EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO. BVIHCM 2017/0086

BETWEEN:

[1] KING BUN LIMITED
[2] KENCY LTD
[3] KAR KWONG DEVELOPMENT LIMITED
(TRADING AS KAI KWONG TRADING COMPANY)
[4] KHI CAPITAL LIMITED
[5] KENTRUE COMPANY LIMITED
[6] HUI PAK KONG
(SUING IN THE NAME AND ON BEHALF OF THEMSELVES AND ALL OTHER SHAREHOLDERS IN VANWAY INTERNATIONAL GROUP LIMITED, EXCEPT THE FIRST AND SECOND DEFENDANTS)

Claimants

and

[1] LAU MAN SANG, JAMES
[2] LUNG HUNG CHEUK
[3] CHEUNG WING SUM, ALBERT
[4] NGAI HIN KWAN, ALBERT
[5] YEUNG YIU CHONG
[6] CHAU CHEUK WAH, ANGUS
[7] ZHANG GUO WEI
[8] VANWAY INTERNATIONAL GROUP LIMITED

Defendants

Appearances:

Mr. Edmund King, QC and Mr. Jern-Fei Ng, QC, with them Mr. Jerry Samuel and Dr. Alecia Johns for the Claimants
Mr. Olivier Kalfon, with him Mr. Nicholas Brookes for the First to Fifth and Seventh Defendants
Mr. John Litton, QC, with him Mr. Robert Nader for the Sixth Defendant

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2019: November 19, 20, 21, 22, 25, 26, 27, 28, 29;
December 2, 3, 4, 5, 6;
2020: July 22, 23, 24, 27, 30, 31;
2021; February 2, 3;
July 20.

JUDGMENT

[1] **WALLBANK, J. (Ag.)**: This is the judgment following the trial on liability of this matter. For the reasons set out below, the claims succeed against each of the First to Seventh Defendants.

[2] There were three sittings to this trial, over a total of 22 days. The 'First Sitting', in November and December 2019, contained the parties' opening submissions and the start of the oral evidence. The 'Second Sitting', in July 2020, continued oral evidence. The 'Third Sitting', in February 2021, contained the parties' closing submissions. Shortly before the Third Sitting, the Claimants' leading learned Counsel, Mr. Edmund King, QC unfortunately passed away. Mr. Jern-Fei Ng, QC led for the Claimants at the Third Sitting.

[3] Although the trial was not as document heavy as some trials in this Court, the parties submitted some 442 pages of closing written submissions. This judgment will be considerably shorter. At the risk of doubtlessly being criticized for omissions, I do not think there is any need to consider every point and argument raised in order to determine the claim fairly and justly.

1. INTRODUCTION

[4] This case concerns a derivative action brought by the Claimants as minority shareholders in a company incorporated in the Territory of the Virgin Islands ('BVI'), Vanway International Group Limited ('the Company'). The Company is named as the Eighth Defendant. The Claimants complain that:

(1) the other Defendants took a series of steps in 2015;
(2) to cause the Company to dispose of certain subsidiary companies;
(3) by wrongful and/or unlawful means;
(4) at a gross undervalue;
(5) to the First Defendant, Mr. Lau Man Sang James ('Mr. Lau');
(6) to the detriment of the Company, and by extension, of its minority shareholders including the Claimants.

2. BACKGROUND

[5] At the most material times, the Claimants together held about 13.33% of the issued share capital of the Company. They did not and do not have managerial power or control over the

Company. The First to the Fifth Claimants are companies associated with the Sixth Claimant, Mr. Hui Pak Kong ('Mr. Hui') and a Mr. Kenneth Tang ('Mr. Tang').

[6] Mr. Hui and Mr. Tang were long-time business associates of the First Defendant, Mr. Lau. This dispute forms part of a wider falling out between Mr. Lau on the one hand and Mr. Hui and Mr. Tang on the other hand.

[7] Mr. Lau is and was the Chairman of the Company's Board of Directors, as well as an executive director, and a holder of around 59.24% of its total issued share capital.

[8] The Second Defendant, Mr. Lung Hung Cheuk ('Mr. Lung') is an executive director and a holder of 20% of the total issued share capital of the Company.

[9] The Third to Fifth and the Seventh Defendants were all executive directors of the Company. For convenience, the First to Fifth and Seventh Defendants can be referred to as the 'Executive Director Defendants'. The First to Seventh Defendants, i.e., the Defendants other than the Company, will for convenience be referred to as the 'Director Defendants'.

[10] The Sixth Defendant, Mr. Angus Chau, was in a slightly different position. He was a director of the Company but was more of a consultant on financial matters for Mr. Lau than an executive director, and he acted without receiving remuneration or a fee. Mr. Chau had another full-time job, as Chief Executive Officer of a publicly listed company, for at least part of the material time. Unlike the Executive Director Defendants, Mr. Chau was not dependent upon Mr. Lau or Mr. Lau's companies for a living. Mr. Chau described himself as a non-executive director. Whilst that is perhaps going too far, I accept that he was not as involved in the direction of the Company as the Executive Director Defendants were.

[11] The Company was a holding company, or finance vehicle. In that sense, there was not much 'executing' that needed to be done by the 'executive directors', in relation to the Company itself. Their 'executive' roles were more involved with 'executing' the affairs and business of the Company's operating subsidiaries. I accept that Mr. Chau had little or no involvement at that subsidiary level. Indeed, it could be said with considerable justification that at the level of the Company, all the directors, including Mr. Chau, had approximately the same degree of involvement.

[12] The Company wholly owned, *inter alia*, two companies, called Vanway Pharmaceutical Holdings Limited ('Vanway') and Vanworld Pharmaceutical (Hong Kong) Limited ('Vanworld'). Vanworld in turn wholly owned Vanworld Pharmaceutical (Rugao) Company Limited ('Vanworld Rugao'). Vanway, Vanworld and Vanworld Rugao have together been referred to for convenience by the parties herein as 'the Target Group'.

[13] Vanworld Rugao was the strongest profit-generating centre for the Company. Vanworld Rugao's main business was (and may still be, but that is irrelevant for present purposes) the manufacture and marketing in the People's Republic of China ('PRC') of a biologically derived painkiller, called 'Analgecine'. The product has a longer clinical name, 'Extracts from Rabbit Skin Inflamed by Vaccinia Virus for Injection' and a commercial name which, the Court was told, transliterates to 'Thank goodness there is the restoration of comfort'.

[14] The product, or simply 'the drug' as I will call it, was (and may still be, but that is irrelevant for present purposes) produced at Vanworld Rugao's factory in Rugao. Rugao is a city near Nantong, Jiangsu province, some 115 miles north-west of Shanghai. The production involves the infection of farmed rabbits with a small-pox variant virus. Once the rabbits' skin 'reacts' sufficiently to the infection, the rabbits are killed and skinned, and the base ingredient for the product is extracted from the skins. The product is then formulated into a drug that can be injected as a pain killer, with a particular use, so the Court was informed, for persons suffering from lower back pain and neuralgia.

[15] This business was a venture started and managed by Mr. Lau. The Claimants' role was mainly as the providers of financial support, initially through loans but then later through equity contributions.

[16] In August and September 2015, the First to Seventh Defendants approved sale of the Company's operating subsidiaries, i.e. the Target Group, to Mr. Lau and convened an Extraordinary General Meeting ('EGM') of members to vote on it. On 15th September 2015, the majority of members entitled to vote at the meeting approved the sale. This majority was comprised of a 20% shareholding held by the Second Defendant, Mr. Lung. Mr. Lau rightly abstained from voting his shares. The Claimants allege that the sale was effected at a gross undervalue, being at a liquidation value.

[17] The Claimants obtained permission on 6th July 2017 to bring a derivative action on behalf the Company against Mr. Lau, Mr. Lung and the other Director Defendants, together with an order that the Claimants be indemnified out of the Company's assets in respect of the costs of the derivative action.

[18] The Claimants alleged that the Defendants breached their common law fiduciary duties owed to the Company and their statutory duties, as set out in section 120 to 122 of the BVI Business Companies Act, 2004[1] ('BCA'), to exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances taking into account, *inter alia*, the nature of the company, the nature of the decision and the position of the directors and the nature of the responsibilities undertaken by them.

[19] The Claimants further allege that the Director Defendants proceeded to dispose of certain assets of the Company, being certain receivables, which the Claimants say constituted more than 50% in value of the assets of the Company, otherwise than in the usual or regular course of business of the Company, without seeking and obtaining the members' prior approval, contrary to section 175 of the BCA.

[20] The Claimants seek orders to compensate the Company for losses it suffered by reason of the alleged sale at an undervalue, and/or to unwind the sale and trace the proceeds of the alleged breaches of fiduciary duties committed by the Defendants.

3. SUMMARY OF SALIENT EVENTS

[21] A summary overview of salient events, in chronological order, will assist here. This was a long and quite detailed trial, and certain events and facts were given greater prominence than others. A chronological overview assists in seeing how all the facts and events fit together. The following is not intended to be an exhaustive summary. Unless otherwise stated, for example by express reference to a witness's evidence which I may elsewhere expressly disagree with, the following are findings of fact.

[1] No. 16 of 2004.

[22] In 1984, Mr. Lau began a trading business called Vanny (Hong Kong) Limited ('Vanny'). He traded edible mushrooms as well as primates (monkeys etc.) for drug testing and research in the pharmaceutical industry. The name Vanny derived from the fact that he started out in business trading with a van. Vanny was a nickname.

[23] In 1987, Mr. Hui, whose main line of business had until then been trading in plywood planks, joined Mr. Lau in establishing a company that would trade in edible mushrooms.

[24] In 1992, Mr. Lau started a primate breeding farm in Vietnam, rearing primates (monkeys etc.) for the pharmaceutical research industry. Mr. Hui, and another of Mr. Lau's acquaintances from his young years, Mr. Tang, helped Mr. Lau financially. Mr. Tang was an established business partner of Mr. Hui. Mr. Tang had trained as an accountant. Thus a pattern began, wherein Mr. Lau would conceive and put into effect business ideas, with Mr. Hui, Mr. Tang, and others that Mr. Lau could persuade to do so, assisting with cash to help capitalize the business.

[25] In 1992, Mr. Lau granted shares in Vanny to Mr. Hui and Mr. Tang to put their financial contributions on a more formal footing.

[26] In 1993, Mr. Lau, assisted by Mr. Hui and Mr. Tang, diversified into breeding rabbits for use in the pharmaceutical industry. They sold the rabbits to a company in Japan that was manufacturing and marketing an analgesic drug with extracts from rabbit skin inflamed by a vaccinia virus. The drug sold well in Japan. The Japanese company had turned to the PRC as a source of cheaper rabbits.

[27] Mr. Lau researched the product. He discovered that it appeared to have originated in or around the Second World War and that it was suspected that Japanese had tested it on Chinese, thus that it already had a history of human trials. Mr. Lau saw in this product a potentially profitable business. He found out how the drug was made from someone familiar with the process used by the Japanese company. This is not to say that Mr. Lau did this himself, as he was and is a tradesman, not a pharmaceutical scientist. Rather, he at least caused or enabled others in his circle to do so.

[28] Very quickly, it would appear, Mr. Lau had created a very similar product and in around the same year, 1993, began distributing it in Japan. This proved to be successful. He also continued exporting rabbit skins to Japan, until 1997.

[29] It was around then, 1997, that Mr. Lau decided to direct his attention to the potential PRC market for the drug, which was in theory some ten times larger than the Japanese market.

[30] In 1998, one of Mr. Lau's associates or employees, an accountant by name of Mr. Wong, advised him on restructuring his businesses. He suggested incorporating the Company as a financial vehicle and/or holding company here in the BVI. The Company was acquired, and the structure set up, more or less as we have it today.

[31] In 1999, Mr. Lau started constructing a factory in Rugao, upon premises purchased for that purpose at a cost of about HK$9 million. At the time, Rugao was relatively undeveloped and the factory site was in a rural area. The local authorities set out to attract businesses to establish premises in what were then the surrounding suburbs and Vanworld Rugao was one of them.

[32] In the meantime Mr. Lau, Mr. Hui and Mr. Tang continued with their primate breeding business. In 2000, they started another primate breeding farm, this time in Cambodia.

[33] In around 2002, Mr. Lau converted loans from Mr. Hui and Mr. Tang into shares in the Company. Mr. Hui and Mr. Tang invested more money into the Company's business.

[34] The drug enterprise continued to grow. By 2003, it had three production plants in business.

[35] Meanwhile, the Rugao factory continued to be built. It took around five years, until 2004, to complete it. Mr. Lau did not have the benefit of major financial institution backing. He was, instead, reliant upon his own powers of persuasion to persuade acquaintances and contacts to lend and/or otherwise invest in the project.

[36] The factory was where the base ingredient would be extracted from the rabbit skins and turned into the drug. The rabbit skins would be produced elsewhere. The skins would then be deep-frozen and transported to the factory in Rugao. There was some oral evidence that the factory

also had to dispose of rabbit carcasses, suggesting that at least some skinning took place at the factory, but the extent to which this was so, if at all, was left unclear.

[37] At an EGM on 20th January 2003, a resolution was passed that creditors of the Company were to have the option to convert their loans into shareholding in the Company, at a value of HK$22.22 per share.

[38] It was also resolved that the Claimants (other than the Fourth Claimant KHI Capital Limited which will feature later) would be deemed to be shareholders of the Company starting from 31st December 2002.

[39] It was further resolved that Mr. Hui and Mr. Tang would be appointed as directors of the Company, and that Mr. Lau would be the Chairman of the Company's Board of Directors.

[40] Another person of some note in the overall matrix of facts was a Mr. Victor Chan. Mr. Victor Chan was an accountant, who was responsible for the accounts and corporate records of the business. He attended a meeting of the Company for the first time on 16th April 2004. Mr. Victor Chan was/is affiliated with Mr. Hui and Mr. Tang.

[41] In 2004, the drug, Analgecine, was accorded a license by the PRC regulatory body that we shall refer to as the 'CFDA'.[2] This license permitted the manufacture and sale of the drug in intravenous form (i.e., by injection) for a renewable period of five years. This was referred to by the Defendants as a 'temporary license'. There is a dispute about whether this was a 'temporary license', as the Defendants say, or an official approval that would require to be re-registered and approved every five years, as the Claimants say. The license number was S20040022, signifying the 22nd license granted in 2004. The license would be renewed again in 2010 and 2015, but we are getting beyond ourselves.

[42] The license document was entitled "Approval Letter of Drug Supplementary Application". The first approval was granted on 23rd March 2004. The reverse side of the document is headed 'Re-registration Form'. It contains a series of boxes for approval to be re-registered every five

[2] The CFDA, as well as SFDA, and NMPA are all different acronyms over time for China's drug regulatory body (standing for the State Food and Drug Administration, China Food and Drug Administration and the National Medical Products Administration). I shall simply use the initials CFDA, as the parties have done.

years, as the form itself indicates at Note 2: 'The Drug approval number becomes effective from the date of issue and remains effective for 5 years…'. There is also a Note 5, which says:

> "If the drug approval number is cancelled, revoked, suspended or invalid, the local drug administration department of the province, autonomous government region or municipality directly under the central government shall take over this document."

[43] The drug was also covered by two patents: one concerning its manufacturing procedure and the other for its use as a painkiller.

[44] Up to around August 2005, Mr. Lau embarked upon a sustained sales and marketing drive for the drug in the PRC. This was not altogether satisfactory, according to Mr. Lau.

[45] The drug was being manufactured and marketed in a challenging commercial environment. On the one hand, a Japanese manufacturer had a license to import its own version of the drug into the PRC and was an aggressive competitor. On the other hand, from 2005 onwards, the PRC government was implementing a reform of the pharmaceutical industry. This appears to have had two main goals: to crack down on bribery and corruption that featured in the sales chain for medicinal drugs in the PRC and to streamline and homogenise the regulatory process for drugs along the lines used in the United States of America. Mr. Lau thus considered that he should change strategy, from rendering the financial rewards more attractive to medical practitioners and intermediaries, to engaging a team of highly qualified medical professionals who could speak well of the product from a medical and scientific perspective. Also, Mr. Lau wanted to get the drug into the catalogue of drugs covered by medical insurance companies and into the PRC's official register of officially approved drugs, known as the 'Pharmacopoeia'.

[46] Another way of growing the business was to make the drug more accessible to patients. In 2006 an application was made for rights to use it in pill form. This received an approval on 10th May 2006 for clinical trials, which were due to last three years. The trial process however completed in 2007 and Mr. Lau and his colleagues started to consider steps to produce a pill manufacturing plant.

[47] In 2006, a retired senior Police officer, Mr. Lung, was asked by Mr. Lau to become involved in the primate breeding business in Cambodia as a security consultant. Mr. Lung would continue in this role until 2015.

[48] In December 2009 another pharmaceutical company, which we can refer to as 'SPharma', showed interest in investing in the business. Mr. Lau entered into negotiations with them. SPharma offered to pay HK$200 million for a 40% shareholding stake in the Company on condition that the Company would surrender the formulation of Analgecine to SPharma. Mr. Lau rejected this offer, without convening a general meeting to consider it. He says he considered this was no more than an attempt by SPharma to obtain the know-how behind the drug.

[49] During 2009, differences between Mr. Lau on the one hand, and Mr. Hui and Mr. Tang on the other, deepened significantly. They resolved these differences, or so they hoped and thought, by separation of what can be called the 'Vanny Group' of companies, which had been (in simplified terms) the parent company of the Company, into two camps, effective from 1st April 2010. This division was eventually memorialized in a settlement agreement dated 29th October 2010. By this agreement, 50% of the shares in the Company would be transferred to Mr. Lau and the other 50% to KHI Capital Limited (the Fourth Defendant).

[50] Mr. Lung's evidence is that in May 2010, Mr. Lau asked Mr. Lung to lend him HK$1.2 million for the drug business. Mr. Lung says he discussed this with his wife, and they agreed to provide this sum of money. Mr. Lung says that his wife suggested that instead of lending money, he should get a shareholding interest in the business. Mr. Lung says that he discussed this in 2011 with Mr. Lau, who agreed. Mr. Lung says that over three years, in 2010, 2011 and 2012, he invested around HK$11.5 million for 20% of the shares in the Company, as allegedly agreed between Mr. Lau and Mr. Lung in early 2011. Mr. Lung claimed that his records showed only transfers totaling about HK$8.94 million. HK$5.2 million of those payments were marked 'Vanny'. All the money Mr. Lung said he paid for his interest in the Company was paid to Mr. Lau personally, or to Mr. Lau and his wife, not to the Company. Mr. Lung's interest, or rather alleged interest, was not recorded in the Company's register of members until 2015.

[51] It was not clear from Mr. Lung's Witness Statement evidence (a) when Mr. Lau agreed to make Mr. Lung a shareholder; (b) when it was agreed that his interest should be 20%; and (c) when in 2015 his interest, or alleged interest, was recorded in the Company's register of members. Mr. Lung was not issued share certificates. In his oral evidence, Mr. Lung ventured that an agreement was reached between him and Mr. Lau in early 2011 that he should have 20% of the shares in the Company for HK$11.54 million. Mr. Lung, though, could not explain how he

had come to make payments in 2010 (of some HK$3 million) in respect of a share purchase **before** allegedly negotiating the share purchase in 2011. Mr. Lung agreed, though, in his oral evidence that at the time of the payments (i.e., about 2010-2011), he had other business dealings with Mr. Lau (some of whose other companies carried the name 'Vanny' in their title) unconnected with the drug business.

