I have reached above.

64 But, to the extent that the court also considered a claim for breach of fiduciary duty to be characterisable as contractual in nature, I respectfully disagree. This approach appears to be premised on taking an expansive interpretation of the preposition "arising by reason of" in s 87(3), such that it suffices that there is a contractual relationship between the parties, even if the claim is not *per se* based on the contract. In this regard, Mr Chew submitted that

there was no clear reason why "breaches of fiduciary duty arising from contract should be provable, and those without should not be", and that "there is no reason a distinction should be made between directors who have employment or other contracts with their companies and those who do not".[25]

65 I agreed with Mr Chew's submission. Claims against directors for breach of fiduciary duty can be, and are often, brought against persons who are not directors in a formal contractual relationship with the company, such as in the case of *de facto* and shadow directors. In a case where there is a *de jure* director (in a contractual relationship with the company) acting as the catspaw of a shadow director (who has no contractual relationship with the company), it would be a rather arbitrary and unsatisfactory consequence for the company's ability to prove a claim in their respective bankruptcies to turn on the happenstance on whether there is a contractual relationship between them. This would entail a triumph of form over substance.

66 I note that a less ambitious approach was suggested in *Auto Group*, as Bryson AJ considered that the claim for breach of fiduciary duty could "conceivably have been expressed as a claim for breach of contract, relying on an implied contractual obligation of an employee … to act faithfully towards his employer" (at [7]).

67 Although there is no objection in principle to this approach to the extent that it does not attempt to metamorphose an equitable claim for breach of fiduciary duty into a contractual claim, it does not provide a complete solution to the apparent lacuna *vis-à-vis* breach of fiduciary duty claims.

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[25] Applicant's Letter to Court dated 4 April 2024 at para 6.

68 First, the implied term as framed by Bryson AJ – *viz*, a duty "to act faithfully" – is not of the same content as fiduciary obligation. An employee's duty of good faith and fidelity is not the same as a fiduciary duty (see the High Court decision in *Clearlab SG Pte Ltd v Ting Chong Chai and others* [2015] 1 SLR 163 at [280]).

69 Second, and related to the first, the conceptual distinction between a contractual duty of fidelity and a fiduciary duty is also apparent from the remedial perspective. In the first place, claims for breach of fiduciary duty do not necessarily entail claims for compensation for loss (see [43] above); but claims for breach of contract are generally compensatory in nature (see *Robinson v Harman* (1848) 1 Exch 850). In the second place, even for reparation claims for non-custodial breaches of fiduciary duty (which are properly compensatory in nature), equity provides more favourable rules for the assessment of the errant fiduciary's liability than general law – for instance, in the context of non-custodial breaches of fiduciary duty, the *Brickenden* rule (stemming from the Privy Council decision in *Brickenden v London Loan & Savings Co et al* [1934] 3 DLR 465) emplaces a rebuttable presumption in favour of the principal that the fiduciary's breach caused its loss (see *Sim Poh Ping* at [254]).

70 Third, to the extent that Bryson AJ's statement may be read as going as far as to suggest that such an implied term is of general application, I entertain doubt as to whether that would be correct; it is not a foregone conclusion that such a term would invariably pass the applicable tests for the implication of terms, whether in law or in fact.

(D) UNLIQUIDATED CLAIM ARISING BY REASON OF AN OBLIGATION TO MAKE RESTITUTION?

71 Finally, I considered the possibility of a claim for breach of fiduciary duty being provable as an unliquidated claim arising by reason of an obligation to make restitution under s 87(3) of the BA. This approach found some support in Bryson AJ's decision in *Auto Group*, as he referred to claims for breach of fiduciary duty as "a claim for restitution of … misappropriated money" (at [4]) and giving rise to "equitable obligations of restitution" (at [23]).

72 I did not regard this as the right approach. It is true that the jurisprudence on breach of trust and breach of fiduciary duty has referred to the remedy being "restitutionary" in nature. An example of this is Lord Millett's description of the falsification remedy at [168] of *Libertarian* (see [55] above). But, in my view, the concept of "restitution" contemplated in s 87(3) of the BA is of a different nature than the substitutive remedy for breach of trust or custodial breach of fiduciary duty.

