THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2021/0034

BETWEEN:

[1] LAU MAN SANG, JAMES
[2] LUNG HUNG CHEUK
[3] CHEUNG WING SUM, ALBERT
[4] NGAI HIN KWAN, ALBERT
[5] YEUNG YIU CHONG
[6] ZHANG GUO WEI

Appellants

and

[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/Respondents

[7] CHAU CHEUK WAH, ANGUS
[8] VANWAY INTERNATIONAL GROUP LIMITED

Respondents

Before:

The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Vicki Ann Ellis	Justice of Appeal
The Hon. Mr. Gerard St. C. Farara	Justice of Appeal [Ag.]

Appearances:

Mr. Richard Hacker, KC with him Mr. John Carrington, KC, Mr. Olivier Kalfon and Ms. Reisa Singh for the Appellants

Mr. Jern-Fei Ng, KC with him Mr. Jerry Samuel, Dr. Alecia Johns and Mr. James Bailey for the 1st, 2nd, 3rd, 4th 5th and 6th Respondents

No appearances by or on behalf of the 7th and 8th Respondents

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2023: February 7 & 8;
July 7.

Commercial Appeal – Alleged crisis affecting company - Sale of subsidiary companies to first appellant at liquidation price – Disposal of company's receivables amounting to more than 50% in value of assets without approval of shareholders - Section 175 of the BVI Business Companies Act 2004 ("the BCA") - Whether directors breached their statutory duties owed to the company - Sections 120 to 122 of the BCA – Duty of directors to act honestly and in good faith – Duty of directors to exercise powers for proper purpose - Duty of directors to exercise reasonable care, diligence and skill - Whether judge erred in law and or fact in determining that respondents' claim against the appellants succeeded - Whether the crisis alleged to be affecting company warranting the sale of its subsidiaries in fact existed - Capitalisation of receivables - Whether judge incorrectly determined that the capitalisation of receivables was not carried out for a proper purpose – Whether judge erred in finding that the capitalisation of receivables was done in breach of section 175 of the BCA – Ratification of breaches of directors' duties – Full disclosure to be given to shareholders to enable them to ratify breaches by directors of their duties – No ratification of breaches involving fraud on minority – Appellate restraint on challenges to findings of fact- Delay

The first to sixth respondents are minority shareholders in Vanway International Group Limited ("the Company"), a company incorporated in the Territory of the Virgin Islands ("BVI"). The Company owns two subsidiary companies referred to as 'the Target Group' which comprise of Vanway Pharmaceutical Holdings Limited ("Vanway") and Vanway Pharmaceutical Holdings (Hong Kong) Limited ("Vanworld"). The Company, through the Target Group, operated a business of manufacturing pharmaceutical products in the Peoples Republic of China ("the PRC") through a PRC company, Vanworld Pharmaceutical (Rugao) Company Limited ("Vanworld Rugao" or "the PRC Company"), which is a wholly owned subsidiary of Vanworld.

The fundamental dispute concerns a derivative claim brought by the respondents as minority shareholders and on behalf of all shareholders of the Company except the first and second appellants. They alleged that the appellants took a series of steps in 2015 which led to the Company disposing of its valuable subsidiary companies by wrongful and/or unlawful means at a gross undervalue to the first appellant, Mr. Lau Man Sang, James ("Mr. Lau"). This was done to the detriment of the Company, and by extension, its

minority shareholders, including the respondents. Mr. Lau, is and was at all material times the Chairman of the Company's Board of Directors, managing director, and the Company's majority shareholder.