[52] Another anomaly was that the 20% shareholding that Mr. Lung was eventually recorded as owning, was 20% of the Company's issued share capital as it stood in ***2012***, which was considerably greater than in early 2011. The Company had issued new shares pursuant to a rights issue in late 2011. This discrepancy, if Mr. Lung's story was true, would have meant that Mr. Lung had been issued some HK$8 million worth of shares more than he had allegedly actually paid for, i.e., free of charge.

[53] In September 2010, the drug business encountered a further difficulty. It received a notice, dated 10th August 2010, allegedly requiring the factory to be removed from Rugao ('the Removal Notice') (or so the Defendants characterized it). This document was entitled 'Notice on Accelerating the Implementation of Relocation of Work of Chemical Production Enterprises in the Main Urban Areas' dated 10th August 2010 (also referred to as the 'Relocation Notice'). This was understood to be part of a wider local government initiative to render the city safer. The city had expanded rapidly, with new residential areas engulfing potentially hazardous factories. Various negotiations allegedly ensued. The removal notice was not enforced, although the removal requirement (such as it may have been) was not lifted either.

[54] The Removal Notice was discussed at a general meeting of the Company on 28th September 2010. Mr. Hui suggested that in light of this and a multitude of other problems faced by the Company, new shareholders should be sought. The other shareholders agreed. Mr. Lau volunteered to take up the task of doing so, based upon a value of the Company at HK$110 million. It was agreed that Mr. Lau would have three months, until 31st December 2010, to do so.

[55] A difference in approach manifested itself at that meeting. Mr. Hui, Mr. Tang and another shareholder, Mr. Chen Zhi Jian, considered that the new shareholder should be a majority shareholder. Mr. Lau however focused upon finding new investor(s) who might buy out Mr. Hui, Mr. Tang and Mr. Chen Zhi Jian.

[56] The drug's distribution and manufacturing license was renewed on 30th September 2010 for another five years.

[57] Mr. Lau was not able to find new shareholder(s) by end of 2010. Nor was he able, personally, to finance a buy-out of Mr. Hui, Mr. Tang and Mr. Chen Zhi Jian. There was a consensus amongst the shareholders that any of the shareholders could thus search for an investor to solve the Company's capital shortage problems. Mr. Hui says there was an understanding that the Company was worth at least HK$105 million.

[58] By the next general meeting of the Company, on 12th April 2011, Mr. Hui had himself found what he said was a very promising offer. That investor was willing to purchase the entire shareholding of the Company at HK$145 million. This price would include buying the factory and the Company's patent of Analgecine. This offer was discussed at the meeting but not pursued.

[59] By July 2011, tensions had grown further between Mr. Lau on the one hand and Mr. Hui and Mr. Tang on the other. In July that year, Mr. Lau found investors interested in buying out Mr. Hui and Mr. Tang. The purchase price would be around HK$5.66 per share, but Mr. Hui and Mr. Tang refused. Mr. Hui explained that he and Mr. Tang believed that their shares were worth significantly more than this. On the evidence, this was Mr. Lau's first attempt to buy out the Claimants.

[60] Mr. Hui explained that he had been having positive discussions with a publicly listed pharmaceutical company, which we can refer to as XCo. Mr. Hui took representatives of XCo on a site visit to the factory in Rugao. XCo proposed to invest HK$200 million by either acquiring all the shares of the Company, without its existing debts and liabilities, or by acquiring a 50% shareholding on condition that it should have the right to manage the Company.

[61] The XCo proposal was discussed and voted upon at an EGM on 22nd November 2011. Only Mr. Lau voted against the proposal. Because he was the majority shareholder, his veto blocked the proposal.

[62] A few days earlier, on 18th November 2011, another EGM of the members of the Company was held. At this EGM the Board of directors of the Company was reconstituted. Mr. Lau caused the following to be appointed as directors:

(1) Mr. Lung (the Second Defendant);

(2) Mr. Angus Chau (the Sixth Defendant);

(3) Mr. Albert Ngai (the Fourth Defendant); and

(4) Mr. Yeung You Chong Terence ('Mr. Terence Yeung') (the Fifth Defendant).

[63] At the shareholders' meeting on 22nd November 2011, Mr. Lau nominated further directors. These were:

(1) Mr. Albert Cheung (the Third Defendant);

(2) Mr. Tang (as a continuing director); and

(3) Mr. Chen Zhi Jian.

[64] Mr. Hui was not nominated, and so was effectively removed as a director as of that date, 22nd November 2011. This is so, and as was reflected in the minutes of that meeting, despite the Company's Register of Directors stating that Mr. Hui ceased to be a director on 26th February 2015.

[65] Mr. Angus Chau argued that he did not become a director until he accepted to take on that role in February 2015. Whether this was or was not correct is not important for present purposes: he was a director during the significant events in the summer of 2015 until his resignation in September 2015.

[66] At the shareholders' meeting on 22nd November 2011, the attending shareholders were listed. Mr. Lung was not included there as a shareholder **in his own right**. He was, though, included under 'others in attendance', where he was listed as a **proxy** attending shareholder representing two companies belonging to Mr. Lau.

[67] There would be no further meetings of members of the Company for about three years and nine months, until September 2015.

[68] On 26th November 2011 Mr. Hui and his brother, the company KHI Capital and Mr. Chen Zhi Jian caused lawyers' letters to be sent to the Company demanding repayment within 30 days of loans advanced by them, together with interest.

[69] Consequently, the Company's Board met on 28th November 2011 and explored an attempt to raise HK$40 million at a price of HK$5.60 per share.

[70] During 2011, adding to the challenges of the business, the PRC regulatory authorities introduced a new 'Good Manufacturing Practices' standard, requiring compliance by 2013.

[71] In the meantime, the notice to remove the factory (if indeed it was to have been construed as such) out of Rugao had not gone away. By the time of a Board meeting on 8th February 2012, the Board of directors had allegedly received an update that the factory was now required to be removed by 31st December 2013.

[72] Also at that Board meeting, Mr. Victor Chan was removed as the Company's Chief Financial Officer ('CFO'). He was replaced by Mr. Terence Yeung, who was appointed to this role in February 2012. Mr. Hui's evidence is that Mr. Victor Chan had submitted financial statements to the shareholders every month during his tenure, but since Mr. Terence Yeung's appointment, no financial information was sent by Mr. Terence Yeung to the shareholders.

[73] At a Board meeting on 20th February 2012, the Board attempted to raise funds for the Company at a price of HK$4.00 per share.

[74] Then, at a Board meeting on 12th April 2012, Mr. Lau proposed a share offering at HK$1 per share. Mr. Lau said in his evidence that the Company badly needed additional finance as (he said) it was in serious trouble.

[75] For the record, I do not accept that this was true. On 26th April 2012 a further Board meeting was held. The Board resolved that Mr. Lau should receive a remuneration of HK$100,000 every month starting from April 2012.

[76] On 30th April 2012 the Board gave notice of a general meeting to be held on 21st May 2012 to invite shareholders to subscribe for new shares in the Company at HK$1 per share. A vote by email was proposed.

[77] Some of the Claimants caused lawyers' letters to be sent to directors and shareholders of the Company to put on record that the value of the shares in the Company was significantly higher than HK$1 per share, that insufficient information and documentation had been provided to evaluate the proposal and stating that ulterior motives for the sudden attempt at fund raising were suspected. By an email sent on 21st May 2012, the proposed rights issue was 'postponed temporarily until further notice'.

[78] In the meantime, Mr. Hui was also looking for another investor. He procured an offer letter from XCo's parent company, which we can refer to as PCo, dated 17th May 2012. PCo offered to acquire 51% of the Company's shares at HK$200 million. The Board of directors replied on 11th June 2012, informing all shareholders that this offer had been rejected by the members already (it had not, as it was in different terms from XCo's offer and from a different entity, PCo) and that the majority shareholder (which could only be Mr. Lau) had indicated to the Board that he would again reject the proposal. The Board went on to say that it would not recommend holding any shareholders' meeting to discuss the PCo's proposal.

[79] No further Board meetings were then held for around nine months, until March 2013.

[80] On 20th June 2012, Mr. Terence Yeung sent Mr. Tang a list of the Company's shareholders. Despite Mr. Terence Yeung claiming that he had already known of Mr. Lung's alleged shareholding by then, Mr. Terence Yeung had not included Mr. Lung there as a shareholder.

[81] Also in 2012, litigation started in Hong Kong between Mr. Lau on the one hand and Mr. Hui and Mr. Tang on the other, in relation to the settlement agreement they had previously entered into, out of which further disputes and monetary claims against Mr. Lau arose.

[82] On 1st March 2013 a Board meeting was held. At this meeting, Mr. Lau caused Mr. Tang to be removed as a director. He was replaced by Mr. Zhang Guowei, the Seventh Defendant ('Mr. Zhang). The Board also approved, apparently without any questions, doubling Mr. Lau's monthly remuneration to HK$200,000. Mr. Terence Yeung's evidence was that the 2013 sales

had shown an improvement of approximately 18% growth compared to the 2012 figures. Mr Yeung took the directors through profits and explained that the gross profit increased from RMB19.62 million in 2011 to RMB30.81 million in 2012, and the gross profit margin increased from 61% to 69.53%. At the group level, profits increased from HK$1.427 million in 2011 to HK$7.404 million in 2012.

[83] According to Mr. Albert Ngai, in 2013 Vanworld Rugao sold approximately 2.8 million units of Analgecine.

[84] In June 2013, Mr. Angus Chau, the Sixth Defendant, was appointed as Chief Executive Officer of a company listed on the Hong Kong Stock Exchange, a position he continued to hold until June 2019.

[85] In 2014, application was made to renew the licenses for the drug.

[86] According to Mr. Albert Ngai, in 2014 Vanworld Rugao sold approximately 3.6 million units of Analgecine. In 2014, Vanworld Rugao's profits were RMB 24.98 million (approximately HK $31.2 million).

[87] In December 2014, Vanway and Vanworld Rugao produced a document referring to a 'Nantong City Production Base Project' (the 'Nantong Report'). This was a business plan intended to seek agreement for a new factory development that would enable capacity to be increased from 10 million doses a year to one that could make 800 million doses a year. The construction budget for phase one was approximately HK$625 million, in order to fund an eighty-fold increase in production capacity. In cross-examination, Mr. Cheung (one of the directors responsible for the report) claimed that such projections were 'a little bit exaggerated' but not impossible, and that such exaggeration was 'a business skill' and 'a business manoeuvre'.

[88] By or on 26th February 2015, the Company's share register was updated to show the share transactions that had taken place up to that date. Mr. Lung's alleged share purchase was not among them.

[89] The number of drug units sold would increase in 2015, according to Mr. Albert Ngai, to approximately 5.1 million units.

[90] Mr. Albert Ngai gave evidence that these increases in sales should however be understood in an overall context in which various market factors had also changed in an adverse manner, and their Japanese competitor continued to have a license to import its own version of the drug into the PRC.

[91] In March 2015, Mr. Lau bought out Mr. Chen Zhi Jian's shareholdings in the Company at HK$5.60 per share, reflecting a value for the Company of about HK$105 million.

[92] Mr. Lau alleged that by the end of April 2015, he was summoned to a meeting with the CFDA in Beijing. He said he was told at this meeting that their 'New Drugs Certificate' 'temporary' license had been refused in 2009 and that he was asked why manufacturing was still on-going. He said that he explained that they had not received notice of this refusal, and that, on checking, the CFDA official realized that this had indeed been the case. The notice in question was a so-called 'Review Opinion Notice' of 19th May 2009 (the 'CFDA Notice'). It had been pleaded in the Amended Defence[3] that the Board was only aware of the CFDA Notice 'in about the end of July 2015'. That was clearly not so – by no stretch of meaning, in the circumstances of this matter, can April 2015 be understood to be 'in about the end of July 2015'.

[93] Mr. Lau stated further that the CFDA had explained that part of the reason for the refusal was that the Pharmacopoeia required molecular standards for every drug, but the rabbit skin extract did not meet with the requirement to become a standard sample. There was allegedly a follow up meeting, at which the CFDA permitted the business to ask for the refusal to be reconsidered because the original notice had not been communicated. Mr. Lau says that he had been given to understand that this concession was only a formality and that it was likely that the CFDA would stand by its refusal.

[94] The CFDA Notice indicates that Vanworld Rugao had applied to upgrade the standard, according to which the drug was manufactured, from a provisional or trial standard to the official standard. This application was rejected on 19th May 2009, as shown in the CFDA Notice. As that document records, Vanworld Rugao had applied for 'the 'official approval of testing

[3] At paragraph 19(2).

standard' issue of the Extracts from Rabbit Skin inflamed by Vaccinia Virus for injection'. The CFDA opined:

> "Upon review, this product does not meet the requirement of 'official approval of testing standard'. The application for 'official approval of testing standard' in relation to the Extracts from Rabbit Skin Inflamed by Vaccinia Virus for Injection is hereby rejected."

[95] On 19th May 2015, an instrument of transfer and a bought and sold note was signed and entered in the Company's Register of Members, recording Mr. Lung's purchase of his shares.

[96] In May 2015, Vanway and Vanworld Rugao produced an amended 'Proposal for Nantong City Production Base Project' (the 'Amended Nantong Report'). The Amended Nantong Report forecasted a 30% increase in sales volume in 2015 and a total of RMB 570 million in sales for the year 2015. Mr. Cheung's evidence was that Mr. Lau prepared the sales projections that were included in the Amended Nantong Report and was ultimately responsible for this aspect of the report. When asked how these figures could be considered to be consistent with a crisis which began with their awareness of the CFDA Notice in April 2015, Mr. Cheung stated that the figures 'could be a little bit exaggerated'. Significantly, Mr. Lau (as author of these sales projections) admitted that he was keen to buy the Target Group because he thought that the sales forecasts set out in the Amended Nantong Report might be achievable.

[97] On 29th May 2015 Mr. Lau purchased more shares in the Company at HK$5.60 per share.

[98] On 1st June 2015 Mr. Lau purchased yet more shares in the Company at HK$5.60 per share.

[99] On 5th June 2015, the Jiangsu FDA (i.e., the local Food and Drug Agency) wrote a favourable letter on Vanworld Rugao's behalf, requesting that its application for formalization to the official approval of testing standard be re-examined and appraised by the CFDA. Mr. Terence Yeung agreed in his evidence that the Jiangsu FDA was therefore sympathetic to Vanworld Rugao's position in June 2015.

[100] In about June 2015, Mr. Lau, through Mr. Lung, asked the Claimants if they were willing to let him buy out all their shares at HK$5.60 per share. The Claimants again rejected this, because, they say, the price was too low. This was Mr. Lau's second attempt, on the evidence before the Court, to buy out the Claimants.

[101] It was also 'in or around June 2015' (according to a Mr. Alfred Sung, on whom more shortly), that Mr. Terence Yeung called Mr. Alfred Sung about producing a valuation report of the Target Group. This must have been sometime before mid-June 2015. Mr. Sung's evidence is that Mr. Terence Yeung said 'there was the possibility that they were going to sell the business and the valuation report was sought in order to give an indication to the directors of the net worth of the business'.

[102] Mr. Alfred Sung says he then went to meet Mr. Terence Yeung at the company's head office in Hong Kong in around **mid-June 2015**. Mr. Alfred Sung says he also met briefly with Mr. Lau on this occasion.

[103] On 26th June 2015 there was a Board meeting, at which the CFDA Notice was discussed. It can thus not have come to the Board of directors' attention at the end of July 2015 as asserted in the Amended Defence. Moreover, Mr. Terence Yeung noted in the minutes that '**If** the standard formalization application is rejected **in the end**, our Company's production and sales license will be revoked at any time' (emphasis added). Mr. Yeung accepted in cross-examination that this meant that the position was not then, as at the end of June 2015, such that the license could have been revoked at any time.

[104] One day after the 26th June 2015 board meeting, on 27th June 2015, Mr. Lau continued to purchase shares at HK$5.60 per share. He purchased 30,600 shares from a Mr. Wu at that price. This was Mr. Lau's sixth and final block purchase of shares in the Company in a period of roughly three months from April to June 2015, involving 683,887 shares for an aggregate price of some US$492,000 or approximately HK$3.83 million.

[105] Vanworld Rugao's unaudited profit and loss accounts as at 30th June 2015 recorded that this company had gross assets of over HK$113 million and in the first six months of 2015 had made a profit of HK$23.5 million. Mr. Ngai agreed with these figures during his oral evidence.

[106] Mr. Alfred Sung met with Mr. Terence Yeung a second time, in early July 2015, by which time Mr. Terence Yeung had updated financial information, up to 30th June 2015.

[107] Mr. Lau further stated in his evidence that on 15th July 2015 there was a PRC government policy document published, which can for convenience be referred to as the 'Pharmacopoeia

Announcement'. According to Mr. Lau, the effect of this announcement was that there would be a requirement that (in Vanworld Rugao's case) the drug would need to be approved by 2017 for inclusion in the Pharmacopoeia, with a 'permanent' license, otherwise production would be required to cease. Until that point, said Mr. Lau, the business had expected to be able to continue on the basis of the renewal of 'temporary' licenses. It should be noted, however, that the Pharmacopoeia Announcement was neither referred to as part of the crisis in Mr. Lau's Amended Defence, filed on 20th December 2018, nor was it referred to in any of the contemporaneous Board meeting minutes, shareholders' meeting minutes, or other documents.

[108] Mr. Lau's, and the other Director Defendants', evidence was that despite this apparently gloomy outlook, they submitted their application to renew the five year distribution and manufacture license for Analgecine on 17th August 2015. Mr. Lau stated that he and the in-house drug specialist, a Dr. Lin, thought there was very little chance of getting this application approved. There is a crucial dispute as to whether 17th August 2015 is the date when the renewal application was ***submitted***, or whether it was the date that application was ***granted***. The Claimants maintained the latter.

[109] The documentary record (the 'Reregistration Document') states that the drug was 'reregistered' on 17th August 2015. It also records in a footnote that 'Where a drug's certificate number is cancelled, withdrawn or invalid, the provincial drug administration should confiscate this document'. The Reregistration Document was not confiscated.

[110] The official website of the CFDA also showed the drug's 'date of approval' as 17th August 2015.

[111] In contrast, no documentary evidence had been advanced by the Defendants demonstrating that their application had been submitted on 17th August 2015.

[112] Mr. Terence Yeung agreed in cross-examination that Vanworld Rugao's drug license to manufacture and sell the drug was renewed on 17th August 2015

[113] Mr. Ngai also admitted that the Reregistration Document provided renewal of permission to produce and sell the drug from 17th August 2015 for a period of 5 years. Mr. Ngai then agreed that it was not illegal to produce and sell the drug as a result of the 17th August 2015 renewal.

[114] Even Mr. Lau admitted in cross-examination that the application for reregistration had been made before 17th August 2015 and the latter was the date upon which the approval was granted.