73 More specifically, "restitution" in s 87(3) of the BA appeared to me to be a reference to a gain-based remedy, the most obvious example being the remedy for the cause of action of unjust enrichment. This is qualitatively different from the nature of a substitutive performance claim for custodial breach of fiduciary duty or a falsification order following a breach of trust. There is a wave of academic authority cautioning that the use of "restitution" to describe remedies for breach of trust or fiduciary duty can lead to confusion of this kind (see, *eg*, Charles Mitchell, Paul Mitchell & Stephen Watterson, *Goff and Jones on Unjust Enrichment* (Sweet & Maxwell, 10th Ed, 2022) at para 2-803; Peter Birks, "Misnomer" in *Restitution: Past, Present and Future – Essays in Honour of Gareth Jones* (W R Cornish *et al* eds) (Hart Publishing, 1998) at pp 11–12). And in fact, precisely the same warning was administered by Vinodh

Coomaraswamy JC in the High Court decision of *Quality Assurance Management Asia Pte Ltd v Zhang Qing and others* [2013] 3 SLR 631 (at [34]):

> A word of caution. The word "restitution" is used here – and in the modern cases on equitable compensation – not as a legal term of art but purely as an ordinary word of the English language meaning "recompense for injury or loss". The word "restitution" is therefore not used in these cases to signify the restoration to its rightful owner of property which has been lost or stolen. Nor is the word "restitution" used in these cases in the same sense as it is used today in the modern law of restitution – as being the law's response to reverse unjust enrichment at the expense of another. Put simply: equitable compensation is neither a proprietary remedy nor a remedy in the law of restitution. It is a personal remedy in equity.

74 It would be anomalous that the word "restitution" in s 87(3) could have been intended by the legislature to carry completely different meanings, which would be the case if it were read to include both a claim for restitution for unjust enrichment as well as claims for breach of trust and/or fiduciary duty, given the completely different nature of the remedies for these causes of action as highlighted above. In contrast, no such anomaly arises from reading "breach of trust" in s 87(3) to include claims for breach of fiduciary duty given the identity in the nature of the remedies for breaches of trust and fiduciary duty (see [41]–[43] above).

75 Moreover, interpreting the reference to "obligation to make restitution" in s 87(3) as inclusive of claims for breach of trust and/or fiduciary duty also leads to other anomalies that militate against this conclusion:

(a) First, given that the "restitutionary" description applies equally to both the falsification remedy for breach of trust and substitutive performance claims for custodial breaches of fiduciary duty, to read s 87(3) of the BA as including custodial breaches of fiduciary duty

would also include claims for breach of trust. This would render the express reference to "breach of trust" in s 87(3) redundant.

(b) Second, and in any event, the "restitutionary" description only applies to one type of remedy for breach of fiduciary duty (*viz*, the substitutive remedy). Thus, even if accepted, the reference to "obligation to make restitution" in s 87(3) would not cover the whole field of claims for breach of fiduciary duty, and it is thus not a complete solution to the problem at hand.

(E) CONCLUSION

76 For the reasons above, I concluded that the optimal solution to the lacuna in s 87(3) of the BA was to read "breach of trust" in an expansionary manner so as to include claims for breach of fiduciary duty. This interpretation was both consistent as a matter of principle – having regard to the nature of claims for breach of fiduciary duty and the historical link to claims for breach of trust – and policy – that the scope of provable debts should be as broad as possible given the "fresh start" principle that the bankruptcy regime embodies.

77 The above analysis also illustrates that the other potential candidates in s 87 of the BA were unsatisfactory. For the most part, they were either conceptually unsound or underinclusive by failing to capture the entire field of claims for breach of fiduciary duty.

(F) THE HIGH COURT'S DECISION IN *WANG AIFENG*

78 Finally, I considered the implications of the decision in *Wang Aifeng*, which had provided the impetus for the Private Trustee's present application in the first place (see [8] above). I did not regard *Wang Aifeng* as authority for a broad proposition that claims for breach of trust (or fiduciary duty) cannot be

resolved through the proof of doubt regime. First, any such rule would fly in the face of the plain language of s 87(3) of the BA since, by expressly stipulating unliquidated claims arising by reason of "breach of trust" as a class of provable debts, the legislature has necessarily determined that such claims can be resolved through proof of debt. The court cannot artificially limit the scope of a statutory enactment to the extent of rendering a part of it completely redundant.

79 Second, and in any event, it was clear on my reading of *Wang Aifeng* and the *Bristol & West Building* case cited therein, that the court in the latter case was not making any statement of general principle. Rather, it was only speaking about the breach of trust claim specifically before it, as evident from how it had prefaced its observations (on the inappropriateness of resolving a breach of trust claim through the proof of debt regime) with "[i]n the present case" (see *Bristol & West Building* at 490).