The events which led up to the sale of the subsidiaries stem from the manufacture and sale of a biologically derived painkiller 'Analgecine'. At most material times, Analgecine was manufactured and produced for sale by the Target Group at its factory in Rugao City in the PRC ("the Rugao Factory"). At a Board meeting held on 20th August 2015, the Board presented the alleged 'crisis' that the Company was facing. The alleged crisis comprised of several elements. Firstly, that on 19th May 2009 the China Food and Drug Administration ("CFDA") issued a 'Review Opinion Notice' ("the CFDA Notice") with respect to the drug Analgecine. The CFDA Notice stated that Analgecine did not meet the requirements of 'the official approval of testing standard' and that the 'official approval of testing standard' was rejected. This notice apparently did not come to the attention of the directors of the Company until 2015. The CFDA's decision to reject the official approval was appealed by the Target Group in 2015. Notwithstanding the rejection, the manufacture, production and sale of Analgecine continued uninterrupted at the Rugao Factory and no stop notice was issued to or received by Vanworld Rugao or the Company. In fact, there was a re-registration of the standard approval from 2009 to 2014 and on 17th August 2015, the re-registration was approved for another 5 years. Another element of the 'crisis' involved a general notice dated 10th August 2010 by the Office of the Safety Production Committee of Jiangsu Province ("the Removal Notice"). It is common ground that by the Removal Notice, the Target Group was required to relocate the Rugao Factory. It is also common ground that the effective date of the factory's relocation was, after consultations with the relevant authority, postponed until 31st December 2016.

This was the situation as of the Board meeting of the Company on 20th August 2015 and it continued throughout the August and September 2015 meetings of the Board and the Extraordinary General Meetings ("EGM") of the Company. Other elements of the crisis discussed at the 20th August 2015 Board meeting include that Vanway was short of capital, that there had been a delay in the payment of wages to Hong Kong and domestic employees during the past two months, and that there would have to be payment by the Company of severance fees and long service fees to employees in Hong Kong and Mainland China in the aggregate sum of HK$45,390,000 if the Rugao Factory is forced to close. At the said Board meeting, a proposal to sell the Rugao Factory was tabled as being one of the solutions to reduce the loss. Mr. Lau then stated that he would like to acquire the two wholly owned subsidiaries of the Company at the price of HK$ 1 million, and he would be liable for the debts of the Company. The Board also discussed the possibility of convening 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, 2004 ("the BCA").

Subsequent to the 20th August 2015 Board meeting, Mr. Yeung Yiu Chong ("Mr. Yeung"), a director, sent all the shareholders an email enclosing the minutes of the Board meeting on 20th August 2015 and a copy of the Alfred Sung & Co. Valuation Report ("the Alfred Sung Report") dated 17th August 2015. Although the Alfred Sung Report is dated 17th August 2015, before the 20th August 2015 Board meeting of the Company, it was not produced at

the said meeting, and the minutes thereof seem to indicate that it had not yet been completed and produced to the directors of the Company. The valuation report opined that as at 30th June 2015, the net asset value of Vanworld Rugao was about HK$113 million and the net profits after tax for the 6 months to that date were approximately HK$20 million. No mention had been made in the Alfred Sung Report re-registration documents in conducting and arriving at his valuation. Mr. Alfred Sung later in his evidence, accepted that this fact was highly relevant and pertinent to his valuation of the Company. The re-registration approval, whilst known to the directors, was not tabled or mentioned at the 20th August 2015 Board meeting of the Company. Likewise, the Alfred Sung Report had not taken into account the very substantial receivables in the form of shareholder loans in excess of HK$150 million owed by the two wholly owned subsidiaries, the Target Group, to the Company. It was evident however, that Mr. Lau's offer of HK$1 million to purchase the Target Group was less than 1% of the value of Vanworld Rugao stated in the Alfred Sung Report.