[115] The expert evidence from both the Claimants' and the Executive Director Defendants' sides, respectively, is that the drug received its reregistration approval on 17th August 2015. In respect of the Executive Director Defendants' expert evidence, there was an apparent conflict of evidence between English and Chinese versions of the expert's report. The Executive Director Defendants' expert apparently was not able to speak nor read English, yet an English version of his report was somehow filed first. This stated at paragraph 21:

> "On 17 August 2015, Vanworld Pharmaceutical (Rugao) Co Ltd submitted its registration renewal for the product "Analgecine". However, the provisional Quality Standard of the product was not yet approved and, as a result of the above regulatory changes, Analgecine faced a manufacturing suspension, despite the registration renewal". (Emphasis added.)

[116] This English version stated, curiously, that:

> "A Chinese version of my report will be produced subsequently." (Emphasis added).

[117] Quite how the expert could have said this, if he neither spoke nor read English, and cannot thus sensibly be understood to have written this himself, begs questions whether the report had been written for him, in English first, for him to put his name to.

[118] When, after an interval of time, the Chinese version was disclosed, a certified translation showed that it in fact said this:

> "Although on 17 August 2015, renewal or registration of the product 'Analgecine' with CFDA was obtained, formalisation of the product's Provisional Quality Standard was not yet approved." (Emphasis added.)

[119] In other words, the Executive Director Defendants' expert did ***not*** maintain that the reregistration was only applied for on 17th August 2015, ***nor*** that the drug faced a manufacturing suspension, as the 'English version' represented the expert's evidence to be. The English version thus appears to show a manipulation of the Executive Director Defendants' expert's opinion to bolster their case.

[120] Putting the matter beyond doubt, the Executive Director Defendants' expert went on to say:

"I understand and agree that the Company obtained the product re-registration from CFDA on 17 August 2015."

[121] 17th August 2015 was also the date used for the final version of the Alfred Sung Report.

[122] Two days later, on 19th August 2015, the Board of Directors convened a Board meeting to take place the following day, 20th August 2015. The stated purpose of the meeting was to resolve an alleged state of crisis within the Company. This alleged crisis had three alleged components to it:

(1) As at 20th August 2015, the Company had used its best endeavours to appeal against the CFDA's decision to refuse official approval of Analgecine's testing standard but each of the directors claimed not to be optimistic about the outcome of the appeal, and the CFDA could stop the manufacture at the Rugao factory and sales at any time;

(2) The Removal Notice which had been issued in August 2010, and originally required removal by 31st December 2013, now entailed that the factory would have to move by 31st December 2016 at the latest; and

(3) The Company's debt position was that it owed some HK$45 million. Of this figure, some HK$18,750,000 was said to be owing to the Bank of China in respect of a loan.

[123] The solution identified (ostensibly) by the directors at the meeting on 20th August 2015, was to take Mr. Lau up on an offer he put forward to acquire the Target Group (i.e., the Company's subsidiaries) for HK$1 million and an assumption by Mr. Lau of all the Target Group's liabilities. All the directors, including Mr. Angus Chau (we will see later why this is significant) concurred.

[124] Mr. Albert Ngai's evidence is that at the meeting Mr. Angus Chau suggested that someone independent be engaged to look at the value of the Target Group. As Mr. Ngai stated, Mr. Terence Yeung then explained:

> "the details of the valuation that we [i.e., the Board] were already having carried out by Alfred Sung & Co. He explained that Alfred Sung was due to look at the full asset value of the Target Group. He explained some of what they had discussed in their meetings and what Alfred [Sung] had said about his initial impressions from the documents and what the valuation would look like ... [including]... that Alfred [Sung] was considering whether the business should be valued as a going concern."

[125] Mr. Alfred Sung is an accountant with his own firm, who claims to have valued companies in the PRC, as well as pharmaceutical companies, before valuing the Company in this case, as

well as to have performed audits. Mr. Sung claims not to have known Mr. Terence Yeung before being asked to produce his report. He did know Mr. Lau, though, for several years, but, Mr. Alfred Sung said, 'very casually'.

[126] Mr. Ngai's evidence thus indicated that:

(1) Mr. Alfred Sung had not yet finished his report ('the Alfred Sung Report') as at 20th August 2015;

(2) The Board was not provided with the Alfred Sung Report, nor a draft thereof at this Board meeting;

(3) Mr. Terence Yeung demonstrated some familiarity with Mr. Alfred Sung's analysis and his 'initial impressions';

(4) Despite not having had an opportunity to consider the Alfred Sung Report, the Board decided that Mr. Lau's proposal should be recommended to the shareholders for vote; and

(5) Mr. Alfred Sung's conclusion was not communicated to the Board of directors at the meeting.

[127] Mr. Terence Yeung's evidence was similar. He added that he:

> "chased Alfred [Sung] by telephone shortly after the meeting on 20 August 2015. I received the Report dated 17 August 2015 from Alfred Sung by email on 28 August 2015. The Report was sent on to the remaining directors on the same day ... ."

[128] No mention was made at the meeting on 20th August 2015 that the drug had been reregistered on 17th August 2015 for another five years.

[129] The Board of Directors proceeded on 20th August 2015 to call an EGM of members for 2nd September 2015, at which the proposal to sell the Target Group to Mr. Lau for HK$1 million would be put to the members' vote. The evidence is that the directors noted at the meeting that BVI law requires a disposal of more than 50% of a company's assets to be approved by shareholders and that an EGM must be convened for that purpose.

[130] Mr. Yeung stated in his oral evidence that on the same day he chased Mr. Alfred Sung for his valuation report which had not yet been received.

[131] On 21st August 2015 Mr. Alfred Sung sent an email to Mr, Terence Yeung. The email attached a draft of the Alfred Sung Report dated **21st August 2015** and its draft appendices, with metadata showing that the documents had been last edited on **21st August 2015**.

[132] On 24th August 2015 Mr. Yeung sent an email to the lawyers who were to be present at the EGM at the request of the Board of directors, attaching a draft of the Alfred Sung Report dated **21st August 2015** and its draft appendices. The content of the draft report and its appendices also plainly show that these were draft documents, with errors corrected when compared with the final version purportedly dated **17th August 2015**. Mr. Alfred Sung maintained in his oral evidence that he had finalized his report on 17th August 2015, but he had no coherent answer to questions seeking an explanation for the work he and/or his staff had appeared to have done on the report subsequent to that date. Mr. Alfred Sung moreover had no sensible answer to a question why he had to be chased on 20th August 2015 in respect of a completed report, which was not then sent for another 8 days.

[133] Notice of this EGM was communicated to Mr. Hui by Mr. Terence Yeung on 26th August 2015. Whilst the Notice stated the purpose of the meeting, nothing else was provided to the shareholders. Nor was any explanation for the reasons for the proposed sale given, nor of the basis upon which the consideration would be HK$1 million.

[134] On 27th August 2015, Mr. Hui instructed Mr. Victor Chan to send an email to Mr. Terence Yeung asking for the financial statements of Vanworld Rugao for the year ended 31st December 2014. The same day, Mr. Terence Yeung sent Mr. Victor Chan the audited report for Vanworld Rugao for that year.

[135] On the following day, 28th August 2015, which was thus less than a week before the EGM, Mr. Terence Yeung sent all shareholders an email enclosing the minutes of the Board meeting on 20th August 2015 and the Alfred Sung Report dated (ostensibly) 17th August 2015.

[136] In this report, Mr. Alfred Sung opined that as at 30th June 2015 the net asset value of Vanworld Rugao was about HK$113 million and net profits after tax for the 6 months to that date were just short of HK$20 million. Four other immediately notable features of the Albert Sung Report are that:

(1) Mr. Alfred Sung did not take into account the 17th August 2015 Reregistration Document in conducting his valuation;

(2) Mr. Alfred Sung did not use a going concern basis for his valuation;

(3) he did not ascribe a value either to the patents or the formulation know-how of Analgecine; and

(4) the source of Mr. Alfred Sung's information had been Vanworld Rugao's management, not including audited reports.

[137] Mr. Alfred Sung agreed in his oral evidence that if Vanworld Rugao had a valid manufacturing permit and was making operating profits, it would be sensible to treat it as a going concern. He also agreed that it was highly relevant and pertinent to his report to know if the CFDA had renewed approval of Analgecine on 17th August 2015.

[138] Mr. Sung gave evidence that he had simply been informed that Vanworld Rugao did not have a valid pharmaceutical manufacturing licence from the very first meeting with Mr. Yeung. When Mr. Sung asked for the patents, Mr. Yeung (and Mr. Lau) did not give him any and told him that the Target Group companies did not hold any patents (which was wrong). When Mr. Sung asked for sales reports, brief forecasts, and similar materials, he was not given any. He said Mr. Yeung told him that the Target Group companies may not be a going concern and confirmed he did not see the Nantong Report sales forecasts.

[139] The consideration of HK$1 million for the proposed purchase by Mr. Lau of the Target Group was less than 1% of the value of Vanworld Rugao stated in the Alfred Sung Report.

[140] Mr. Angus Chau also received the Alfred Sung Report on 28th August 2021. His evidence is that he spoke to Mr. Lau on or about the same day, suggesting that there should be an additional valuation of the Target Group and that it would be more desirable for the valuer to be instructed by the shareholders to avoid the possibility of future disputes.

[141] On 1st September 2015, Mr. Hui and Mr. Tang asked Mr. Victor Chan to send an email on behalf of KHI Capital Limited to Mr. Terence Yeung, in his capacity as company secretary of the Company, asking for audited financial statements of Vanway, Vanworld and Vanworld Rugao for the years 2010 to 2014, the latest management accounts, and the draft for the

proposed sale and purchase agreement to be entered into between the Company and Mr. Lau. Mr. Yeung did not provide this information.

[142] At this meeting on 2nd September 2015, Mr. Lau did not attend. He could thus not immediately be questioned. Mr. Angus Chau did not attend either. The Claimants did attend, as did Mr. Lung, who claimed to be a member by virtue of an ostensible 20% shareholding he is recorded in the books and records of the Company to have then held. Mr. Lung also attended as a proxy for Mr. Lau.

[143] This EGM was both tense and frosty. Both sides (it is appropriate, at this point in time, to call them that) had a lawyer present. The Claimants queried the proposal, and how Mr. Alfred Sung had been able to prepare a valuation report without apparently having seen any audited financial statements. No meaningful responses were forthcoming.

[144] Mr. Hui offered to purchase the Target Group for HK$1.1 million, i.e., at slightly higher than Mr. Lau's proposal, and thus slightly more beneficially for the Company. There was no response to Mr. Hui's offer.

[145] Mr. Hui questioned why the Company could not try to survive the challenges facing it without selling the Target Group to Mr. Lau and if that were not successful, then to have it wound up and liquidated. Mr. Hui's evidence is that '[t]here was no meaningful response to my comment, other than the Director Defendants' general emphasis on James Lau's prior devotion and efforts spent on the businesses of the Target Group'.

[146] The Claimants raised an issue whether Mr. Lau, in saying that he would personally assume all the Target Group's liabilities, would also personally be assuming some HK$156 million the Target Group owed the Company ('the Receivables'). This question caught Mr. Lau's camp by surprise. They had not thought of that and did not have an immediate answer. The EGM was therefore adjourned.

[147] The next day, 3rd September 2015, the directors passed a Board resolution to deal with the problem posed by the Receivables. Mr. Terence Yeung had come up with a solution. The Receivables would be capitalized by issuance of new shares which the Company would then acquire, increasing the net worth of Vanway and Vanworld to, the Board intimated,

HK$5,929,909. The consideration to be paid by Mr. Lau would be increased to HK$6 million to reflect the increased capital worth.

[148] In passing this resolution, the Board did not obtain the prior approval of the members. The Claimants considered that such approval had been required, as the capitalization of the Receivables amounted to a disposal of more than 50% in value of the Company's assets, pursuant to section 175 of the BCA.

[149] Mr. Angus Chau, as a director, also approved both the capitalization of the Receivables and the proposed sale to the Target Group to Mr. Lau.

[150] There was a further meeting of the Board on 4th September 2015. It was at this meeting that the capitalization of the Receivables took place.

[151] The Board convened a further EGM for 15th September 2015, by way of an email from Mr. Terence Yeung on 8th September 2015.

[152] On 8th September 2015, Mr. Terence Yeung circulated, at least to Mr. Angus Chau, a draft copy of the proposed sale and purchase agreement for the sale to Mr. Lau.

[153] Mr. Angus Chau arranged to meet Mr. Lau at a bar on 9th September 2015. Mr. Angus Chau's evidence is that the conversation turned into an argument. Mr. Angus Chau's evidence is that the meeting ended when Mr. Angus Chau said that if he could not persuade Mr. Lau to get a second valuation report or abandon the sale and purchase of the Target Group, then he would resign. Mr. Lau confirms such a meeting did take place, and that there had been a difference in opinion between them, but he disagreed that there had been a quarrel. Mr. Lau gave evidence that Mr. Chau had merely suggested a second valuation would be prudent, and that he (Mr. Angus Chau) did not have enough time to keep participating in both his main job and in the Company's business, and that he would thus resign as a director.

[154] The following day, 10th September 2015, Mr. Angus Chau tendered his resignation to the Company via an email to Mr. Terence Yeung. The resignation letter itself does not cite the reason for Mr. Chau's resignation. It stated generally that he hoped the board would

understand the rationale behind his decision. His resignation was accepted. Mr. Angus Chau's evidence is that he had no further involvement with the Company from then on.

[155] On 11th September 2015 Mr. Tang requested further financial information concerning the Company, but Mr. Terence Yeung refused to provide it, querying Mr. Tang's standing to make the request.

[156] On 14th September 2015 Mr. Hui formally objected by way of a lawyer's letter to the proposal to sell the Target Group to Mr. Lau for HK$6 million.

[157] On 15th September 2015 this further EGM was held. Again, Mr. Lau did not attend. The Claimants and Mr. Lung did. Mr. Lung attended as a shareholder and as proxy for Mr. Lau.

[158] Mr. Victor Chan, who was also present, asked Mr. Lung if his 20% shares were held by him as beneficial owner or as nominee for Mr. Lau. Mr. Lung's initial response was to refuse to answer the question, saying 'I will not answer this question; I do not need to answer that', or words to that effect. Mr. Victor Chan pressed further. Mr. Lung peremptorily cut short the enquiry by saying that 'This is not a question-and-answer session'. Mr. Lung eventually simply denied being a nominee for Mr. Lau, saying that 'officially I am the ultimate beneficial owner', or words to that effect, which suggests that unofficially he was not. Mr. Lung abruptly indicated that this question could be explored further after the meeting.

[159] Mr. Tang raised the issue of the illegality of capitalizing the Receivables without shareholder approval in accordance with BVI law. Mr. Lung brushed this aside on the basis that the meeting had not been convened for discussion on BVI law and that this matter could not be dealt with at that meeting.

[160] After very little actual discussion, the proposal was put to a vote. The proposal was approved. The Claimants voted against it, but Mr. Lung's slightly greater number of shares carried the vote as Mr. Lau abstained. This was the disposal in favour of Mr. Lau that the Claimants complain of.

[161] The final executed sale and purchase agreement was dated 18th September 2015 and there was a supplemental agreement dated 5th October 2015.

[162] The minutes of this EGM were provided, by Mr. Terence Yeung to Mr. Victor Chan only, by way of an email dated 14th October 2015.

[163] Mr. Lau and the Director Defendants (other than Mr. Angus Chau, who had resigned by then) went on to cause the Company to disburse around HK$4.8 million of the HK$6 million consideration to repay shareholder loans from the former shareholder Mr. Chen Zhi Jian. The Claimants say this was contrary to what had been recorded at the Board meeting on 20th August 2015, that Mr. Lau was going to assume personally the Company's liabilities to repay shareholders' loans.

[164] Mr. Hui's specific complaint is that after having invested a total sum of around HK$33 million (US$4.2 million) into the Company over many years, during about nine of which he acted as an executive director for no remuneration, he was suddenly left holding shares in an insolvent company with no available cash.

[165] Mr. Tang gave similar evidence that he and his companies had invested some HK$32 million (about US$4.1 million) in the Company over a considerable number of years, with the entire investments disappearing into thin air.

[166] The Defendants were adamant that the Court should not have regard to the state of affairs of the Target Group after these events in question. I will not do so. The answer to the present case, at least so far as the issue of liability is concerned, does not depend upon what did or did not happen afterwards. Insofar as subsequent events might affect issues of quantum and/or valuation, the Court can render judgment on those aspects at an appropriate juncture.

4. **WITNESSES**

[167] For the Claimants, both Mr. Tang and Mr. Hui gave evidence. I found them to be reliable witnesses. Since they were not active inside the Company or its subsidiaries at Board of director level during the key events in August 2015, the Court has had to look to the other witnesses and documents to assess the credibility of the parties' respective cases.

[168] Each of the Director Defendants gave evidence for the Defence. The Executive Director Defendants also called Mr. Alfred Sung as a witness.

[169] Mr. Tang's evidence was that each of the Director Defendants, apart from Mr. Angus Chau, had been dependent upon Mr. Lau for their livelihoods in August/September 2015. I accept this evidence.

[170] Evidence also emerged during the trial, during Mr. Ngai's oral evidence, that Mr. Lau had been paying the BVI legal fees for each of the other Director Defendants, apart from for Mr. Angus Chau.

[171] The Claimants' case was that all the Director Defendants, apart from Mr. Terence Yeung, had been long term friends of Mr. Lau. I accept this also.

[172] Thus, in respect of all the Director Defendants there was present either or both of two potentially important factors that might affect their impartiality: financial dependence upon Mr. Lau and/or long term friendship with him.

[173] Another important factor is the type of personality Mr. Lau has, compared with that of the other Director Defendants.

[174] Mr. Lau's personality revealed itself in a somewhat curious fashion. Mr. Lau gave evidence on two separate occasions. Upon the first occasion, Mr. Lau gave evidence in person from the witness box in the Courtroom. He came across as a senior entrepreneur, of relatively little academic education and intellectual formation, mild of manner, and trying to be helpful. He claimed to have little knowledge of the events in question and little knowledge of the workings and factual position in relation to the drug, the Company, the subsidiaries and the business as a whole. The most apt description of Mr. Lau that came to my mind then was that if his *persona* was true, he must be an 'accidental millionaire'. In light of Mr. Lau's apparent unfamiliarity with basic events and facts, it appeared to me that if Mr. Lau's lawyers had indeed been able to ascertain the elements of his carefully drafted witness statements from Mr. Lau himself, then this must have been a heroic achievement of patience and incisive inquiry, as Mr. Lau had difficulty following rational trains of thought.

[175] Mr. Lau was recalled sometime later to give further evidence. On this second occasion, he did so by video-link from Hong Kong, beginning around 9 p.m. Hong Kong time. It was clearly Mr. Lau who gave evidence, but this time, he was vociferous, pugnacious and insistent. The mild man had vanished. The difference was stark. It was plain that in his own environment, Mr. Lau has a forceful personality and that when he wants something, he presses his point with no letting up, with no subtlety, until he gets his way.

[176] By contrast, the other Director Defendants were less forceful characters.

[177] Mr. Angus Chau was patently more sophisticated, professionally and socially, than Mr. Lau and the other Executive Director Defendants.

[178] Mr. Terence Yeung is a generation younger. Mr. Terence Yeung showed himself to have the intellectual acuity and suave professional presentation skills that Mr. Lau and the other Director Defendants, apart from Mr. Angus Chau, lacked. Mr. Terence Yeung appears to have been the coordinator and liaison point between the other Director Defendants, including Mr. Lau, an overseas litigation law firm not regulated by BVI law that shall remain nameless, Mr. Alfred Sung, the Defendants' experts and the Defendants' BVI legal practitioners (other than for Mr. Angus Chau, who was separately represented).