80 Given that *Wang Aifeng* could not be read as authority precluding a breach of trust or fiduciary duty claim from being resolved by way of proof of debt, I concluded that there was no objection in principle to resolving a claim for breach of fiduciary duty against a bankrupt through the proof of debt regime.

When a claim for breach of fiduciary duty can be resolved within the proof of debt regime

81 Turning to the second issue of when a claim for breach of fiduciary duty can be resolved through the proof of debt regime, although I did not consider *Wang Aifeng* to institute any general bar against resolving claims for breach of fiduciary duty through the proof of debt regime (see [78]–[80] above), I found that lessons could be drawn from the High Court's decision for this second issue.

82 In oral submissions, Mr Chew submitted that the main determinant ought to be the complexity of the claim. I agreed that this was an important consideration. In *Wang Aifeng*, Goh Yihan JC stated that the court should "consider the degree of complexity of the legal and factual issues involved, and whether it may be preferable for those issues to be resolved at a hearing rather than by way of proof of debt" (at [35]).

83 In addition to the complexity of the matter, I found the principles governing applications for leave to commence an action against a bankrupt or company in insolvent liquidation – currently, under ss 327(1)(*c*) and 133(1) of the IRDA respectively – to be relevant. This was unsurprising, given that the implication of a court granting leave to commence proceedings is that the court considers it necessary or expedient for the claim to be resolved outside of the proof of debt regime, which takes over as the primary mode of enforcement of claims against a debtor upon the onset of bankruptcy or insolvent liquidation (see the recent High Court decision of *Park Hotel CQ Pte Ltd (in liquidation) and others v Law Ching Hung and another suit* [2024] SGHC 105 at [64]).

84 Finally, the issue of whether a claim should be resolved through the proof of debt regime or outside of it is a matter that is, in the first instance, for the officeholder to assess and determine. In general, the officeholder, and not the court, is the main decision-maker for issues arising in the bankruptcy or liquidation. As Neuberger J observed in the English High Court decision of *In re T & D Industries plc and another* [2000] 1 WLR 646 (at 657):

> … a person appointed to act as an administrator may be called upon to make important and urgent decisions. He has a responsible and potentially demanding role. Commercial and administrative decisions are for him, and the court is not there to act as a sort of bomb shelter for him.

85 A natural corollary of this is that the court would generally be disinclined to interfere with the officeholder's decision-making. As Goh JC cautioned in *Bob Yap*, the court would not intervene simply because the officeholder may feel some unease and wishes to obtain some sort of insurance against the possibility of error, and assurance that he is on the right track (at [21]). If the officeholder has full power to act, it would typically be inappropriate for the court to intervene on an application for directions (see the Supreme Court of New South Wales decision of *Re Spedley Securities Ltd (in liq)* (1992) 9 ACSR 83 at 85).

Conclusion on Question 1

86 To summarise my conclusion on Question 1, I answered the question posed in the affirmative. In principle, as a matter of the legal position, there was no objection for POA's claim against THM for breach of fiduciary duty to be accepted under the proof of debt process in THM's bankruptcy. Claims of this type are within the ambit of provable debts in bankruptcy.

87 However, I made no decision or direction on the specific issue of whether the Private Trustee *should* accept POA's proof of debt. For the reasons articulated at [84]–[85] above, that was a matter for the Private Trustee to decide in the first instance.

Question 2

88 In Question 2, the Private Trustee sought the court's confirmation that THM's liability to POA accrued as of 8 August 2018 in the sum of S$6,565,803.76.

89 As a starting point, I did not consider this question, as it was framed, to be one that the court should answer. For the reasons I have explained at [84]–[85] above, the court would generally be slow to provide a definite determination on parties' rights and obligations in an application for directions. Such applications are more suited for the determination of discrete issues of law or principle. It is one thing for the court to determine a legal issue that may guide or bear on a trustee's decision as to whether or not to accept a proof; but it is quite another for the court to determine whether to accept a proof altogether. The statutory scheme clearly contemplates a trustee arriving at his own decision, subject to the right of an aggrieved party to appeal to the court (see s 87(5) of the BA; s 345(6) of the IRDA). The court should thus generally not jump the gun by making a determination before the trustee has come to his own decision.