At an EGM held on 2nd September 2015, Mr. Hui Pak Kong ("Mr Hui") offered to purchase the Target Group for HK$1.1 million (slightly more than the offer of HK$1 million from Mr. Lau). This was met with no response. The fact that the Company also held assets of HK$156 million in receivables owed to it by the Target Group was also raised by Mr. Hui at the EGM. The EGM was adjourned. The following day, 3rd September 2015, the Board of Directors of the Company passed a resolution dealing with the receivables. It was resolved that 'in the best interest of the Company, the board shall capitalise the Loans owed by each of Vanway and Vanworld by issuing new shares'. It was noted that 'the new combined value of the net worth of [the two subsidiaries] will be increased to HK$5,929,909 after the capitalization of the loans'. It was also noted that the Board had informed Mr. Lau of the new combined value net worth and after due negotiation, both the Board and Mr. Lau agreed to the new consideration of HK$6,000,000 to acquire a total of 128,947,630 ordinary shares in Vanway and a total of 33,076,392 ordinary shares in Vanworld. The Board then unanimously approved to sell the shareholdings in Vanway and Vanworld at a total consideration of HK$ 6million to Mr. Lau.

In passing this resolution, the Board did not obtain the approval of shareholders as was required by section 175 of the BCA. On 15th September 2015, at an EGM of the Company, the majority of members entitled to vote at the meeting approved, confirmed and ratified the sale of the Target Group to Mr. Lau for HK$6 million. The consideration was expressly made payable by instalments and subject to certain stated terms and conditions, the effect of which would significantly reduce the actual sum to be paid by Mr. Lau for the Target Group. The respondents voted against the sale, however Mr. Lung Hung Cheuk ("Mr. Lung") who held a slightly greater number of the votes carried the vote.

The respondents thereafter filed the derivative action BVIHC(COM)2017/0086 whereby they alleged that 'the crisis which the Company was facing', which was relied upon as justifying the disposal of the Target Group to Mr. Lau, did not in fact exist and was known not to exist by the appellants and the directors or the board; that the sale of the Target Group to Mr. Lau was driven by the personal interest of Mr. Lau and the other appellants who acted in concert with him, at the expense of the overall interest of the Company and by extension, its minority shareholders; that the appellants breached their common law

fiduciary duties owed to the Company and their statutory duties as set out in sections 120 to 122 of the BCA; and that the appellants had proceeded to dispose of receivable assets which 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 approval of the shareholders contrary to section 175 of the BCA.

In a written judgment delivered on 11th August 2021, the learned judge made various findings in favour of the respondents and the claim against the appellants and the seventh respondent succeeded. The appellants, being dissatisfied with the decision of the learned judge, appealed against the judgment and against paragraph 1 together with the consequential directions at paragraphs 2 to 7 of the order of the court dated 5th October 2021. The appellants in their notice of appeal set out 26 grounds of appeal on which they challenge the decision of the learned judge. The grounds of appeal were however addressed under three broad heads: i) The Crisis and the Board; (ii) Capitalisation of Receivables; and (iii) Ratification. Primarily, the appellants allege that the judge erred in law and/or fact and/or was wrong in determining that the respondents' claim against the appellants succeeded and/or there was no or no sufficient evidence to support the judge's findings.

Held: Dismissing the appeal; affirming the decision of the learned judge and awarding costs to the respondents to be assessed if not agreed within 21 days of the date of this judgment, that:

1. The duties owed by the directors of a BVI company are set out in sections 120 to 122 of the BCA. Section 120 provides that a director must act honestly and in good faith and in what he believes to be in the best interests of the company. Section 121 mandates a director to exercise his powers as a director for a proper purpose and to not act in a manner that contravenes the BCA or the memorandum or articles of the company. Lastly, section 122 directs that in exercising his powers or performing his duties, a director must exercise care, diligence and skill that a reasonable director would exercise in the same circumstances.

   Sections 120 to 122 of the **BVI Business Companies Act**,**2004** Act No. 16 of 2004 of the Laws of the Virgin Islands applied.