[179] It is apparent to me that the other Executive Director Defendants were susceptible to succumb to overbearing pressure placed upon them by Mr. Lau to let him have his way. It is most probable that this is what happened.

[180] In terms of the quality of the Director Defendants' evidence, none was an altogether satisfactory witness.

4.1 Mr. Lau

[181] Mr. Lau was not a credible, nor reliable witness. Mr. Lau seemed unable to accept that he could not have the benefit of mutually exclusive propositions. An example is that he insisted that the Board only became aware of the CFDA Notice in late July 2015, when even Board meeting minutes proved otherwise. When confronted with the incontrovertible evidence that the CFDA Notice had been discussed at a Board meeting on 26th June 2015, Mr. Lau insisted

that his (late July 2015) version, as pleaded, was 'more true'. But such tergiversation is of course impossible. On this factual issue, there could be no middle ground. Mr. Lau's version was contradicted moreover by a number of other Defendant Director witnesses, who admitted that the Board had become aware of the CFDA Notice in or around April 2015.

[182] Mr. Lau also adhered obdurately to untenable positions until he had no choice but to concede. An example was his initial insistence that 17th August 2015 had been the date the approval for the drug had been re-applied for, not the date the reregistration was granted. To support that proposition, Mr. Lau argued that the Reregistration Document was in fact two separate and unrelated documents. He maintained this in the face of all the facts and even what he had said (or had been given to say) in his witness-statement. The document consisted of two sides of the same piece of paper and had its own internal consistency. By this, I mean that the content of the second page could only be understood in light of the information set out on the first page. Indeed, if the second page were a standalone document, there would be no means of knowing what drug was being referred to, who it was manufactured and marketed by and what the drug certificate number was. As a standalone document, the second page would be meaningless. Mr. Lau finally sought to extricate himself by asserting that this had only been his understanding, with no knowledge on it, and that it was only his interpretation upon seeing the document. Mr. Lau ultimately adopted the indisputable position that the reregistration had occurred on 17th August 2015.

[183] There were a number of other instances where matters stated by Mr. Lau were shown to be untrue.

[184] Otherwise, when Mr. Lau was asked how selling the Target Group to himself would help solve the alleged crises, he repeatedly said he could not grasp the question. He could not give any sensible answer as to how the sale would solve the alleged crises, even though the question was put to him ***six*** times. He did however appreciate that the effect of a sale of the Company's assets was that there would be no further prospect of a return on the shareholders' investment in the Company.

[185] Mr. Lau was also unable to explain sensibly why he was buying shares in the Company in May 2015 if the Company was in crisis at the time. Mr. Lau's strategy in relation to this difficulty was again to try to have the matter both ways. Mr. Lau explained that the Company had been in a

little bit of a crisis, but that it was not a mortal crisis. In this regard, his evidence differed remarkably from that of other Director Defendants, who would have it that the Company was indeed in a mortal crisis.

4.2 Mr. Cheung

[186] The Third Defendant, Mr. Cheung, was a long standing friend of Mr. Lau. They had met in around 1968 and had been in the same school in England.

[187] Mr. Cheung similarly claimed he could not understand the question how selling the Target Group to Mr. Lau would help solve the alleged crises. Like Mr. Lau, Mr. Cheung could not give any sensible answer to this question, despite being asked ***nine*** times (including twice by the Court). Instead, Mr. Cheung indicated he was not privy to whatever Mr. Lau thought and did not know what his plan was. This is telling, in that it was direct evidence supporting the Claimants' case that the sale had been devised and planned by Mr. Lau.

[188] Mr. Cheung agreed in his oral evidence that Vanworld Rugao was a going concern in August 2015. He stated that 'I knew that business was good but I did not know the figures'.

[189] In other respects, Mr. Cheung showed himself to be an unreliable witness. Mr. Cheung was an author of the Nantong Report. He vacillated between standing by the sales and production forecast figures and describing them as exaggerated, or a little bit exaggerated. Tellingly, he justified such exaggeration as 'a business skill' and 'a business manoeuvre'. Exaggeration is of course a form of untruth. His acceptance of this as a legitimate way of getting ahead in business undermines any notion that Mr. Cheung is a reliable witness of truth.

[190] Mr. Cheung was also a proponent of the false proposition that the Reregistration Document was two separate documents.

4.3 Mr. Ngai

[191] The Fourth Defendant, Mr. Ngai, had also been an acquaintance of Mr. Lau, since their school or college days in the United Kingdom. Mr. Ngai's evidence was that he became more closely

and regularly involved with Mr. Lau in around 2010. Mr. Lau would call Mr. Ngai every day to persuade to help him with money for his companies. Mr. Ngai initially resisted, before succumbing. This does have the ring of truth about it.

[192] But Mr. Ngai was a witness who tailored his evidence to support the Director Defendants' overall case of an alleged crisis, whilst conceding on elements of it. He provided some valuable indications as to what had and had not transpired behind the scenes. For example, Mr. Ngai was the source of the evidence that Mr. Lau had been paying other Director Defendants' legal fees.

[193] Mr. Ngai was also unable to answer the question how selling the Target Group to Mr. Lau would help solve the alleged crises.

[194] Mr. Ngai gave evidence that the CFDA Notice was 'the very source, the very fountainhead' of the alleged crisis events that took place in August and September 2015. He called the CFDA Notice a 'termination notice'. He sought to bolster his evidence in support of the alleged crisis by stressing that the Pharmacopoeia Announcement specified the 'death' of the Company. Yet he had made no mention of the Pharmacopoeia Announcement in his Witness Statement, it did not feature as an element of the alleged crisis, and such an effect was not pleaded. The Pharmacopoeia Announcement was not addressed to any company within the Target Group, and it did not feature in the minutes of the Board meeting on 20th August 2015.

[195] Mr. Ngai claimed that his role was to 'provide insight into the regulatory processes in the PRC' and 'ensuring we had the right people for the job'. Despite this, Mr. Ngai showed himself to have relied uncritically upon others (to the extent to which he in fact did so), in particular upon Mr. Terence Yeung and Mr. Alfred Sung. An example of this was that Mr. Ngai said Mr. Lung, an ex-police officer in Hong Kong, was appointed as a director 'to provide security services due to his personality and experience in the police'. When asked what security service the Company needed in 2011, Mr. Ngai could not give any sensible answer.

[196] Despite Mr. Ngai's role in relation to regulatory processes and ensuring the 'right people for the job' should be engaged, and further, his apparent desire to rely upon other professionals, he did not suggest that PRC legal advice should be sought in relation to the effect of the registration documents, registration requirements and the Removal Notice, if there was really

any doubt about these matters, or in relation to what legal steps might be taken to avoid or mitigate their effects.

[197] Mr. Ngai admitted, however, that the drug reregistration provided renewal of permission to manufacture and sell Analgecine at the trial standard from 17th August 2015 for a period of five years, and that it was legal for Vanworld Rugao to do so.

4.4 Mr. Lung

[198] Mr. Lung admitted that he had been a good friend of Mr. Lau since the 1980's. He too could not point to any material benefits of, or say how, the sale would solve the alleged crises.

[199] Mr. Lung could give not satisfactory explanations for the various anomalies in his and Mr. Lau's story concerning his alleged purchase of a 20% shareholding in the Company.

[200] Mr. Lung was an uncomfortable and unagile witness who was devoid of satisfactory answers to many questions.

[201] Mr. Lung admitted that the reregistration on 17th August 2015 was a piece of good news, and conceded that he would have known of the reregistration very shortly thereafter, but he could not explain why the reregistration was not referred to in the 20th August 2015 Board meeting, or the 2nd and 15th September 2015 shareholders' meetings.

4.5 Mr. Terence Yeung

[202] Mr. Terence Yeung was the CFO responsible for accounts and book-keeping as well as the secretary for the Company. He was in charge of obtaining a valuation report from a valuer (Mr. Alfred Sung) in June 2015 and was responsible for providing Mr. Sung with the financial and other company information for the purpose of preparing the report. Mr. Terence Yeung confirmed he was the main point of contact between the Executive Director Defendants and Mr. Sung. He admitted he had direct contact with the witnesses (including Mr. Sung) and the Executive Director Defendants' experts. He admitted that he was the person responsible for talking to the experts to make arrangements for producing their reports, and he admitted he

had spoken to all the Executive Director Defendants' experts. These raise the real possibility that they have been influenced by Mr. Yeung in giving their evidence.

[203] As the Company's financial controller (or ex-financial controller), Mr. Yeung was the main source of the Executive Director Defendants' disclosure. That disclosure was woefully inadequate. Moreover, a number of key documents which were adverse to the Defendants' case had clearly been deliberately withheld. Where, precisely, in the chain of communications such decisions were made is unclear, but it was plain from interactions between Mr. Terence Yeung and the Executive Director Defendants' legal practitioners in the Courtroom that Mr. Terence Yeung was their key source of instructions.

[204] Mr. Terence Yeung was an agile and smooth witness. He combined some candour with clever answers that gave little away. But then he tripped up. In an extraordinary response concerning a document, he stated in his oral evidence:

> "What I would like to point out is that... if it's damaging to our case then I would not have given it to Mr. Cheung."

[205] It came as no surprise to me that it had been Mr. Terence Yeung who had been behind the Executive Director Defendants' obvious attempts to suppress and avoid releasing inconvenient documents.

[206] In my respectful estimation, Mr. Yeung did not speak the truth when he said he 'only received one ... email from him [Mr. Alfred Sung] and that was when he sent me the report'. He also did not appear to speak the truth when he said 'on my computer I had no such record of its existence', which was contradicted by disclosure shortly before the Second Sitting of emails dated 21st August 2015 from Mr. Sung to Mr. Yeung attaching a draft report, and a draft report dated 21st August 2015, following an application for specific disclosure by the Claimants. This disclosure, made under compulsion, appears to show that Mr. Yeung did not speak the truth in his statement by omitting reference to the 21st August emails and the existence of the draft report dated 21st August 2015:

> "I chased Alfred by telephone shortly after the meeting on 20 August 2015. I received the Report dated 17 August 2015 from email by email on 28 August 2015."

[207] Mr. Yeung could not give any sensible explanation as to why he did not disclose the 2015 accounts for Vanway and Vanworld until 29th November 2019 (ten days after the

commencement of the First Sitting), which he agreed were obviously relevant, since they cover the very period in question in this action. Those accounts, importantly, treated the Target Group **as a going concern**. The irresistible inference is that the Executive Director Defendants deliberately suppressed disclosure of the accounts of Vanway and Vanworld for the period up to 31st December 2015 for that reason.

[208] Mr. Yeung was also far from being frank as regards important events in issue:

(1) His statement is internally inconsistent: at one point he said the initial rationale for obtaining a valuation report in June 2015 was 'to look for investors'; and at another point he confirmed he told Mr. Alfred Sung when they first spoke in early June 2015 that 'we were going to sell the business';

(2) At one point he blamed Mr. Victor Chan for not keeping the accounting information in good order; and at another point he had to admit that whatever problems he had with accounting information after becoming CFO and company secretary, they were all fixed by 20th June 2012;

(3) At one point he admitted that he knew of the reregistration very shortly after 17th August 2015; and at another point he said it was not so soon as 17th to 19th August 2015. Mr Yeung's admission that he knew of the reregistration very shortly after 17th August 2015 is a very significant recantation from his unquestioning support, set out in his second witness statement, for Mr. Lau's untruth that 17th August 2015 was only the submission date for the new application but not the reregistration date.

(4) He conceded that as at 20th August 2015, it was not the case that the manufacture and sales licence of the drug was under threat and could be revoked at any time right then. This is another notable backtrack from the position set out in his witness statement that as at 20th August 2015 he 'perceived the Company's position to be... that it had no real prospect of recovering and was likely to go bust'.

[209] As the Claimants submitted, these are classic examples of using lies to cover up lies, such that up to a certain point, inconsistencies become inevitable.

[210] Mr. Terence Yeung agreed that although he informed the Board at the meeting which he chaired on 26th June 2015 that the management learned of the CFDA Notice, the management had in fact been aware of this notice since at least April 2015.

[211] When Mr. Yeung was asked how the crises were made any better by selling the Target Group to Mr. Lau, he could not give any sensible answer.

[212] Regarding Mr. Lung's shareholding, he said for the registered agent to update the register, they must at least have seen the instrument of transfer and bought and sold notes of Mr. Lau's transfer of shares to Mr. Lung. These were disclosed after the First Sitting and found to be dated 19th May 2015. He accepted that if he had information relating to Mr. Lung's alleged purchase of shares, he would have updated them at the same time as he did the other updates on 26th February 2015.

[213] Mr. Yeung agreed that the intercompany receivables as set out in the accounts were real loans and that the accounts were not wrong, and he agreed that the HK$156 million the Company was owed was a very significant asset.

[214] Mr. Yeung admitted that in August 2015 he did read section 175 of the BCA. He admitted that the receivables being capitalized must have been worth more than half of the value of the assets of the Company and he knew that such a disposal could not be done without the approval of shareholders in an EGM.

4.6 Mr. Zhang

[215] Mr. Zhang, the Seventh Defendant, had been a friend of Mr. Lau since 1979. Mr. Zhang's witness statement was of limited probative value as he was obviously unaware or unfamiliar with its contents; for instance, it transpired from cross-examination that he had not been familiar with the term 'Target Group', albeit this was referred to specifically in his witness statement. Mr. Zhang thereafter admitted that his statement was first written in English by a lawyer at the, for present purposes, nameless overseas law practice that was assisting the Executive Director Defendants with their case, and subsequently translated from English into Chinese. It was apparent that Mr. Zhang had simply been given a story to put his name and signature to. He

had been happy to do so, and whilst it would be for others to try and defend it, he would do his best, within his limited capacities, to do so as well.

[216] Mr. Zhang confirmed that Mr. Lau was the one who could make final decisions concerning the Company. He backed Mr. Lau's untruth that 17th August 2015 was only the submission date for the application but not a reregistration. He suggested he had never seen the Nantong sales forecasts. Regarding the capitalization of receivables, Mr. Zhang acknowledged he just did what Mr Yeung wanted him to do, as he trusted him because he was not familiar with financial matters. Mr Zhang could not point to any possible advantage to the Company from disposing of all the operating assets at their liquidation value, despite being asked the question, in different ways, ***six*** times.

[217] Mr. Zhang claimed to have read the Alfred Sung Report very carefully, but when questioned about details such as the omission of the value for the patents, he reneged and said the report was in English and he only listened to Mr. Yeung's explanation and that he did not know accounting matters. He claimed not to have drawn his mind and attention to Mr. Sung's omission to address the possibility that a relocation of the factory might involve compensation, despite his awareness of that possibility. Accordingly, there was no basis on which he could reasonably believe the report to have been 'credible and accurate' as purported in his witness statement.

[218] The overwhelming impression given by Mr. Zhang was that he remained steadfastly loyal to Mr. Lau's narrative no matter how irrational and untrue it transpired to be.

4.7 Mr. Angus Chau

[219] Mr. Angus Chau, the Sixth Defendant, had been an acquaintance of Mr. Lau since 1996.

[220] Mr. Chau, too, could not explain how selling the Target Group to Mr. Lau at liquidation value could have been in the best interests of the Company.

[221] Mr. Chau made a concerted effort to distance himself from the Board of directors, and consistently to minimize the extent of his own knowledge and involvement in what transpired with the Company. This was borne out by the manner in which he initially pleaded and stated

in written evidence that he was not appointed as a director until February 2015, but he was then forced to retract this in both evidence in chief and cross-examination. He admitted to attending board meetings as a director from as early as November 2011 and that he had been on the board in 2012. Mr. Chau also sought to create distance and represent that he was ignorant by claiming that he did not receive a large number of key letters and accounting documents sent to his Yahoo email address, on the implausible basis that he was no longer using that address and that this somehow went undiscovered by the Board for years. Mr. Chau maintained this story even in the face of emails which he himself disclosed from his Gmail address that were in fact originally sent to his Yahoo address, which plainly demonstrated that emails were being forwarded on from his Yahoo account to his Gmail address. He maintained this unconvincing story even when asked by the Court how it could be possible that some emails were being forwarded from his Yahoo address while others were not.

[222] Mr. Chau also raised for the first time in oral evidence a number of allegedly key matters which were not included in any of his witness statements. Mr. Chau claimed in oral evidence that:

(1) there were a number of options being considered at the August Board meeting including the possibility of inviting existing shareholders such as Mr. Hui and Mr. Tang to acquire the Company;

(2) he questioned Mr. Terence Yeung about the date of the Alfred Sung Report;

(3) it was the Board's initial suggestion to sell the Target Group and Mr. Lau thereafter responded in anger to say that he would purchase it for HK$1 million; and

(4) the possibility of holding an auction was discussed at the August meeting.

[223] The Claimants submitted these were all obvious and deliberate lies aimed at (in Mr. Chau's estimation) improving his case. The fundamental difficulty with these points is that they were entirely unsupported by any other witness's evidence or contemporaneous documents. I am not persuaded that they were raised and discussed at the meeting in question.

[224] Mr. Chau admitted that he was an experienced corporate financier and that he was a lot more financially sophisticated than Mr. Lau and was brought onto the Board for his corporate finance expertise. That much was very clear and, I do not doubt, correct. Yet, Mr Chau sought to shy away from his own involvement in financial matters by saying that he did not really see any accounting information and simply relied on Mr. Lau telling him that the operating companies were loss-making. I also accept that.

[225] Mr. Chau sought to deny receipt of the draft Sale and Purchase Agreement (SPA) sent to him for the proposed sale by Mr. Terence Yeung on 8th September 2015, even though Mr. Chau himself disclosed that email and even though he stated in his witness statement that he received the SPA on that date.

[226] Mr. Chau approved the impugned sale prior to his resignation.

[227] I believe Mr. Chau when he stated that he had resigned as a director of the Company over Mr. Lau's refusal to obtain a second valuation. Regardless of what Mr. Chau in fact gave Mr. Lau as the reasons for his resignation, the timing would have left no doubt in the mind of Mr. Lau and of the other directors that Mr. Chau could no longer support the sale of the Company to Mr. Lau.

[228] Fear appears to have been Mr. Chau's predominant motivation behind a number of aspects of the matter. His denial that he had been a director prior to February 2015 appears to have been motivated by fear on his part that he would be sacked from his main job if his directorship in the Company were to be revealed. Fear of being sued for breach of duty if the sale to Mr. Lau would proceed without a second valuation report was the motive behind Mr. Chau's resignation as a director.

4.8 Mr. Alfred Sung

[229] Mr. Alfred Sung was not a Defendant. Mr. Sung stated that he had known Mr. Lau very casually through businesses and friendship circles for about 8 or 9 years, but this was the first time that he did any accounting or valuation work for any of Mr. Lau's companies. The fee for the Alfred Sung Report was HK$34,000 (i.e., about US$4,360) and involved about 50 hours of work. He said he thought this was only an 'assessment' (i.e., in his own words 'a general indication or a general value of what the companies worth based on the books') but not a 'valuation', which involves different methodologies. He was paid for his time associated with being a witness in these proceedings, at HK$3,150 per hour (about US$404 per hour).