90 It was thus not appropriate for the Private Trustee to seek the court's confirmation of the specific quantum of POA's proof of debt that he should accept. That was a matter for him to determine in the exercise of his statutory discretion and power as to the valuation of claims against THM; in the event that any creditor turns out to be aggrieved by his decision, that creditor has the liberty under the legislative scheme to then bring the matter to court to have it decided.

91 Instead, I considered that Question 2 could be reframed into the following two questions of principle:

(a) First, when does a cause of action for breach of fiduciary duty accrue?

(b) Second, what is the relevant time for valuing a creditor's proof of debt?

Neither of these questions were particularly complex and can be disposed of briefly.

The time when a cause of action for breach of fiduciary duty accrues

92 For context, at the hearing, Mr Chew clarified that the issue of the time of the accrual of POA's cause of action against THM was important as s 87 of the BA contained a temporal element. Specifically, only a debt or liability (a) that the bankrupt is subject to at the date of the bankruptcy order; or (b) that the bankrupt may become subject to before the bankrupt's discharge by reason of an obligation incurred before the bankruptcy order, was a provable debt (see s 87(1)(*a*) of the BA). Further, the time of the accrual of POA's cause of action would also bear on the issue of POA's financial situation at any given time, which could affect the availability of clawback options available to the Private Trustee.[26]

93 In this regard, Mr Chew submitted that, at the date of the bankruptcy order, THM was subject to a liability for breach of fiduciary duty (under s 87(1)(*a*)(i) of the BA), as opposed to merely a potential liability arising from an obligation incurred before the bankruptcy order (under s 87(1)(*a*)(ii) of the BA).

94 I accepted this submission. It is clear from a plain reading of the provision that s 87(1)(*a*)(i) of the BA encompasses (a) debts and liabilities already due and payable, as well as (b) debts and liabilities not already due and payable but "definitely payable at a future date" (*ie*, prospective, and not merely contingent, liabilities). The defining characteristic of claims falling within s 87(1)(*a*)(i) is that they are liabilities that are "unquestionably payable at a

[26] AWS at para 28.

future date". In contrast, s 87(1)(*a*)(ii) refers to potential debts or liabilities that hinge on some contingency that may or may not occur, given the equivocal nature of the phrase "may become subject" (see the English High Court decision of *Re T&N Ltd and others (No 2)* [2006] 2 BCLC 374 at [116]–[117]).

95 I also agreed with Mr Chew that the cause of action for breach of fiduciary duty accrues at the time of breach, albeit the quantification of liability occurs at the time of the court's judgment.[27] That is the point made by the House of Lords in *Target Holdings* in the passage which I have extracted at [54] above. As such, a cause of action against THM accrued from the moment of the first improper disbursement of POA's assets; he was then subject to an immediate duty to reconstitute POA's assets and, if a claim for an account or equitable compensation had been brought at any time against him, THM's liability would have been assessed as the shortfall representing the unauthorised disbursements. Subsequent payments into and out of POA's assets *vis-à-vis* the Civil Tech companies[28] would have had the effect of reducing or increasing THM's outstanding liability to POA if the claim had been brought at any given time.

96 Thus, at the time of the commencement of THM's bankruptcy (*ie*, the date of the bankruptcy order), THM was subject to a liability for breach of fiduciary duty for the purposes of s 87(1)(*a*)(i) of the BA for a sum representing the net of the inflows and unauthorised outflows from POA's assets. Attendant questions as to the quantum of THM's liability to POA at any given time, and THM's solvency at any given time,[29] were for the Private Trustee to assess and,

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27 AWS at para 51.

28 PTIB's Affidavit, Tab 3, p 85.

29 PTIB's Affidavit at paras 33–34.

if necessary, for a court hearing any action down the line that implicates these issues directly.

The relevant time for valuation of a claim for breach of fiduciary duty within the proof of debt regime

97 However, I did not agree with Mr Chew's submission that the relevant date for quantifying THM's liability to POA was the date of the final transfer of monies between POA and the Civil Tech companies, that is, 8 August 2018. In my view, the Private Trustee's selected date of 8 August 2018 was inconsistent with both the principles set out in *Target Holdings* and basic principles of insolvency law.

98 The court in *Target Holdings* recognised that the quantification of a trustee's liability for breach of trust was on the date of the court's judgment (see [54] above). In my judgment, it followed as a matter of logic that if the court's determination is substituted for that of the trustee in bankruptcy – which occurs where the claim is resolved through proof of debt rather than through court proceedings – the time for the quantification of a claim is the time prescribed by insolvency law for the quantification of claims against the bankrupt generally.