2. Where there has been a failure by a director or directors to consider the separate interests of their company or where there is a challenge by an applicant as to the 'good faith' of a director, the test becomes an objective one and not simply whether the director believes he was acting bona fide. The court must therefore determine 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. Similarly, where there is a dispute as to whether a director exercised his powers for a proper or an improper purpose, bona fides cannot be the sole test and the court is entitled to look at the situation objectively. Accordingly, in assessing whether the directors have acted in good faith or for a proper purpose, the court will look for independent, objective evidence to test the directors' claim to be acting bona fide and will consider all the evidence concerning the directors' decision-

making processes such as the minutes of board and shareholder meetings and reports. In such cases, the reviewing court will expect such material to exist to assist it in reaching a determination. The court should further assess whether any one or more factors under the BCA are particularly relevant to the directors' decision.

Mitchell and others v Al Jaber and others [2023] EWHC 364 (Ch) considered; **Antow Holdings Limited v Best Nation Investments Limited et al** BVIHCMAP2017/0010 (delivered on 21st September 2018, unreported) followed; **Charterbridge Corporation, Ltd v Lloyds Bank Ltd. And Another** [1970] Ch. 62 considered; **Colin Gwyer & Associates Ltd and another v London Wharf (Limehouse) Ltd and others; Eaton Bray Ltd and another v Palmer and others** [2002] All ER (D) 226 (Dec) considered; **Nam Tai Property Inc v IsZo Capital LP et al** BVIHCMAP2021/0010 (re-issued 6th October 2021, unreported) followed; **Smith (Howard) v Ampol Petroleum Ltd** [1974] AC 821 applied.

3. There was ample evidence to support the learned judge's findings that the crisis alleged by the appellants did not exist; that the appellants were acting in breach of their statutory duties under the BCA; and that the sale of the Target Group was done at liquidation price or at a gross undervalue. The sale of the company to Mr. Lau at an undervalue can be regarded as an unusual and extreme decision. Further the Directors, in resolving to approve the sale of the subsidiaries to Mr. Lau, did not seek the most basic and independent advice as to either the true financial status of the Company or the true value of its assets nor did the Directors, in breach of section 175 of the BCA, obtain the appropriate resolution of the shareholders to dispose of more than 50% in value of the assets not in the usual or regular course of business. Any breach by directors of this section 175 requirement is important evidence that the directors have acted in breach of their duty to the Company under section 122 of the BCA (failure to exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances). In all the circumstances, the judge properly and carefully evaluated the evidence before him in coming to his findings and there is no basis on which this Court should interfere. The grounds of appeal challenging these findings are therefore dismissed.

4. There was evidence before the learned judge on which he could properly base his finding that the capitalisation of receivables was not done for a proper purpose but was a deliberate step to have the Company transfer the Target Group to Mr. Lau by way of a sale at a gross undervalue. The capitalisation of receivables was not only done without the benefit of independent accounting and legal advice, as none was sought by the Directors, but resulted in the minority shares held by the respondents in the Company being rendered virtually worthless. Further, the shareholders were not given adequate details of the proposed capitalisation and no majority of the shareholders, or any shareholders, approved it. Accordingly, this Court will not disturb the judge's findings on this issue.

   Section 175 of the **BVI Business Companies Act, 2004**, Act No. 16 of 2004 of the Laws of the Virgin Islands applied.

5. Where directors of a company have acted in breach of their duties, in order for them to be absolved from liability for failure to comply with their duties, full disclosure must have been made to the shareholders so that they are furnished with the full knowledge that they need to enable them to assent to or ratify the breaches of directors' duties. Additionally, such breaches can only be ratified where the breach does not involve a fraud on the minority. In the instant case, the learned judge found that this case was one that involved a fraud on a minority of the shareholders, and that not all the shareholders had received the information needed for a proper consideration of the question whether the directors' decision and conduct should be approved or ratified. Therefore, the purported authorisation and/or approval and/or confirmation and/or ratification was ineffective to relieve the appellants from liability for breach of duty. This was a most stark and gross breach of duty by the Directors who voted for that resolution. The judge's conclusion that the appellants failed to comply with their duty based on the evidence was clearly open to him to make and is not one that no reasonable court would have reached, and the judge was entitled to decide that full disclosure was not provided to the shareholders.