[230] Mr. Sung did not come across as a reliable witness, rather, one who was wily and calculating. Mr. Sung had no good explanation why or how it was that work was being done on his report

after he had ostensibly signed it on 17th August 2015, and how it came to be that he had circulated a draft dated subsequently.

[231] He confirmed clearly that 17th August 2015 was the signing date of his report and confirmed 'I have already done my report on the 17th'. This was, however, subsequently contradicted by documentary evidence disclosed shortly prior to the Second Sitting. He further denied any awareness that the drug licence was renewed on 17th August 2015 and said he relied on the internet (rather than competent professionals) to tell him whether the drug had a valid licence. He could not sensibly explain why his report was not sent to the Defendants until 28th August 2015 if he truly signed it on 17th August 2015.

[232] A number of observations cast further doubts in general on the reliability of his evidence:

(1) He said his report 'did not take into account the Pharmacopeia issues that arose in July 2015 as a result of the CFDA's new notice (which has been referred to in the First Witness Statement of Albert Ngai)' – when in fact Mr Ngai did not refer to the July 2015 document (i.e., the Pharmacopeia Announcement) at all in his statement; and

(2) He said the July 2015 document (i.e., the Pharmacopeia Announcement) 'post-dated' the Alfred Sung Report – which is obviously wrong as he claimed he signed off his report on 17th August 2015.

[233] The Claimants submitted that these observations indicate it is likely that the Executive Director Defendants coordinated closely with Mr. Sung in aligning their evidence, and that these Defendants procured Mr. Sung to say that the Pharmacopeia Announcement would not affect the result of Mr. Sung's valuation in any way even if provided.

[234] Mr. Sung admitted he was aware that the general position in China is that compensation is payable when a factory is asked to relocate. Importantly, he admitted that the assessment exercise would have to be redone if he was aware of the CFDA approval on 17th August 2015. He had to admit that would entail a very fundamental change to the whole basis on which he had approached his report and he would have had to reconsider his valuation approach. He further admitted that various parts of the Alfred Sung Report reflect that he initially prepared a draft or carried out work procedures which assumed that the Company was a going concern.

[235] Mr Sung acknowledged that the Executive Director Defendants tried to influence his view, but he believed in his own professional judgment based on the information and documents obtained from them. He further confirmed he only looked at information from Mr. Terence Yeung in preparing the Alfred Sung Report, mainly liaised with Mr. Yeung and had two meetings with Mr. Yeung.

[236] Mr. Sung said when he was first engaged to prepare the Alfred Sung Report, he was not told that the Company might be selling the Target Group, which contradicts the evidence in his witness statement that Mr. Yeung said they were going to sell the business. Mr. Sung claimed he was not told that Mr. Lau was going to buy the business. He claimed he would not need to know if the management or Mr. Lau was looking to buy the Target Group companies and if that was the case, he would not think it is particularly important for the financial statements to be audited, despite himself being an auditor who must have understood the significance and the importance of audit, and despite such a sale being to an otherwise interested party. He claimed that he did not know that the audited financial statements do not value the Target Group companies on the basis that they are not a going concern.

[237] Mr. Sung said that at the point in time when he was instructed, he was not told that the Target Group companies were in crises – he was simply informed that they did not have a valid pharmaceutical manufacturing licence from the very first meeting with Mr. Yeung. He said Mr. Yeung told him that the Target Group companies may not be a going concern and confirmed he did not see the Nantong sales forecasts. Nobody told him such a sales forecast was in existence. When asked if he considered that those forecasts would be relevant, he insisted they would be irrelevant unless the drug licence was to be renewed.

[238] Remarkably, Mr. Sung said he thought it was beyond his jurisdiction to consider the reliability of any of the information given to him.

[239] His evidence was that the Executive Director Defendants respected his professional opinion, which was that Vanworld Rugao was 'technically bankrupt because it is very contingent in its future'.

[240] Mr. Sung's evidence was that whether the Target Group companies were profit making or loss making, from his perspective, was a very contingent question and they might just stop trading at any time.

5. DISCUSSION

5.1 The Law

[241] The relevant statutory provisions from the Act governing the duties of directors can be briefly stated:

> **"120. Duties of directors**
>
> (1) Subject to this section, a director of a company, in exercising his powers or performing his duties, **shall act honestly and in good faith and in what the director believes to be in the best interests of the company**.
>
> ...
>
> **121. Powers to be exercised for proper purpose**
>
> A director shall exercise his powers as a director **for a proper purpose and shall not act, or agree to the company acting, in a manner that contravenes this Act** or the memorandum or articles of the company.
>
> **122. Standard of care**
>
> A director of a company, when exercising powers or performing duties as a director, shall **exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances** taking into account, but without limitation,
>
> (a) the nature of the company;
>
> (b) the nature of the decision; and
>
> (c) the position of the director and the nature of the responsibilities undertaken by him.
>
> **123. Reliance on records and reports**
>
> (1) Subject to subsection (2), **a director of a company**, when exercising his powers or performing his duties as a director, **is entitled to rely upon** the register of members and upon books, records, financial statements and other information prepared or supplied, and on **professional or expert advice given**, by

(a) **an employee of the company** whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned;

(b) **a professional adviser or expert** in relation to matters which the director believes on reasonable grounds to be within the person's professional or expert competence; and

(c) any other director, or committee of directors upon which the director did not serve, in relation to matters within the director's or committee's designated authority.

(2) Subsection (1) applies **only** if the director

(a) **acts in good faith**;

(b) **makes proper inquiry** where the need for the inquiry is indicated by the circumstances; and

(c) has no knowledge that his reliance on the register of members or the books, records, financial statements and other information or expert advice is not warranted." (Emphasis added.)

[242] If the facts are as alleged by the Claimants, the Claimants submitted, this is unlikely to be a borderline case of breach of fiduciary duties and so the Court will not need to be troubled with what the test is for whether powers are used for a proper or improper purpose. Harney Westwood & Riegels: British Virgin Islands Commercial Law (4th edn., Sweet & Maxwell Hong Kong) at paragraph 2.280 cites the leading UK Supreme Court case of **Eclairs Group Ltd and another v JKX Oil & Gas plc**[4] as the leading authority when discussing section 121 of the BCA. The **Eclairs** decision was also cited with approval by our Court of Appeal in its interpretation of section 121 in the case of **Independent Asset Management Company Limited v Swiss Forfaiting Ltd**.[5]

[243] The appropriate test for *bona fides* and proper purpose was considered by our Court of Appeal in **Antow Holdings Limited v Best Nation Investments Limited & Ors**.[6] As explained in particular at paragraphs [25]-[26]:

"[25] Nonetheless, a section 120(1) enquiry has an objective overlay as bona fides cannot be the sole test, 'otherwise you might have a lunatic conducting the affairs of the company and paying away its money with both hands in a manner

[4] [2015] UKSC 71.
[5] BVIHCMAP2016/0034 (unreported, delivered 24th November 2017), at paragraph [25] (Webster JA(Ag.)).
[6] BVIHCMAP2017/0010 (unreported, delivered 21st September 2018), at paragraphs [22]-[26] (Pereira CJ).

perfectly bona fide yet perfectly irrational'. The courts will look for independent, objective evidence to test the director's claim to be acting bona fide.

[26] Where there has been a failure by a director to consider the separate interests of their company, or a challenge by an applicant on the 'good faith' of a director, the test then becomes an objective one. In **Charterbridge Corporation, Ltd v Lloyds Bank and Another**, Pennycuick J held that the proper test in the absence of actual separate consideration of the interests of the company, is whether an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company. As stated in **Colin Gwyer & Associates Ltd and another v London Wharf (Limehouse) Ltd and others**, 'the effect is therefore to substitute an objective test for the normal subjective one'." (Emphasis added)

[244] The standard of care applicable to directors is helpfully set out in Harney Westwood & Riegels: British Virgin Islands Commercial Law (4th edn., Sweet & Maxwell Hong Kong) at paragraphs 2.282 to 2.283:

"**2.282** The common law duty of care and skill (as it has now developed) is enshrined in the BVI Business Companies Act 2004. Thus a director must exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances taking into account the nature of the company, the nature of the decision, his position and the nature of the responsibilities undertaken by him. These factors are not exhaustive.

2.283 The BVI Business Companies Act 2004 specifies the circumstances in which a director can rely upon the information (including books, records, financial information) and advice of others, but they are more restrictive than the position at common law. Thus, he can rely on an employee, a professional adviser or expert if, broadly speaking, he believes on reasonable grounds that they are competent in relation to the matter or it is within their competence. He can also rely on another director or a committee of directors on matters within the latter's designated authority. However, he can only rely on any of these if he acts in good faith, makes proper inquiry as indicated by the circumstances, and has no knowledge that his reliance on the information or advice is not warranted." (Emphasis added)

[245] As the text notes above, the circumstances in which a director can rely upon others under BVI law is more restrictive than at common law. In the circumstances of this case it will not be necessary for me to consider the principles at common law.

[246] There is a useful summary of the extent to which a non-executive director can rely on other directors at common law (which is weaker than the position here) in **Equitable Life Assurance Society v Bowley & Ors**.[7] That makes clear that the short answer is: the director has to have

[7] [2003] BCC 829 at paragraphs [36]-[39] (Langley J).

a sufficient understanding on the matters in issue in order to discharge his or her responsibilities, and cannot simply trust others to have that understanding, as otherwise, there would be a dark-hole whereupon no one could be held accountable for wrongs committed.

[247] Even in England, the position is still that a director cannot simply follow professional advice without exercising independent judgment. See, for example, the decision of Lawrence Collins J (as he then was) in **Re Bradcrown Ltd, Official Receiver v Ireland**.[8] That was a case of directors' disqualification where a director sought to avoid being struck off after a demerger. The director said that he had been entitled to rely on the advice of those retained to advise on, and effect the demerger, and in particular the solicitors. The argument failed and the director was disqualified for two years. The director still has to exercise independent judgment and cannot simply rely on professionals to point out whether the transaction was improper. Similarly, in **Re Loquitur**,[9] the fact that the directors had taken legal advice did not absolve them of responsibility.

[248] In particular, in this case there is an unhappy circularity in any attempt by the directors to rely on valuation advice and legal advice. The net worth assessment report prepared by Mr. Sung (the Alfred Sung Report) does not pretend that Mr. Sung is an expert in PRC law, nor that he had sought advice on PRC law, nor that he understood the prospects of Vanworld Rugao having approval from the CFDA, which had in fact been obtained on 17th August 2015. If the directors are able to rely on the Alfred Sung Report, while Mr. Sung relies on the directors for the key finding that the business was not a going concern, responsibility would disappear into a black hole. As matters then stood as at August and September 2015, there was no professional advice on the important points: whether there was CFDA approval, and whether Vanworld Rugao could continue to manufacture the drug to the provisional standard. Thus, section 123(1)(b) does not apply: in that regard there was no advice from 'a professional adviser or expert in relation to matters which the director believes on reasonable grounds to be within the person's professional or expert competence'.

[249] The material provisions of the BCA that deal with the disposition of assets are also set out below. These are important because if the section applies, the necessary step of seeking approval for wiping out the intercompany debts owed by the Target Group to the Company

[8] [2001] 1 BCLC 547.
[9] [2003] 2 BCLC 442.

would have triggered a right on the part of the minority shareholders to be bought out at fair value:

> "**175. Disposition of assets**
>
> Subject to the memorandum or articles of a company, any sale, transfer, lease, exchange or other disposition, other than a mortgage, charge or other encumbrance or the enforcement thereof, of more than 50 per cent in value of the assets of the company, other than a transfer pursuant to the power described in section 28(3),[10] if not made in the usual or regular course of the business carried on by the company, shall be made as follows:
>
> (a) the sale, transfer, lease, exchange or other disposition shall be approved by the directors;
>
> (b) upon approval of the sale, transfer, lease, exchange or other disposition, the directors shall submit details of the disposition to the members for it to be authorised by a resolution of members;
>
> (c) if a meeting of members is to be held, notice of the meeting, accompanied by an outline of the disposition, shall be given to each member, whether or not he is entitled to vote on the sale, transfer, lease, exchange or other disposition; and
>
> (d) if it is proposed to obtain the written consent of members, an outline of the disposition shall be given to each member, whether or not he is entitled to consent to the sale, transfer, lease, exchange or other disposition.
>
> **179. Rights of dissenters**
>
> (1) A member of a company is entitled to payment of the fair value of his shares upon dissenting from
>
> (a) ...
>
> (b) ...
>
> (c) any sale, transfer, lease, exchange or other disposition of more than 50 per cent in value of the assets or business of the company, if not made in the usual or regular course of the business carried on by the company, ..."

[250] The relevant principles governing ratification of breaches of directors' duties can de distilled as follows:

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[10] Section 28(3) concerns transfers of property to trustees and is not relevant.

(1) Full disclosure has to be given so that the shareholders have full knowledge to enable them to assent to (i.e., ratify) the breaches of directors' duties: **EIC Services Ltd v Phipps**.[11]

(2) Shareholders may relieve a director from liability from any breach of duty, provided only that the breach does not involve a fraud on the minority: **Cook v Deeks**;[12] **Atwool v Merryweather**;[13] **Mason v Harris**.[14]

5.2 Discussion of facts and law

[251] Upon mature reflection, in my respectful judgment, this was a classic and literal case of a fraud upon a minority of the shareholders in the Company.

[252] I find as a fact that the sale of the Target Group to Mr. Lau had been orchestrated by him, and executed with the assistance of each and all of the Director Defendants, with the purpose of ridding the drug manufacturing and sales business of Mr. Hui and Mr. Tang and their respective corporate vehicles, i.e., the Claimants. The means, conceived by Mr. Lau with the help of each and all of the other Director Defendants, was that Mr. Lau would buy the Target Group from the Company at liquidation value and leave Mr. Hui and Mr. Tang holding shares in the Company, which would be left as nothing or little more than an empty shell.

[253] The reason why Mr. Lau wanted to achieve a separation in this manner was because he had already fallen out with Mr. Hui and Mr. Tang some four or five years earlier. They had come into conflict about the primate breeding farms they had established together. By 2011, the relationship had soured. In July 2011 Mr. Lau had proposed to buy out Mr. Hui's and Mr. Tang's shareholding in the Company, but they had refused. By 2012, they found themselves on opposite sides in Hong Kong litigation, with monies being claimed against Mr. Lau in respect of an attempted settlement of their disputes in relation to the primate breeding business. The differences ran deeper than the primate business, and adversely affected their relationship

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[11] 2003] EWHC 1507 (Ch) at paragraphs [133]-[135] (Neuberger J) (This case was reversed on appeal by the English Court of Appeal, but not on this ground, which remains good law).
[12] [1916] 1 AC 554.
[13] (1867) LR 5 Eq 464n.
[14] (1879) 11 ChD 97.

pertaining to the Company. By 1st March 2013, when Mr. Tang was removed as a director of the Company, the division lines had been drawn. All the Director Defendants congregated in one block, and the Claimants in another. This division had in effect already come into being in May 2012, when the Board of directors, controlled by Mr. Lau and those loyal to him, pre-emptively stymied the PCo investment proposal raised by Mr. Hui.

[254] I am persuaded that the Director Defendants, including Mr. Angus Chau until shortly before his resignation in September 2015, were loyal to Mr. Lau and were prepared to help him get what he wanted, which was to cut Mr. Hui and Mr. Tang out from the drug business. Mr. Lau was the leader and a voluble, insistent and dominant character. The other Director Defendants were followers and prepared to compromise themselves, most probably out of loyalty for Mr. Lau, from desire for a quiet life and, apart from Mr. Angus Chau, most importantly, not to bite the hand that fed them. All the Director Defendants were united in that effort. It was not the case that one or more were ignorant of the true position in relation to the alleged crisis.

[255] As the drug business grew, Mr. Lau progressively tried to increase his control over the Company by buying up shares and paying off shareholder loans. In June 2015, Mr. Lau tried a second time to buy out Mr. Hui and Mr. Tang, but, again, they refused as they considered the price too low.

[256] Mr. Lau had a fall-back plan, which is why Mr. Sung was engaged the same month, June 2015. Mr. Lau activated his fall-back plan.

[257] It is clear that a sale of the Target Group to himself was an eventuality that Mr. Lau had been contemplating. In May 2015, Mr. Lau had made sure that his trusted friend and proxy, Mr. Lung, had 20% of the shares in the Company vested in him. The reason Mr. Lau did this was that he knew he would not be allowed to vote in a shareholders' meeting of the Company upon such a sale to himself. Mr. Lau thus needed to ensure that someone he could trust would be able to vote more shares than Mr. Hui and Mr. Tang together could muster, directly or indirectly, which Mr. Lau correctly understood to be just under 14%.

[258] It is extremely probable, and I find as a fact, that Mr. Lung held his shares in the Company as a nominee for Mr. Lau, or at least, upon an agreement that Mr. Lung would vote in favour of a

sale of the Company's assets to Mr. Lau, and not as their unconditional beneficial owner. My reasons for this finding are:

(1) It is curious that Mr. Lung prevaricated when asked directly at the EGM on 15th September 2015 whether he was the beneficial owner. If he was, then a straightforward affirmative answer would have come naturally and sufficed. Such a straight-forward answer would have been in line with his apparent desire to forestall and curtail debate at the meeting, on this and other matters (e.g. the need for shareholders' approval of the capitalisation of receivables under BVI law). The fact of the matter was that he had been caught off-guard and did not have a ready answer to cover up the true position;

(2) The number of shares that would ultimately comprise Mr. Lung's 20% do not tally with the 20% he said he had agreed with Mr. Lau to buy in 2011;

(3) If he had already bought his shares by 2012, it is odd that Mr. Lung should not have been recorded as a shareholder at subsequent shareholder meetings, but only as a proxy of Mr. Lau's corporate vehicles;

(4) None of the Defendants could produce any evidence that Mr. Lung had paid for any shares at all in the Company. Those payments that Mr. Lung could show some evidence for referenced another company or companies of Mr. Lau, or were personal payments, and anyway fell short of the total alleged purchase price for his shares.

(5) The alleged lack of record-keeping concerning such payments, and Mr. Lung's apparent reluctance to have sought earlier documentary recognition for his alleged shareholding, does not fit well with the apparent picture that Mr. Lung, as a retired police officer, was a man of relatively modest means, for whom these alleged investments in the Company must have been quite significant.

[259] Instead, I am persuaded that Mr. Lung's share acquisition was an artifice and a device to enable Mr. Lau to obtain a sale of the Target Group were it to be put to a shareholder vote.

[260] It was also part of Mr. Lau's plan to purchase the Target Group for as little of his own money as possible. He had already recently expended significant sums buying up blocks of shares, in half a dozen separate tranches. Mr. Hui and Mr. Tang had already balked at the price at which Mr. Lau had first offered to buy them out, as being too little, and Mr. Lau either could not or would not agree to paying his adversaries any more than he absolutely had to. Indeed, by a sale of the Target Group by the Company to himself, the price he would pay would go to the

Company, and he could (as he did) ensure that those proceeds would be used to repay others' shareholder loans, with little or no money going to the Claimants.

[261] The pretext for the sale would be an alleged crisis, at which the Board of directors would collectively wring their hands, feign despair, and identify a sale at liquidation value to Mr. Lau as the only way to save the day, by realising a little money for the Company.