99 In this connection, it is trite that the relevant time for the valuation of a bankrupt's liabilities is the date of the bankruptcy order. This is because it is at this date that the notional taking of the account between the bankrupt and his creditors occurs by mandatory operation of insolvency set-off (see *Schaw Miller and Bailey: Personal Insolvency: Law and Practice* (Giles Maynard-Connor QC *et al* eds) (LexisNexis, 6th Ed, 2022) at para 23.105). Insolvency set-off facilitates the orderly and *pari passu* distribution of the bankrupt's estate among his creditors, and *pari passu* distribution requires a common date for the

ascertainment and quantification of the bankrupt's debts (see the English High Court decision of *In re Elenin, decd* [2016] 1 WLR 2091 at [25]). This was clearly explained by Oliver J in the English High Court decision of *In re Dynamics Corporation of America (in liquidation)* [1976] 1 WLR 757 (at 764):

> The provisions of both the Companies Act 1948 and the Bankruptcy Act 1914 with regard to the submission of proof are I think all directed to this end, that is to say, to ascertaining what, at the relevant date, were the liabilities of the company or the bankrupt as the case may be, in order to determine what at that date is the denominator in the fraction of which the numerator will be the net realised value of the property available for distribution. It is only in this way that a rateable, or pari passu, distribution of the available property can be achieved, and it is, as I see it, axiomatic that the claims of the creditors amongst whom the division is to be effected must all be crystallised at the same date, even though the actual ascertainment may not be possible at that date, for otherwise one is not comparing like with like; …

100 For this reason, I considered that, to the extent that the Private Trustee intended to quantify THM's liability to POA for purposes of proof of debt as it stood on 8 August 2018, this was erroneous as a matter of law. I thus directed that the Private Trustee assess and value THM's liability to POA as at the date of the bankruptcy order, that is, 26 September 2019 (see [4] above).

101 For the avoidance of doubt, my direction that the Private Trustee quantify POA's proof of debt on the date of the bankruptcy order does not have any bearing on the separate issues of when THM's liability to POA arose or what THM's liability to POA stood at as at any time prior to the date of the bankruptcy order (see [95]–[96] above). The date of the bankruptcy order is relevant as the date for the valuation of THM's liability to POA for the purposes of determining whether POA's lodged proof of debt should be admitted and the quantum thereof.

Conclusion on Question 2

102 To summarise my conclusion on Question 2, I declined to determine the exact quantum of THM's liability to POA as sought by the Private Trustee. The quantification of THM's liability to POA was a matter to be properly determined by the Private Trustee.

103 However, I determined two points of principle that may guide the Private Trustee in making his determination on the quantum of POA's claim against THM:

(a) first, that THM's liability to POA did accrue prior to the date of the bankruptcy order; and

(b) second, that the Private Trustee was to use the date of the bankruptcy order – *ie*, 26 September 2019 – as the relevant date for the quantification of POA's claim against THM in adjudicating upon POA's proof of debt in THM's bankruptcy.

Conclusion

104 My conclusions on the Questions posed by the Private Trustee are set out at [86]–[87] and [102]–[103] above. I shall not repeat them here. I should add, finally, that while the present application was brought under the BA, my decision on the Private Trustee's Questions remains applicable to the current personal bankruptcy regime under the IRDA, given that the provisions of the BA that were engaged in this case have been ported over to the IRDA without any material modification.

105 In closing, I express my gratitude to, and commend, Mr Chew for his helpful submissions. As the present application was brought on an uncontested

basis by the Private Trustee, there was a particular risk that views contrary to the Private Trustee's position might not be put forward or adequately fleshed out before the court. However, this risk did not materialise due to the fair and measured way in which Mr Chew advanced his submissions. The court is invariably better assisted when counsel evince such candour in their submissions, especially when asked to determine novel issues such as those that arose in the present case. It is certainly hoped that counsel appearing in such circumstances would take notice and do the same in the future.

Aedit Abdullah
Judge of the High Court

Chew Xiang and Naomi Lim Bao Bao (Rajah & Tann Singapore LLP) for the applicant;
Lee Ming Hui Kelvin (WNLEX LLC) for the non-party Planar One & Associates Pte Ltd (in liquidation).