   BTI 2014 LLC v Sequana SA and others [2022] 3 WLR 709 considered.

6. The issues in this matter concern important questions of fact to be determined by the court who heard and saw the witnesses and who had the benefit of cross-examination at trial. An appellate court's role is not to substitute its own conclusions for those of the lower court. In the absence of some identifiable error, such as a material error of law, or making a critical finding of fact that has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will only interfere with a trial judge's findings of fact if it is satisfied that the trial judge's decision cannot reasonably be explained or justified. Upon review of the judge's decision and the evidence which was before him, it cannot be concluded that the findings made by the judge were plainly wrong or findings that no reasonable judge would have reached.

   Yates Associates Construction Company Ltd v Blue Sand Investments Limited BVIHCVAP2012/0028 (delivered on 20th April 2016 unreported) followed; **Shankar Khushalani et al v Lindsay Mason (Trading as Tropical Home Designs Architectural & Construction Services)** GDAHCVAP2016/0017 (delivered 11th June 2021, unreported) followed; **Capital WW Investment Limited (in liquidation) acting through its Directors v Tall Trade Limited** BVIHCMAP2020/0025 and BVIHCMAP2020/0026 (delivered on 24th January 2022, unreported) followed.

7. The delay of 5 months from the close of trial to when judgment was rendered, was not such that adversely affected the learned judge's assessment of the oral evidence and his findings and decision. The judge gave a detailed judgment which highlighted the salient issues and addressed the law and facts arising therefrom, and it cannot be said that the time between the end of the trial and delivery of judgment was so inordinate as to be inexcusable.

NatWest Markets Plc and another v Bilta (UK) Ltd (in liquidation) and others [2021] EWCA Civ 680 distinguished.

JUDGMENT

[1] **FARARA JA [AG.]:** The appellants appeal against paragraph 1 together with the consequential directions at paragraphs 2 to 7 of the order dated 5th October 2021 and against the decision of the learned judge of the High Court contained in the written judgment delivered on 11th August 2021 ("the Judgment"). Following a trial on liability only, the learned judge determined that the claims of the first to sixth respondents ("the respondents") against the appellants and seventh respondent succeeded.

[2] The fundamental dispute concerns a derivative claim brought by the respondents as minority shareholders (collectively holding about 13.33% of the issued shares) in the eighth respondent, Vanway International Group Limited ("the Company"), a company incorporated in the Territory of the Virgin Islands ("BVI"). In brief, the respondents, who brought the claim on behalf of all shareholders of the Company except the first and second appellants, alleged that the appellants took a series of steps in 2015 which led to the Company disposing of certain valuable subsidiary companies by wrongful and/or unlawful means at a gross undervalue to the first appellant, Mr. Lau Man Sang, James ("Mr. Lau"), to the detriment of the Company, and by extension, of its minority shareholders, including the respondents. These subsidiary companies referred to as 'the Target Group' comprise of Vanway Pharmaceutical Holdings Limited ("Vanway") and Vanway Pharmaceutical Holdings (Hong Kong) Limited ("Vanworld"). The Company, through the Target Group, operated a business of manufacturing pharmaceutical products in the Peoples Republic of China ("the PRC") through a PRC company, Vanworld Pharmaceutical (Rugao) Company Limited ("Vanworld Rugao" or "the PRC Company"), a wholly owned subsidiary of Vanworld.

Background and salient events

[3] The first to fifth respondents are companies associated with the sixth respondent Mr. Hui Pak Kong ("Mr Hui") and Mr. Kenneth Tang ("Mr Tang"). The first appellant, Mr. Lau, is and was at all material times the Chairman of the Company's Board of Directors, managing director, and the Company's majority shareholder.