[262] In reality, there was no crisis. The manufacture and sale of Analgecine had grown from year to year and the business was profitable, including in 2015. In jarring contradiction to the constantly repeated lament that the business was always in serious financial trouble, the Board of directors awarded Mr. Lau **monthly** remuneration of HK$100,000 in April 2012 and in March 2013 this monthly sum was **doubled**. No evidence was led that Mr. Lau was not paid such sums, then or subsequently. The Court will assume he was paid these sums.

[263] I will consider the alleged crisis further below.

[264] Before doing so, however, I should say that I am persuaded that Mr. Sung did back-date his report to 17th August 2015, either at the request of Mr. Terence Yeung or Mr. Lau. Not only was Mr. Sung still working on it on 21st August 2021, so as to send a draft to Mr. Yeung that day, but Mr. Ngai's evidence was clear that the Alfred Sung Report was not yet ready when the directors met on 20th August 2015. Mr. Ngai stated that Mr. Yeung shared 'first impressions' of what Mr. Sung's findings might look like, and only that Mr. Sung was considering whether the Company would be treated as a going concern, that is, that Mr. Sung had not reached a conclusion yet. The only sensible conclusion that this suggests is that Mr. Sung's report was not yet ready then.

[265] The reason why the Alfred Sung Report was backdated to 17th August 2015, was because very shortly after that date Mr. Lau and the other Director Defendants were informed that the drug had been reregistered for manufacture and sale, for another five years. It had previously been reregistered for five years, on 30th September 2010. They had applied for reregistration, and that had been granted on 17th August 2015. As at 17th August 2015, Mr. Lau and the other Director Defendants did not know that yet, although they did shortly afterwards. So, procuring Mr. Sung to back date his report to 17th August 2015 meant that Mr. Lau and the Director Defendants could maintain a pretence that there was a consistent basis, as at that date, to

proceed with a sale of the Target Group as if the Company was not a going concern. The reregistration of the drug for manufacture and sale for another five years meant that it would be legal for Vanworld Rugao to do so, contrary to the alarmist over-statements of some of the other Director Defendants (such as Mr. Angus Chau).

[266] I am persuaded that that was the reason why the reregistration was not mentioned in the minutes of the 20th August 2015 Board meeting, nor at the 2nd and 15th September 2015 shareholders' meetings. Although all the Director Defendants knew of the reregistration by each of these dates (as I am satisfied, on a balance of probabilities, they were) the reregistration was not mentioned because it did not fit the Director Defendants' narrative. The reregistration negated any suggestion that the Company was no longer a going concern. The reregistration confirmed that it would be lawful for Vanworld Rugao to continue manufacturing and selling Analgecine to the trial or provisional drug standard for the next five years. The reregistration scotched any notion that the worst was about to happen to the Company. What the Director Defendants had sought to do was to paint a picture that they thought the worst was about to happen, from which it would, they assumed, be an imperceptible step to sell the Company's assets off on the basis that the worst had already happened. With the reregistration, that tiny step would become an impossible leap.

[267] I am persuaded that the reason why none of the Director Defendants, including Mr. Angus Chau, even so much as considered seeking an opinion from PRC lawyers in relation to the reality or otherwise of the alleged perceived crisis, or of other possible steps that could be taken to mitigate its alleged effects (such as compensation for factory removal), was because they had already determined that they would go along with, and assist, Mr. Lau's wishes to get rid of Mr. Hui and Mr. Tang by his purchase of the Target Group. Their, and in particular Mr. Angus Chau's, only issue was that the price should be justifiable when the shareholders should come to vote on it. They were not addressing a crisis, *as portrayed at the 20th August 2015 Board meeting*. They therefore did not check themselves and ask whether their intended 'solution' made sense.

[268] It did not make sense, and none of the Director Defendants could explain how it could do so. Clearly, the Company would potentially benefit more if allowed to continue trading, for however long the PRC authorities would let Vanworld Rugao to do so, and ***then*** let it be put in liquidation, assuming it could not be sold to an investor in the meantime, or be allowed to

continue in business by a regulatory authority. Instead, if there was any truth to the alleged crisis (which there was not), the Board at best reacted irrationally on the basis that the worst had already happened, when, on the Director Defendants' own case and Board minutes, it had not.

[269] The 'problem' that the Director Defendants were addressing was different, if it can be called a problem. This was simply that differences between Mr. Lau and Mr. Hui and Mr. Tang had come to a stage where both sides wanted to part ways, with the sticking point being how much money Mr. Lau would have to pay to rid himself of them. Mr. Lau's 'solution' was to force a sale of the Company's assets to himself at as low a net asset value as he could procure, from a compliant accountant. Thus, the purchase value was the potentially problematic aspect for professional advice the Director Defendants, and Mr. Yeung and Mr. Angus Chau in particular, were focussed on getting, not PRC legal advice. Mr. Angus Chau clearly saw the dangers in relying upon just the Alfred Sung Report.

[270] The Director Defendants' determination to press through sale of the Target Group to Mr. Lau is also demonstrated by their haste in capitalizing the Company's receivables in early September 2015, when the Claimants raised questions about them. Their haste and determination was such that they did not even trouble themselves to obtain shareholder approval to do so, pursuant to section 175 of the BCA.

[271] In this regard, I accept the Claimant's case, and Mr. Yeung's admission, that the receivables were clearly assets of the company that comprised more than 50% in value of the Company's assets. The Claimants' learned Queen's Counsel submitted that if regard is had to the Company's audited accounts for the year ending 31st December 2014, the receivables represented 96.3% of the Company's assets. Whilst I express no judgment upon this mathematical conclusion, I accept that the receivables clearly were assets of the Company and that they comfortably exceeded 50% in value thereof.

[272] The moment when the Claimants queried what would be done with the receivables would have been a natural point at which the Director Defendants could have taken stock of the situation as a whole, and engaged PRC lawyers to opine on issues pertaining to the alleged crisis (if it had been genuine) and a more considered valuation. That the Director Defendants did not do so but hastened to have the sale remitted to the shareholders for vote casts additional doubt upon

their *bona fides* and supports a conclusion that they were intent upon effecting a sale to Mr. Lau.

[273] In light of irrational and incoherent answers given by the Director Defendants in their oral evidence, it is easy to understand how the Director Defendants could see no difficulty with their emotive and illogical reasoning that a sale to Mr. Lau would make sense in light of the years of effort and money he had put into the Company. In doing so, they completely overlooked the plain fact that merely changing the owner of the Target Group would not cure the alleged 'crisis' that they had portrayed.

[274] In their single-minded focus upon achieving a sale of the Target Group to Mr. Lau at liquidation value, the Director Defendants also overlooked the fact that they owed fiduciary duties to the Company.

5.2.1 The alleged crisis

[275] The Court's primary finding is that the alleged crisis was an artificial construct to set up a decision at both Board and shareholder level to sell the Target Group to Mr. Lau at liquidation value, and that all the Director Defendants had knowledge of this plan and assented to it. The Court's secondary finding is that a reasonable director, exercising care, diligence and skill would not have seen that there was a crisis.

[276] The circumstances of the Board meeting on 20th August 2015 warrant closer examination.

5.2.2 The Board meeting on 20th August 2015

[277] This Board meeting was convened by Mr. Terence Yeung, as 'Secretary of the group company' by email dated 19th August 2015 at 5.43 p.m., i.e., the evening before. It was addressed to the Board of directors and all directors were invited to attend. The meeting was announced to take place at the Company's Hong Kong Head Office at 3 p.m. on 20th August 2015.

[278] A Notice of Board Meeting, on the Company's headed notepaper, was attached to Mr. Yeung's email. This Notice was addressed to Mr. Lau as the Chairman, and to each of the six Director Defendants.

[279] The Notice of Board Meeting recited the date, time and place for the meeting and then, under the heading of 'Topic', it stated as follows:

> "1. Discuss the current crisis and solutions of the Group
> 2. Discuss the possibility of convening extraordinary general meeting."

[280] The reference to '**the** current crisis' suggests that the Directors were already aware of 'an' (alleged) crisis.

[281] The reference to 'the possibility of convening extraordinary general meeting' indicates that those who had come up with the idea of this Board meeting had already thought about the possible need for an EGM. It is also reasonable to conclude that the purpose for such an EGM would be for the shareholders to vote upon one or more 'solutions' that the Board might propose. There is also clear evidence that Mr. Yeung was very much aware that a disposal of more than 50% of the Company's assets by value would require the affirmative vote of a majority of the shareholders. It is reasonable to conclude that those who had come up with the idea for this Board meeting had in mind such a vote. This is supported by the fact that Mr. Lung had already been equipped with sufficient shares to outvote Mr. Hui and Mr. Tang.

[282] We should then see what is said to have transpired at the Board meeting on 20th August 2015.

[283] According to the minutes, the meeting is said to have lasted two hours. All seven directors attended, either in person or by telephone.

[284] The minutes took care to note compliance with the Company's Articles of Association.

[285] Under the first topic, the minutes mentioned four elements as underlying the alleged crisis:

(1) The Company was short of capital and there had been a delay in paying wages of Hong Kong and domestic employees during the previous two months;

(2) As of 20th August 2015, the Company had 'made every effort to appeal to [the CFDA] with respect to the "official approval of testing standard", but directors are not optimistic about it. CFDA may suspend the production and sales of Rugao Factory at any time.' The minutes then referred to a notice from the CFDA, entitled 'Review Opinions Notice' dated 19th May 2009, which were appended to the minutes.

(3) According to a 'Notice on Accelerating the Implementation of Relocation Work of Chemical Production Enterprises in the Main Urban Areas' dated 10th August 2010, attached to the minutes as a second appendix, the Rugao factory was listed and was required to relocate before 31st December 2013, but following extensive negotiations, the relocation of the factory had been postponed to 31st December 2016 at the latest.

(4) If the factory would be forced to close, the Company would be required to pay severance and long service fees to employees in Hong Kong and Mainland China, with the Company's 'liabilities and arrears' standing, as at 20th August 2015 at about HK$45,390,000. This figure was purportedly broken down. It included two former shareholder loans totalling about HK$4.83 milion, a loan from the Bank of China of about HK$18.75 million and various other payables, of which HK$1.2 million in wages payable by the Hong Kong office.

[286] No other elements were minuted as pertaining to the alleged crisis.

[287] It is then recorded that

> "To protect the interests of the shareholders, [Mr. Angus Chau] believed that the sale of the Rugao Factory may be one of the solutions to reduce the loss."

[288] The minutes do not say why or how Mr. Chau believed such a sale to be a solution.

[289] Nor do the minutes say what, and how much, 'the loss' was. Whilst the minutes purported to set out the Company's 'liabilities and arrears', no mention was made of the Company's total assets, nor its steady monthly profits.

[290] The minutes instead immediately record that:

> "[Mr. Lau] pointed out that he had put a lot of time and funds to operate [the Company]. Therefore, he would like to acquire the two wholly owned subsidiaries of [the Company] at the price of one million, and would be liable for all the debts of [the Company]."

[291] Mr. Zhang and Mr. Lung are then recorded as believing that the possibility of requiring all the shareholders to raise funds for a second time was 'very low', and that the suggested sale could also reduce 'the loss' of shareholders. Mr. Cheung is recorded as believing that 'all the relevant suggestions' should be notified to all the shareholders immediately.

[292] Mr. Angus Chau is then recorded as having suggested that the Board should appoint an evaluation expert to make a value assessment of the Company to let all the shareholders know the value of the Company. Thereupon Mr. Yeung is recorded as having 'pointed out that the Board had already appointed Alfred Sung & Co. to evaluate the value of [the Company's] assets' and that the 'relevant report will be provided to all shareholders'. It should not be forgotten that the evidence is that Mr. Alfred Sung had already been told by Mr. Terence Yeung some two months earlier, in June 2015, that his report was sought in view of an eventual sale of the business.

[293] The first topic was closed off, in the minutes, with a record that the 'relevant arrangements and suggestions were passed by unanimous consent of all the directors'.

[294] The second topic is recorded more briefly. Mr. Yeung is recorded to have

> "raised that the Board should hold an [EGM] to pass the relevant shareholders' resolutions if the value of the company's assets sold exceeds 50% of the total asset value in accordance with the relevant provisions of the BVI Business Companies Act."

[295] The use here of the word 'raised' suggests that the issue of convening an EGM was a new matter. In fact, it had already been 'raised' in the Notice of Board Meeting – and, thus, clearly, thought about, before the Board meeting was held.

[296] Indeed, the only reason for holding an EGM as recorded in the minutes was for the shareholders to vote upon the disposal of assets. **No** mention was made of convening an EGM just to inform the shareholders of a crisis and to holde a wider discussion on possible solutions.

[297] Mr. Ngai is then recorded as having suggested that a law firm be appointed to arrange the EGM to ensure the EGM would be 'carried out in a lawful and reasonable manner', and Mr. Yeung is recorded as then suggesting the appointment of the Hong Kong law firm that eventually presided over the EGMs in September.

[298] No discussion is recorded to have taken place about taking legal advice in respect of the alleged crisis, nor about the Hong Kong law firm's qualifications and suitability to ensure correct conduct of a BVI company EGM in accordance with BVI law.

[299] No discussion or mention is made in the minutes of

(1) any other possible solutions to the alleged crisis;

(2) any perceived risk to subsidiary companies or staff of any penalties or other sanctions in respect of any unlawful manufacturing or trading; nor

(3) the Pharmacopoeia Announcement.

[300] When these additional matters were raised in evidence at the trial, these were clearly afterthoughts.

[301] Again, the minutes record that the 'relevant arrangements and suggestions were passed by unanimous consent of all the directors'.

[302] Both the Notice of Board Meeting and the minutes are commensurate with a predetermined plan to sell the Company's assets to Mr. Lau.

[303] Turning to the individual elements of the alleged crisis:

(1) It is unclear why wages had allegedly not been paid for the two months prior to the Board meeting. Mr. Yeung's evidence was that the Target Group was in a positive financial position by 'several millions'. Vanworld Rugao's unaudited profit and loss accounts to the end of June 2015 showed that it had made HK $23.5 million in operating profits for the first 6 months of 2015. The unpaid wages were said to be a fraction of this sum, at HK$1.2 million.

(2) The fact that the drug had been reregistered for manufacture and sale on 17th August 2015 for a further five years meant that the CFDA could not 'suspend the production and sales of Rugao Factory at any time'. The Claimants adduced expert evidence from a senior and highly qualified PRC lawyer that 'if the [CFDA] had any reason to revoke the Drug Approval based on the 2009 [CFDA] rejection, the [CFDA] should not have approved the PRC Company's renewal application on 17 August 2015'. The expert explained that:

> "Article 126 of the 2007 Registration Measures provides that the Drug Approval of a drug shall not be renewed in any of the following cases... (9) other circumstances not in compliance with relevant regulations."

I accept this view, which treats the PRC drug regulatory scheme as having interior consistency. That is more likely than the Director Defendants' ostensible view, which would entail the anomalous situation that the PRC regulatory authorities could renew a

license to manufacture and sell a drug for another five years with one hand, and to take away such a right with the other. The latter is possible, but inherently less likely. The minutes do not record why the directors came to be of an alleged view, or allegedly assumed, that the CFDA could suspend manufacture and sale at any time. If indeed this was what they assumed, a moment's intelligent and rational reflection would have caused a director to ask whether that was indeed the position under PRC law and to suggest that a PRC lawyer should be consulted upon it.

(3) Concerning the effect of the Removal Notice, the Claimants submitted that this is also a matter upon which the Directors should have been prompted to seek PRC legal advice in relation to compensation payable. The directors had previously already considered the issue of compensation for relocation at a Board meeting in March 2013, so it was not a new issue. The Claimants obtained expert evidence that, in fact:

(i) The Removal Notice (which was not specifically addressed to Vanworld Rugao) was not enforceable against this company without governmental approval (specifically, an approval certificate of dismantlement); and

(ii) In the event the factory would have to be relocated, the government would be required to pay compensation to Vanworld Rugao.

I accept this evidence as it appears more likely than not to be correct.

(4) The fourth element to the alleged crisis, as recorded in the minutes, was that the Company would face severance and long service fees **if** the factory were to be forced to close, in addition to its existing debt burden. That 'if' was a rather big assumption. It had not yet been forced to close and, on the directors' reported understanding, the deadline for relocation was still some one year and five months away. The focus, in isolation, on liabilities and arrears omitted to refer to Vanworld Rugao's unaudited profit and loss accounts as at 30th June 2015, which showed that Vanworld Rugao had gross assets of over HK$113 million (dwarfing the alleged liabilities and arrears) and that in the first six months of 2015 alone it had made HK$23.5 million in operating profits. Mr. Ngai agreed with these figures in his evidence. The minutes of the Board meeting did not mention this. There appears to have been no balanced discussion on the point at the meeting. Incredibly, Mr. Lau claimed not to be familiar with these accounts at all even though he disclosed them, and they were the basis of the valuation on which he bought the Target Group. In 2015, Vanworld Rugao was also making operating profits of more than HK$5

million per month. In respect of the financial position as at August 2015, Mr. Cheung stated, 'I knew that business was good but I did not know the figures'. Additionally, the biggest liability listed was a loan from the Bank of China stated to be in the amount of HK $18,750,000. However, when set against the profits of Vanworld Rugao for the first 6 months of 2015, this was not a large figure. The Claimants' own further inquiries indicated that the amount due to the Bank of China was much lower and would not fall due until 2016.

[304] In short, each of these elements of the alleged crisis was at the very least factually problematic, such that when assessed objectively, there was in fact no crisis.

[305] The Board meeting on 20th August 2015 was a rather crude and transparent attempt to create a pretext for a pre-planned sale of the Target Group to Mr. Lau. I am persuaded that the outcome of the Board meeting had been planned and foreseen with this intention, as the Notice of Board Meeting itself contained the tell-tale hallmarks of an intended sale of over 50% of the Company's assets by value. The Director Defendants appear to have suspended all critical judgment in relation to the alleged elements of the 'crisis'. I am also persuaded that the minutes of the meeting on 20th August 2015 had been mere window-dressing to create the false impression of a crisis and a search for a solution through discussion.

5.3 The issues.

[306] As so often happens when Defendants have the facts against them, they seek salvation by raising a storm of fine technical pleading points and objections. It was no different here. This trammelled what is, in essence, a reasonably straight-forward matter with confusion and obscurity. In relation to the pleading points, there was nothing in substance to them. The Claimants' pleaded case was sufficiently clear for the Defendants to know the case against them and the Defendants had ample opportunity to clarify any genuinely unclear matters, and the Claimants sufficiently stayed within the confines of the pleadings including matters addressed in witness statements. The Claimants were entitled to test the veracity of matters stated by the Defendants and their witnesses, including with reference to documents that had been disclosed, or disclosed late and under compulsion, or with reference to a remarkable absence of documents, so that the Court should obtain as full and accurate an appreciation of the matrix of facts as a just determination should require.

[307] Nonetheless, to be absolutely clear in case it might be objected that I have left uncertainties, I will spell out the Court's findings on the issues for determination as identified by the parties. This now follows. The following are the principal issues agreed by the Claimants and the Sixth Defendant, Mr. Angus Chau, so far as they are presently material. I will deal separately with the central legal issues.