[4] The respondents are minority shareholders and do not have managerial power or control over the Company. At most material times, the respondents together held about 13.33% of the issued share capital of the Company. The Company owned, amongst other holdings, the two subsidiary companies - the Target Group. The Target Group was involved in the manufacture and sale of a biologically derived painkiller 'Analgecine'.

Initial Drug Approval for Analgecine

[5] At most material times, Analgecine was manufactured and produced for sale by the Target Group at its factory in Rugao City in the PRC ("the Rugao Factory") pursuant to a 'Grant for Supplemental Drug Application' issued by the China Food and Drug Administration ("CFDA") on 23rd March 2004 to Vanworld Rugao for the initial period of 5 years, that is, until 22nd March 2009. This approval expressly permitted or authorised: production of the drug 'Extracts from Rabbit Skin Inflamed by Vaccina Virus for Injection'; the issue of a drug certification number; permission to sell after obtaining the relevant GMP[1] certificate; and the usage of the commercial name 'Enzalshi'. As is stated in this document, it was affixed with the seal of the CFDA and copied to Jiangsu Food and Drug Administration, National Institutes for Food and Drug Control, Chinese Pharmacopoeia Commission and CFDA Certification and Assessment Centre. On the same day 23rd March 2004, the CFDA issued under its 'special' seal a document headed 'Approval Letter of Drug Supplementary Application' with respect to the same drug 'Extracts from Rabbit Skin Inflamed by Vaccinia Virus for Injection' under the trade name 'Analgecine' naming Vanworld Rugao as the manufacturer. This approval was

[1] Good Manufacturing Practices.

valid also for 5 years until 22nd March 2009. The 'Approval Conclusion' stated therein is as follows:

> "Approval for production of this drug, issuance of the drug approval number, and sale of the drug only after obtaining the GMP certificate of the corresponding dosage form. Approval for using the trade name "Analgecine" for this drug. The trade name shall be used in accordance with relevant regulations."

19th May 2009 CFDA Notice

[6] On 19th May 2009, the CFDA issued a 'Review Opinion Notice' ("the CFDA Notice") with respect to the drug Analgecine. The material part of this Review Opinion Notice states:

> "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."

[7] It is common ground that by this document dated 19th May 2009, the CFDA had refused 'official approval' for the drug Analgecine. However, as also seems to be common ground, this document apparently did not come to the attention of the directors of the Company until 2015. The Target Group in 2015 appealed to the CFDA its rejection of the 'official approval', as is recorded in the minutes of a meeting of the Board of the Company dated 20th August 2015. This document notwithstanding, the manufacture, production and sale of Analgecine continued uninterrupted at the Rugao Factory and no stop notice was issued to or received by Vanworld Rugao or the Company.

17th August 2015 Re-registration Approval

[8] In fact, there was a re-registration of the standard approval from 2009 to 2014. Thereafter, an application was made by the Target Group for re-registration for another 5-year period of the standard approval of the drug Analgecine. This application was approved, and a 'Re-registration Form' was issued by the CFDA dated 17th August 2015 for another 5 years. On the re-registration form, it states: '[i]t is hereby approved that the product's standard is formalized to WS4 – (S-001)

– 2017Z. The generic name is changed to "Extracts from Rabbit Skin Inflamed by Vaccina for Injection"'.[2] Note 3 of the said document states:

> "3. China Food and Drug Administration delegates the Drug Supervision and Administration Departments of the province, autonomous region and municipality directly under the central government where the drug manufacturer is located to re-register the product for examination, and the examination results shall be reported to China Food and Drug Administration for records. If re-registration is approved, the official seal of re-registration examination authority shall be affixed."