(1) Did the directors of the Company undertake a series of steps in pursuit of a scheme to transfer the Target Group to the First Defendant Mr. Lau at a gross undervalue. Answer: Yes.

(2) Did the crises alleged in the 20th August 2015 Board meeting actually exist? Answer: No.

(3) If the alleged crises did not exist as stated, did each of the directors know that they did not exist? Answer: Yes.

(4) If the directors did not know that the alleged crises did not exist, should they reasonably have known that they did not exist? Answer: Yes.

(5) In particular, should professional advice have been sought in respect of (i) Vanworld Rugao's ability to manufacture, distribute and sell Analgecine and (ii) the meaning and effect of the Removal Notice? Answer: Yes and Yes.

(6) Was Vanworld Rugao prohibited from manufacturing, selling and/or distributing Analgecine during the period 20th August 2015 to 15th September 2015? Answer: No.

(7) Did the Target Group have significant liabilities and arrears as at 20th August 2015? Answer: No.

(8) Was there a requirement under the Removal Notice for the PRC Company Vanworld Rugao to relocate its factory premises and if so, on what terms? Answer: It is unclear to the Court whether there was such a requirement. If there was a general requirement, it had not been crystallized, nor put into effect, by further action on the part of the

government. If relocation would be required, Vanworld Rugao would be entitled to receive financial compensation from the government.

(9) Was the capitalization of Receivables done in breach of section 175 of the BVI Business Companies Act 2004? Answer: Yes. The Receivables equated to more than 50% of the Company's assets as at 3rd and 4th September 2015; the capitalisation was not made in the regular course of business, in that it was a one-off event to facilitate a sale of the target Group to Mr. Lau. The shareholders did not receive adequate details of the proposed capitalization (in fact they were not even informed of it before the capitalisation was done) and no majority, nor indeed any, shareholders approved it.

(10) Was the capitalization of Receivables carried out for a proper purpose? Answer: No. It was a deliberate step in Mr. Lau's scheme to have the Company transfer the Target Group to himself by way of a sale at a gross undervalue.

[308] The other Director Defendants filed their own List of Principal issues, which was broadly similar to that agreed by the Claimants and Mr. Chau. It was however framed more in terms of a mixture of factual and legal issues and it referred somewhat generally back to the Amended Statement of Claim to frame the issues for judgment now. The factual issues postulated by these Director Defendants principally and materially come down to these additional issues:

(1) Did each of the Directors know from their roles as executive director of the Company that the drug had already been approved in respect of its production and sale on 17th August 2015?

(2) Alternatively, should each of the directors of the Company have known this by reason of their position as directors of the Company?

[309] The answer is that I am persuaded on a balance of probabilities that each of the Directors did know of the re-registration on 17th August 2015 or very soon after that date, if not on that date itself. Mr. Terence Yeung and Mr. Lung certainly knew of the reregistration very soon after 17th August 2015. Mr. Lung said he had received this 'piece of good news' by the next day. I am certain Mr. Lau similarly must have known. Mr. Ngai admitted to finding out about the reregistration shortly after it happened and in any event by 20th August 2015. There is no reason to suppose that the news had been withheld from the remaining directors Mr. Cheung, Mr. Zhang and Mr. Chau, as it obviously had been communicated urgently to the other

directors. Taking all the circumstances in the round, I am persuaded on a balance of probabilities that Mr. Cheung, Mr. Zhang and Mr. Chau also knew very shortly after 17th August 2015.

5.4 Issues of liability

5.4.1 Breach of directors' duties

[310] I will first address the legal position pertaining to the Executive Director Defendants and then the Sixth Defendant (Mr. Angus Chau) separately. Whilst the Amended Statement of Claim included various specific allegations of wrongdoing, it is convenient to address issues of liability with reference to the headline allegations pleaded.

5.4.2 First allegation of liability

[311] In terms of the Claimants' pleaded case on liability, their first and overarching allegation, which is made at paragraph 9 of the Amended Statement of Claim, is that each of the Director Defendants did wrongs to the Company, which consequently suffered losses, through breaches of fiduciary duties and/or breach of trust and/or breach of duty of fidelity and good faith owed by each of the Defendants to the Company as its directors, including but without limitation to the sale of the Target Group to Mr. Lau at gross undervalue.

[312] This general, and broad, pleading ultimately engages predominantly the duties of BVI company directors as set out in the BCA. It is apt therefore to address these.

[313] There is no material difference in the respective factual positions of the Executive Director Defendants.

[314] By section 120 of the BCA, all the Director Defendants had a statutory duty to act honestly and in good faith and in what they each believed to be in the best interests of the Company.

[315] In terms of the application of section 120, the well settled authority is our Court of Appeal decision in **Antow Holdings Limited v Best Nation Investments Limited**:[15]

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[15] BVIHCMAP2017/0010 (unreported, delivered 21st September 2018) at paragraphs [22]-[26] (Pereira CJ).

> "The courts will look for independent, objective evidence to test the director's claim to be acting bona fide."[16]

And:

> "Where there has been a failure by a director to consider the separate interests of their company, or a challenge by an applicant on the 'good faith' of a director, the test then becomes an objective one. In **Charterbridge Corporation, Ltd v Lloyds Bank and Another**, Pennycuick J held that the proper test in the absence of actual separate consideration of the interests of the company, is whether an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company."[17]

[316] By section 121 of the BCA, all the Director Defendants were under a statutory duty to use their powers for a proper purpose and not to act, or agree to the Company acting in a manner that contravenes the BCA.

[317] By section 122 of the BCA, all the Director Defendants had a statutory duty to exercise the care, diligence and skill a reasonable director would exercise in the same circumstances, taking into account, without limitation, the nature of the company, the nature of the decision and the position of the director and the nature of the responsibilities undertaken by him.

[318] Pursuant to section 123 of the BCA, a director is only entitled to rely upon the company's records or other information, or professional or expert advice if the director:

(1) acts in good faith;

(2) makes proper inquiry where the need for the inquiry is indicated by the circumstances; and

(3) has no knowledge that his reliance on the register of members or the books, records, financial statements and other information or expert advice is not warranted.

[319] In considering whether the Director Defendants satisfied their duty pursuant to section 120 of the BCA to act honestly and in good faith and what they each believed to be in the interests of the Company, in light of the Court's finding of fact that all the Director Defendants knew there

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[16] BVIHCMAP2017/0010 (unreported, delivered 21st September 2018) at paragraph [25] (Pereira CJ).
[17] BVIHCMAP2017/0010 (unreported, delivered 21st September 2018) at paragraph [26] (Pereira CJ).

was no genuine crisis and that they undertook a series of steps in pursuit of a scheme to transfer the Target Group to Mr. Lau at a gross undervalue, they inherently acted dishonestly.

[320] They also acted in bad faith. Applying the criteria for there to be independent, objective evidence to test a director's claim to be acting bona fide, as expounded in **Antow Holdings Limited v Best Nation Investments Limited**,[18] I must first ascertain whether there has been a failure by each of the Director Defendants to consider the separate interests of the company or whether there has been a challenge by the Claimants to their 'good faith'.[19] Both apply here.

[321] The Director Defendants failed entirely to consider the separate interests of the Company. They acted only to give Mr. Lau what he wanted in terms of full ownership and control over the operating subsidiaries of the Company at the lowest possible price to the exclusion of the Claimants. None of the Director Defendants could say how the sale to Mr. Lau of the Target Group at liquidation value in September 2015, whilst Vanworld Rugao was still trading, and indeed profitably, would solve the alleged crisis of the Company, because, of course, it would not. No intelligent and honest man in the position of the Director Defendants could, in the whole of the circumstances I have set out chronologically at some length, have reasonably believed that such a sale was for the benefit of the Company.

[322] Each of the Director Defendants was thus acting in breach of their section 120 statutory duties.

5.4.3 Second allegation of liability

[323] The second, more specific, allegation of breach by the Director Defendants of their fiduciary duties to the Company and/or their statutory duties under section 120(1) of the BCA was pleaded at paragraph 22A of the Amended Statement of Claim. The Claimants there pleaded that the Director Defendants had not acted honestly, and in good faith and in what they believed to be in the best interests of the Company, in determining to sell the Target Group at HK$1 million on the basis of the Alfred Sung Report. In particular, the Claimants pleaded that the Director Defendants unreasonably relied upon the Alfred Sung Report in that Mr. Sung was clearly not qualified to comment of the relevance of PRC laws and regulations and their effect upon the value of the Target Group; the Director Defendants had failed and/or deliberately

[18] BVIHCMAP2017/0010 (unreported, delivered 21st September 2018) at paragraph [25] (Pereira CJ).
[19] BVIHCMAP2017/0010 (unreported, delivered 21st September 2018) at paragraph [26] (Pereira CJ).

omitted to seek independent professional advice on PRC law and regulation; the Director Defendants had failed and/or deliberately omitted to question Mr. Sung's determination that assessment of valuation of the Group on a going concern basis was inappropriate, and thereby that the Director Defendants failed to exercise independent judgment; the Director Defendants failed and/or deliberately omitted to ask Mr. Sung or another professional adviser to take into account the patent held by Vanworld Rugao and the business goodwill; the Director Defendants had knowingly withheld from Mr. Sung, *inter alia* that from 2009 to 2015 the Company had won bids for sale and distribution of the drug in various provinces throughout the PRC for almost every year.

[324] The Claimants extended this alleged breach to alleged breaches of sections 121 ('Powers to be exercised for a proper purpose') and 122 ('Standard of care') of the BCA.

[325] The fundamental difficulty with this allegation is a factual one. The facts show that the Director Defendants resolved to refer the proposed sale at a price of HK$1 million to a vote of the shareholders at the Board meeting on 20th August 2015 ***before*** they even so much as knew what the Alfred Sung Report would say. That itself is problematic, and highly indicative of the Director Defendants' lack of honesty and lack of good faith and lack of regard for the interests of the Company.

[326] The Alfred Sung Report only came out on 28th August 2015, and the shareholders were able to consider it on its merits at the EGM on 2nd September 2015. By then the Director Defendants had already determined the price of HK$1 million, but **not** on the basis of the Alfred Sung Report. This pleaded allegation must thus fail.

5.4.4 Third allegation of liability

[327] The Claimants pleaded at paragraph 31 of their Amended Statement of Claim that the capitalisation of the Receivables was a deliberate step by Mr. Lau and/or the other Director Defendants in furtherance of Mr. Lau's scheme to dispose of the target Group to himself by way of a sale at gross undervalue. I find this allegation to have been made out.

[328] I have already explained that the capitalisation of the Receivables constituted a breach of section 175 of the BCA. This was thus an unlawful disposal of the Company's assets. In addition to being a breach of section 120 of the BCA, it was of necessity also a breach by the Director Defendants of section 121 of the BCA, in that, by that section, a director shall not act, or agree to the company acting, in a manner that contravenes this Act (thus including section 175).

[329] Moreover, the capitalisation of Receivables was done for an improper purpose, of procuring the sale to Mr. Lau at a gross undervalue. In this regard the Director Defendants breached their statutory duties provided for by section 121 of the BCA. This breach was caught by the Claimants' general pleading of breach of duty at paragraph 9 of the Amended Statement of Claim.

[330] I reach this legal conclusion as follows.

[331] Harney Westwood & Riegels: British Virgin Islands Commercial Law (4th edn., Sweet & Maxwell Hong Kong) at paragraph 2.280 cites the leading UK Supreme Court case of **Eclairs Group Ltd and another v JKX Oil & Gas plc**[20] as the leading authority when discussing section 121 of the BCA. The English Supreme Court held that the 'proper or improper purpose' rule:

> "...is concerned with abuse of power, by [directors] doing acts which are within its scope but done for an improper reason. It follows that the test is necessarily subjective. "Where the question is one of abuse of powers," said Viscount Finlay in *Hindle v John Cotton Lt* (1919) 56 Sc LR 625, 630, "the state of mind of those who acted, and the motive on which they acted, are all important".[21]

The **Eclairs** decision was also cited with approval by our Court of Appeal in its interpretation of section 121 in the case of **Independent Asset Management Company Limited v Swiss Forfaiting Limited**.[22] This was a case involving the issuance of shares so as to effect a shift in the balance of power in a company. Paragraphs [25] to [27] of our Court of Appeal decision in that case warrant setting out here in full (without footnotes but with emphasis added):

> "[25] The foundation of the proper purpose rule lies in the fact that a company is divided into two basic organs: the board of directors and the shareholders. Directors are

[20] [2015] UKSC 71.
[21] [2015] UKSC 71 at paragraph 15 (Lord Sumption).
[22] BVIHCMAP 2016/0034 (unreported, delivered 24th November 2017) at paragraph [25] (Webster JA (Ag.).

responsible for managing the business and affairs of the company and have the power to issue the shares as a part of that responsibility. In doing so, they must ensure that a proper balance is maintained between the two organs of the company, and, as Lord Sumption said in Eclairs Group Ltd v JKX Oil & Gas plc and others: "These considerations are particularly important when the company is in play between competing groups seeking to control or influence its affairs. The directors' task is no more difficult than it was in the many cases like Howard Smith Ltd v Ampol Petroleum Ltd in which other fiduciary powers, such as the power to issue shares, have been held improperly exercised because in the face of pressures arising from a battle for control the directors succumbed to the temptation to use their powers to favour their allies. I would agree with the majority of the Court of Appeal that in that situation the board would naturally wish to have the predators disenfranchised. That is precisely why it is important to confine them to the more limited purpose for which their powers exist. Of all the situations in which the directors may be called upon to exercise their fiduciary powers with incidental implications for the balance of forces among shareholders, a battle for control of the company is probably the one in which the proper purpose rule has the most valuable part to play." In the situation described by Lord Sumption, where there is a power struggle between different groups of shareholders, the directors should not issue additional shares in such a way as to affect the balance of power in the company or influence in any way the outcome of shareholders' resolutions, even if this results in additional capital or other benefits for the company. This restriction is not written into the company's articles and it for this reason that equity imposes on directors the additional requirement that the shares must be issued for a proper purpose. If the directors issue shares for an improper purpose, the issue is liable to be set aside. The fiduciary obligation to issue shares for a proper purpose was incorporated in section 121 of the BC Act which provides that-"A director shall exercise his powers as a director for a proper purpose and shall not act, or agree to the company acting, in a manner that contravenes this Act or the memorandum or articles of the company."

[26] The appellant submitted that the directors did not carry out the July Issuance for a proper purpose and it was therefore in breach of section 121 of the BC Act. ... The Act does not provide any guidance as to what is a proper purpose for issuing shares. We must therefore resort to the case law which is helpful.

[27] Lead counsel for the appellant, Mr. Jonathan Crow, QC, invited this Court to approach the analysis of the proper purpose rule by following the four-step procedure that he applied sitting as a deputy judge of the High Court in England in Extrasure Travel Insurances Ltd and another v Scattergood and another. The four steps are:

(i) Identify the power whose exercise is in question.

(ii) Identify the proper purpose for which that power was delegated to the directors.

(iii) Identify the substantial purpose for which the power was in fact exercised.

(iv) Decide whether that purpose was a proper purpose.

Mr. Christopher Parker, QC who appeared for the Fund did not take issue with the correctness of the procedure suggested by Mr. Crow.[23]

[332] Applying these principles, it can immediately be seen that the issue of whether the Director Defendants carried out the capitalisation of Receivables for a proper purpose arises, because it was taken as a step in part of a scheme of disposal of the Company's assets that would see such a fundamental shift in their ownership and control that Mr. Lau would obtain these to the complete exclusion of the Claimants. That is the starting point.

[333] The Court must then apply the four stage test. In this case:

(1) It is uncontroversial that the directors of the Company have the power to capitalise receivables;

(2) The proper purpose of that power plainly is to increase the Company's capital for the benefit of the Company;

(3) The substantial purpose for which the power was exercised was not to increase the Company's capital but to wipe out a debt that the purchaser, Mr. Lau, was not prepared to assume. That debt would need to be wiped out if the scheme of selling the Company's assets to Mr. Lau was to succeed;

(4) That was not a proper purpose, because the Director Defendants' purpose was to ensure that Mr. Lau obtained ownership and control of the Target Group to the exclusion of the Claimants at a gross undervalue. The purpose was emphatically not to increase the capital of the Company for the benefit of the Company, but rather in furtherance of a scheme to strip its assets in favour of Mr. Lau. All the steps taken by the Director Defendants in furtherance of that scheme, including but not limited to the capitalisation of Receivables, were done for that same improper purpose, and thus in breach of section 121.

5.4.5 Fourth allegation of liability

[334] The Claimants pleaded at paragraph 33A of the Amended Statement of Claim that the Director Defendants breached their common law fiduciary duties and their statutory duties pursuant to sections 120 to 122 of the BCA in that, in issuing the notice of 8th September 2015 (convening

[23] BVIHCMAP 2016/0034 Independent Asset Management Company Limited v Swiss Forfaiting Limited (unreported, delivered 24th November 2017) at paragraph [25] – [27] (Webster JA (Ag.).

the EGM for 15th September 2015 to have the sale at HK$6 million voted by the shareholders), the Director Defendants failed and/or deliberately omitted to instruct Mr. Alfred Sung or any other professional adviser to update and revise the Alfred Sung Report to take account of the capitalisation of Receivables in assessing the value of the Target Group.

[335] This pleaded allegation should be understood in its procedural context, namely that it was made before disclosure and the evidentiary stage. It has been overtaken by events, in that the capitalisation of Receivables has been shown (a) to have been improperly effected in breach of section 175 of the BCA and (b) for an improper purpose in breach of section 121 of the BCA. In that light, the Director Defendants would not be saved by having instructed Mr. Sung to revise his report to take it into account.

[336] The remaining part of the allegation is that the Director Defendants did not instruct any other professional adviser to produce a valuation that took account of the capitalisation of Receivables, assuming such capitalisation to have been for a proper purpose. This ultimately goes to a question whether the Director Defendants could properly rely upon the Alfred Sung Report and to the question whether they should have taken PRC law advice on whether the drug could lawfully be continued to be manufactured and sold and upon the effect, if any, of the Removal Notice.

[337] This is however a convoluted way of looking at the pleading, whereas the point of pleadings is to be simple, clear, and easy to construe and apply. It is also not necessary. I will therefore make no findings in respect of this particular allegation. The Director Defendants' breaches of duty are covered by the Claimants' general pleading at paragraph 9 of the Amended Statement of Claim and the fact that they dishonestly and in bad faith engaged in a scheme to sell the Company's assets to Mr. Lau at a gross undervalue, which could not be in the interests of the Company.

5.4.6 Fifth Allegation of liability

[338] The Claimants pleaded at paragraph 52A of the Amended Statement of Claim that the Director Defendants breached their common law fiduciary duties and statutory duties pursuant to sections 120 and 122 of the BCA in unreasonably relying upon the Alfred Sung Report without

more as the basis for calculating the consideration for the proposed sale of the Target Group to Mr. Lau.

[339] This allegation concerns the calculation and approval of HK$6 million as the consideration, since we have already seen that the Director Defendants did not rely upon the Alfred Sung Report for the HK$1 million consideration first proposed.

[340] The Alfred Sung Report was not a true report. It had been prepared to depress the true value of the Company and to create the pretence of having sought professional advice. This was shown by the deliberate backdating of the report to 17th August 2015 to justify a net asset valuation not on a going concern basis after the reregistration of the drug on that date. Moreover, in the evidence, it was shown that in several respects Mr. Sung wrote down the value of assets or ignored them completely (such as the ignored patents and potential compensation for an eventual relocation).

[341] At least Mr. Terence Yeung, and, I am persuaded to a very high degree of certainty, Mr. Lau as well, were directly aware of this and orchestrated it. Their reliance upon the Alfred Sung Report was not honest and not in good faith and they did not believe doing so was in the best interests of the Company. Mr. Yeung and Mr. Lau were squarely in breach of their section 120 duties in this regard.

[342] By dint of their dishonesty and lack of good faith, they also failed to exercise the care, diligence and skill a reasonable director would exercise in the same circumstances. Thus, Mr. Yeung and Mr. Lau were also in breach of their duties pursuant to section 122 of the BCA.

[343] Section 123 of the BCA ('Reliance upon records and reports') does not avail them, because subsection (2) of section 123 provides that reliance can only be had upon records and/or reports where the director concerned

(1) Acted in good faith;

(2) Made proper inquiry where the need for the inquiry is indicated by the circumstances; and

(3) Had no knowledge that his reliance on the register of members or the books, records, financial statements and other information or expert advice is not warranted.

Mr. Lau and Mr. Yeung did not come within any of these categories, which are cumulative.

[344] Leaving Mr. Angus Chau aside for a moment, the factual position in relation to the other Director Defendants was somewhat different from that of Mr. Lau and Mr. Yeung. Those other Executive Director Defendants do not appear to have been directly involved in the commissioning and preparation of the Alfred Sung Report. They appear to have been presented with it, and contentedly accepted that here there was an outside accountant's assessment of the value of the Company's assets, and thus that an outsider looking in (like this Judge) should at first (and they would hope, last) sight conclude that they had acted reasonably in relying upon the report's findings.

[345] There are several difficulties with their position however. The first is that they were not acting honestly and in good faith, in that their purpose was to give effect to Mr. Lau's disposal scheme.

[346] Secondly, the other Director Defendants knew that the Company and the Target Group was a going concern in August and September 2015, whereas the Alfred Sung Report treated it as if it were not. That, at least, should have put the other Director Defendants upon inquiry whether the Alfred Sung Report was reliable.

[347] The net effect of this is that these other Director Defendants also do not fall within any of the three cumulative categories specified in section 123(2) of the BCA for being permitted reliance upon records and reports.

[348] Thus, these other Director Defendants were also in breach of their duties provided by sections 120 and 122 of the BCA.

5.5 Allegations of liability against the First Defendant

[349] At paragraph 46 of the Amended Statement of Claim, the Claimants specifically allege in addition that Mr. Lau

(1) placed himself in a position where his personal interests conflicted with those of the Company;

(2) made profits for himself from his position as the Chairman, an executive director of the Company at the expense and detriment of the Company; and

(3) deprived the Company of the opportunity to make full use of its only major asset and opportunities to generate profits from a bona fide sale of the Target Group at market value in an arm's length transaction.

[350] On the facts as I have found, each of these allegations is made out.

5.6 Allegations of liability against the other Director Defendants

[351] The other Director Defendants were also alleged, at paragraph 49 of the Amended Statement of Claim, to have

(1) placed themselves in a position where their personal interests conflicted with those of the Company; and

(2) deprived the Company of the opportunity to make full use of its only major asset and opportunities to generate profits from a bona fide sale of the Target Group at market value in an arm's length transaction.

[352] These allegations are made out in respect of each of the other Executive Director Defendants.

5.7 Ratification

[353] The Executive Director Defendants pleaded at paragraphs 68 and 69 of their Amended Defence that the capitalisation of Receivables and the sale (and terms of the sale) of the Target Group to Mr. Lau, and the conduct of the Director Defendants, was authorised and/or approved and/or ratified by the members of the Company and/or by the Company at the EGM on 15th September 2015, and therefore no breach duty on the part of the Director Defendants arises.

[354] These Defendants relied upon the provisions of the resolution passed at the EGM on 15th September 2015, and in particular clause (h) on page 4 thereof, which purported expressly to approve, confirm and ratify 'any and all actions and any other documents in connection with the Agreement, the Transactions and the Disposals, or of any one Director or officer...prior to the execution hereof.'

[355] The Claimants however submitted the following:

(1) There can be no ratification in circumstances where full disclosure was not given to the shareholders. There was no such full disclosure, and it was thus impudent for the Defendants to advance an argument on ratification.

(2) There are two principal reasons why the directors' breaches of duty could not be ratified, either of which would be sufficient:

(i) the purported ratification resolution constitutes a fraud on the minority; the breaches committed constitute a failure to act honestly and are therefore incapable of ratification by ordinary resolution; and

(ii) full disclosure was not given to the shareholders and they could not thus be said to have had full knowledge to enable them to assent to the breaches of directors' duties. Each of these two grounds is dealt with in turn below.

(3) It is well settled that any breach of duty involving 'fraud on the minority' – whereby the majority of shareholders succeeds in taking (at the expense of the minority) money, property or advantages of the company – is incapable of ratification. In **Cook v Deeks**,[24] the Privy Council held that directors holding a majority of votes were not permitted to make a present to themselves of the company's property since this would amount to allowing the majority to oppress the minority. The Executive Director Defendants' case is that the ratification resolution is not impugned on this basis given that Mr. Lau abstained from the vote and the resolution was instead passed by virtue of Mr. Lung's vote (who these Defendants claim was independent and had no interest in the transaction).

(4) However, as outlined above, (and as I have now found) Mr. Lung held 20% of the shares in the Company as nominee for Mr. Lau or alternatively that Mr. Lung acquired the shares pursuant to an agreement that he would vote the shares in accordance with Mr. Lau's instructions. The ineluctable conclusion is that Mr. Lung's vote (as Mr. Lau's nominee/agent) to all intents and purposes constituted Mr. Lau himself voting and thereby making a present to himself, as forbidden in **Cook v Deeks**.

[24] [1916] 1 AC 554.

(5) Further, any breach of duty involving a failure of honesty on the director's part incapable of ratification by ordinary resolution: **Atwool v Merryweather**;[25] and **Mason v Harris**.[26] If, therefore, the Court finds (as alleged by the Claimants and as the Court does indeed find) that a series of corporate steps were dishonestly taken to facilitate the sale of the Target Group at an undervalue in breach of the directors' duty to act honestly in the best interest of the Company, such a breach would not be capable of ratification by ordinary resolution.

(6) Moreover, full disclosure has to be given so that the shareholders have full knowledge to enable them to assent to (i.e., ratify) the breaches of directors' duties. See **EIC Services Ltd v Phipps**:[27]

> "133. If a director of a company informs shareholders of an intended action (or a past action) on the part of the directors, in circumstances in which neither the directors nor the shareholders are aware that the consent of the shareholders is required to that action, I do not think it is right, at least without more, to conclude that the shareholders have assented to that action for *Duomatic* purposes. As a matter of both ordinary language and legal concept, it does not seem to me that, in such circumstances, it could be said that the shareholders have "assent[ed]" to that action. The shareholders have simply been told about the action or intended action, on the basis that it is something which can be, and has been or will be, left to the directors to decide on, and no question of "assent" arises.
>
> 134. The word "assent" is to be found in the passages I have cited from *Duomatic* and *Parker and Cooper*, the word used in the passage I have quoted from *Herman* is "waiver": **Waiver classically requires the person who waives to have knowledge of the legal right which he is waiving**: see *Peyman -v- Lanjani [1985] Ch. 457*. Indeed, in *Herman* itself, just before the passage I have quoted, also at *8 ACLC 1096*, Meagher JA described the *Duomatic* principle in these terms:
>
> > "Where it can be shown that all shareholders having right to attend and vote at a general meeting of a company assent with full knowledge and consent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be" (emphasis added).
>
> 135. The words I have emphasised were added by Meagher JA to what is otherwise almost a word-for-word repetition of the principle as defined in *Duomatic* itself. Before the *Duomatic* principle can be satisfied, **the**

[25] (1867) LR 5 Eq 464.
[26] (1879) 11 ChD 97, CA.
[27] [2003] EWHC 1507 (Ch) paragraphs [133]-[135] (Neuberger J).

> **shareholders who are said to have assented or waived must have the appropriate or "full" knowledge**. If a shareholder is not even aware that his "assent" is being sought to the matter, let alone that the obtaining of his consent is at least a significant factor in relation to the matter, he cannot, in my view, have the necessary "full knowledge" to enable him to "assent", quite apart from the fact that I do not think he can be said to "assent" to the matter if he is merely told of it." (Emphasis added)

(7) The words 'full knowledge and consent' in the extract set out above (quoting from the decision of Meagher JA in **Herman v Simon**[28] were emphasised in underlined text by Neuberger J (as he then was) in his judgment in **EIC**.

(8) On 11th September 2015, Mr. Tang (on behalf of the 2nd Claimant) requested additional information of the Directors regarding the proposed sale. The requested information included: all documents and information supplied to Mr. Alfred Sung for the purposes of his report; signed audited financial statements of the Company, Vanway, and Vanworld for the period 1st January 2010 to 31st December 2014; and the latest management accounts of the Company, Vanway, Vanworld and Vanworld Rugao up to 31st July or 31st August 2015. None of this information was provided. The requested information was plainly necessary in order to enable the shareholders to make an informed decision on the proposed sale.

(9) The Executive Director Defendants are wrong in making the self-serving argument that Mr. Lung, the shareholder who voted in favour of the ratification resolution, had all of the information necessary for the resolution to be effective. On that basis, it was argued that any non-disclosure to the Claimants is, in any event, irrelevant since they voted against the ratification resolution. However, if Mr. Lung acted as nominee or agent for Mr. Lau, this objection necessarily falls away. Further, the fact that Mr. Lung was satisfied to vote in favour of the resolution without having received the additional information, does not negate the fact that this information *was* necessary in order for fully informed consent to be given. Regardless of Mr. Lung's willingness to vote in the circumstances, it remains a separate question as to whether full disclosure was given to the shareholders so as to enable them to ratify the directors' breaches of duty. The Claimants submitted that full disclosure was plainly not given.

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[28] (1990) 8 ACLC 1094.

(10) Not only was full disclosure not given, but the position that the Directors had taken all along (up to and including the trial of liability issues in this action) was that there was nothing untoward about the disposal of the shares in the Target Group to Mr. Lau (i.e., there was no erroneous conduct that required ratification).

(11) In the circumstances, it takes 'real chutzpah' for the Executive Director Defendants to contend that the impugned share disposal and, thus, the directors' breaches of duty in relation thereto, had been ratified.

[356] I accept these submissions. The key difficulty with those Director Defendants' case was that Mr. Lung was not acting honestly or in good faith in authorising the disposal, as he was doing it at Mr. Lau's behest and for Mr. Lau's benefit to obtain the Target Group at a gross undervalue, in furtherance of a fraud upon the minority. The secondary, but still important, difficulty is that not all the shareholders had received the information needed for a proper consideration of a question whether the directors' decision and conduct should be approved or ratified. The information that had been requested, but not provided, was necessary because it would or should have enabled the shareholders, including the Claimants, to assess whether the sale price was reasonable in light of the audited financial position of the Company and the extent to which Mr. Alfred Sung's analysis was complete and tallied with the Company's audited financial position. For these reasons, in my respectful judgment the purported authorisation and/or approval and/or confirmation and/or ratification was ineffective to relieve the Director Defendants from liability for breach of duty.

5.8 Mr. Angus Chau

[357] The thrust of Mr. Angus Chau's defence was that he had not been involved in the day to day management of the Company or of the Target Group and that he substantially derived his knowledge and information from Mr. Lau. Mr. Angus Chau described his role as akin to that of an entirely unremunerated non-executive director. He said his role was largely limited to advising the Company on how to raise capital and a possible stock market listing of the Company. He claimed to have had no involvement in the preparation of the Alfred Sung Report and averred that he was entitled to rely upon it. Mr. Chau denied that he had failed to exercise independent judgment. He denied that he had acted in concert with Mr. Lau. Mr. Angus Chau never became a shareholder in the Company. Unlike other Director Defendants, Mr. Angus Chau did not rely on Mr. Lau to make a living.

[358] In closing submissions for Mr. Chau, his learned Counsel Mr. Litton, QC summarised Mr. Chau's position. In substance, Mr. Chau stood by Mr. Lau's case, even in respect of elements which were conclusively shown to have been wrong and widely (on the Defendants' side) accepted as such, for instance, that reregistration of the drug in fact took place on 17th August 2015.

[359] Concerning Mr. Chau's resignation, his learned Counsel submitted as follows:

> "It is not in dispute that Angus Chau resigned as a director on 10th September 2015 or that his resignation followed an argument with James Lau on 9th September 2015 as to whether the shareholders should instruct a second valuation because of his concern, raised on 2 occasions, that they would be unwilling to accept the Alfred Sung Report."

[360] It was stressed on Mr. Chau's behalf that he had had no misgivings about the Alfred Sung Report itself.[29] As his learned Counsel submitted:

> "So his advice to Mr. Lau to get the second valuation report was not a criticism of the Sung Report; it was a pre-emptive attempt to head off a possible dissent from shareholders…because it was a connected transaction."[30]

[361] Mr. Chau's resignation took place after he had approved the Board of directors' resolutions (a) to propose to the shareholders that the Target Group should be sold to Mr. Lau for HK$1 million; (b) to capitalise the Receivables; and (c) to propose to the shareholders that the Target Group should be sold to Mr. Lau for HK$6 million. There were no other steps left of the directors to take.

[362] At this point, it is appropriate to observe what Mr. Chau did **not** do, and what his learned Counsel did **not** argue.

[363] Mr. Chau did not take a position that he regretted his decisions to approve the directors' resolutions that he had approved earlier, or that, upon reflection, any of those decisions had been premature. Instead, he insisted that his conduct, such as it was, had been justified. He did not resign because he had changed his mind about whether those decisions had been right. Neither Mr. Chau nor his learned Counsel submitted that he should be spared any findings of liability on the basis that he had disavowed his earlier decisions.

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[29] Transcript of 3rd February 2021 page 209 line 25 to page 210 line 1.
[30] Transcript of 3rd February 2021 page 209 lines 19 – 23.

[364] I have to say that I found this rather surprising. In his First Witness Statement, Mr. Angus Chau explained that:

> "I thought about the sale of the Target Group to Mr. Lau a bit more between the meeting of 4 September and receiving the draft SPA on 8th September 2015. The more I thought about it, the more uncomfortable I became with it as I thought that the shareholders might oppose Mr. Lau's acquisition on the basis that they may have thought that the purchase price offered by Mr. Lau was too low without having the benefit of their own independent valuation.
>
> ...
>
> The meeting [with Mr. Lau on 9th September 2015] ended when I said that if I could not persuade Mr. Lau to get a second valuation report or abandon the sale and purchase of the Target Group, then I would resign.
>
> ...
>
> The reason for my resignation was because I thought that the other shareholders would oppose the sale to Mr. Lau on the terms that had been suggested without a second independent valuation from a valuer appointed by the shareholders."

[365] I believe this evidence. I also believe that Mr. Lau understood precisely why Mr. Chau had resigned even if Mr. Chau had not in terms spelt out the reason. The timing of the resignation itself, at this high-pressure moment in the life of the Company, in which its entire asset base was going to disposed of, spoke for itself. It is more compatible with a disownment of the process thus far undertaken by the Director Defendants than with a more general desire to be more available to attend to other matters as Mr. Lau suggested. I also believe that Mr. Lau, as Chairman of the Board of Directors, communicated the resignation promptly to the other directors, and that they would also have understood the true reason, even if Mr. Lau had been less than candid about it.

[366] Mr. Angus Chau's instinct, or professional training as he called it, in thinking that a further, independent, valuation should be obtained was also entirely correct. His decision to resign was correct.

[367] This resignation, in relation to this Company, and in the context of the personal relationships in play at the time, would have been enough in my view for Mr. Chau to have made it clear that he had withdrawn his approval for the sale at HK$6 million to be recommended to the shareholders' vote on 15th September 2015, if that was what he meant to convey by his resignation. Since the other directors were in favour of that proposal going forward, Mr. Chau's withdrawal of his approval would not have stopped it, but a retraction of his approval is

something the Court could and would have taken into account in considering whether, in all the circumstances (including such retraction), Mr. Chau should be relieved from liability on account of his earlier acts. From my perspective of all the evidence and all the facts, that would have been a position I would have had complete sympathy with, to the extent the law would allow it. But Mr. Angus Chau did not make that argument (and no authorities on the point were cited to the Court) and thus it is not an issue that I should consider.

[368] Instead, Mr. Chau argued that he was entitled to have relied on the Alfred Sung Report. By that I understood him (or rather his learned Counsel) to be saying that Mr. Chau should be treated as having been entitled to rely upon the Alfred Sung Report without reference to any further valuation.

[369] Unfortunately for Mr. Chau this does not help him. In my respectful judgment, Mr. Chau had gone along with, and supported, Mr. Lau's plan to rid himself of Mr. Hui and Mr. Tang by procuring that the Company should transfer the Target Group to Mr. Lau at the lowest possible price. As a director of the Company, doing so meant that Mr. Chau was dishonest (with regard to the Company and the Claimants), in bad faith (with regard to the Company and the Claimants) and acting in a way which he could not have believed to have been in the best interests of the Company, thus in breach of section 120 of the BCA. This means that Mr. Chau cannot avail himself of section 123, which permits a director to rely upon records and reports only if he acts in good faith and if he makes proper inquiry where the need for the inquiry is indicated by the circumstances.

[370] The Alfred Sung Report itself should have put a professional such as Mr. Angus Chau on proper inquiry as to its accuracy and reliability. Upon its own text, it was plain that Mr. Sung had relied only upon information provided to him by the Company's management. Thus, it was infected with circularity. A financial professional such as Mr. Chau should also have questioned whether it was right that the Company should be treated as not a going concern. That is even before being put on proper inquiry whether Vanworld Rugao could, as a matter of PRC law, continue to manufacture and sell the drug and continue to retain the factory at its site. There is no evidence that Mr. Angus Chau made any such proper inquiries.

[371] Thus, in my respectful judgment, I am constrained to find that Mr. Angus Chau is liable to the same extent as the other Director Defendants.

5.9 Breaches caused loss and damage to the Company

[372] As pleaded at paragraph 50 of the Amended Statement of Claim, as a result of these breaches of duty by the Director Defendants, the Company was indeed wrongfully deprived of its only major asset and has thereby suffered loss and damage.

5.10 General

[373] If there is an area that I have missed, I would, and hereby do, adopt the Claimants' submissions as my own reasons. Whilst the Claimants' submissions were not right on everything (for instance, they sought to gloss over some of the pleading difficulties I have identified and have ruled against them on), the Claimants' submissions were in my respectful judgment more reflective of the true position on the facts than the Defendants' submissions.

6 Disposition

[374] For the reasons given, the claims succeed against the First to Seventh Defendants.

[375] I will hear the parties further in relation to consequential matters. The time for appeal will run from the later of either the date the finalised copy of this Judgment is communicated to the parties or the date upon which the order upon this judgment (i.e., not the order on consequential matters) is made.

[376] The Court thanks the parties and their learned Counsel for such assistance as they have rendered to the Court.

Gerhard Wallbank
High Court Judge

By the Court

Dep **Registrar**