The Removal Notice

[9] By a general notice dated 10th August 2010 (5 years before the crisis alleged in the meeting of the Board on 20th August 2015), the Office of the Safety Production Committee of Jiangsu Province gave notice that 'all chemical production enterprises in the downtown area, residential clusters and drinking water source protection area have to relocate' ("the Removal Notice"). It is common ground that by the Removal Notice, the Target Group was required to relocate the Rugao Factory. The Removal Notice had been discussed at a general meeting of the Company on 28th September 2010, and the agreed upon solution was for Mr. Lau, the managing director, to take on the task of finding new shareholders based upon a value of the Company at HK$110 million. Mr. Lau, who was given 3 months until 31st December 2010 to do so, was unsuccessful in finding any new shareholders.

[10] It is also common ground that the effective date of the factory's relocation was, after several consultations with the relevant authority, delayed until 31st December 2016. This was the situation as of the Board meeting of the Company on 20th August 2015 about the alleged crisis with the Company and it continued throughout the August and September 2015 meetings of the Board and the Extraordinary General Meeting ("EGM") of the Company at which the decision was made to have Mr. Lau acquire the Target Group, initially for HK$1 million and subsequently for HK$6 million.

[2] Supplemental Core Bundle v2, page 11.

The 2015 Announcement of New Technical Standard

[11] On 15th July 2015, the State Food and Drug Administration (not the CFDA) issued an announcement on 'Matters Relating to Implementation of the Pharmacopeia of PRC Version 2015 (No. 105 of 2015) ("the 2015 Notice"). This was a public notice announcement of the release by Pharmacopeia of PRC of version 2015 of its 'legal technical standard to be followed by the units of drug development, manufacturing, production (importation), operation, use, supervision and management, etc.'. The notice made known that this new technical standard was to be put into practice from 1st December 2015.[3] Part V of the 2015 Notice states:

> "For the drugs obtaining an approval before the date of Chinese Pharmacopeia version 2015 being issued (inclusive), the corresponding requirements of the pharmacopeia of the new version should be followed from Dec. 1, 2015. In case of relating to (sic) any change in drug prescription, raw and auxiliary material, production process, etc., a supplementary application should be submitted to State Food and Drug Administration in a makeup manner before Dec. 1, 2015 according to Drug Registration Management Regulations. During review, examination and approval, the original can still be followed. The new standard should be followed in case of passing the examination and approval. The production must be stopped in case of failing in the examination and approval."

[12] The appellants and their expert witness on Chinese law, Colonel Zhou Zhengxiang ("Colonel Zhou"), place much reliance on the statements at Part V of the 2015 Notice in support of the contention that there was indeed a real and substantial crisis with the continued manufacturing, production and sale of Analgecine and thus with the business of the Company, as operated through its subsidiaries. I shall return to this issue later in this judgment.

Approval of Acquisition of Target Group by Mr. Lau

[13] During the period 20th August 2015 to 15th September 2015, the sale of the Company's operating subsidiaries, i.e. the Target Group, to Mr. Lau at a price of HK$6 million was approved at a convened EGM of members to vote on it. At the 20th August 2015 Board meeting, the directors resolved to accept Mr. Lau's offer to

[3] Supplemental Core Bundle v2, pages 129-131.

acquire the Target Group for HK$1 million and an assumption by Mr. Lau of all the Target Group's liabilities. All the directors, including Mr. Chau Cheuk Wah, Angus ("Mr. Chau") concurred.

20th August 2015 Board Meeting

[14] At the 20th August 2015 Board meeting, the Board only relied on two documents to present the alleged crisis with the Company. These are: (i) a notice dated 19th May 2009 titled 'Review Opinion Notice' from the CFDA refusing 'official approval of testing standard' of the drug 'Extracts from Rabbit Skin inflamed by Vaccina Virus for Injection', which notice was subsequently appealed; and (ii) a notice dated 10th August 2010 requiring the factory to be removed from Rugao (the Removal Notice). Both documents had been issued some 5 years before the alleged crisis with the Company as discussed at the Board meeting on 20th August 2015.

[15] The minutes of the meeting dated 20th August 2015[4] record that broadly speaking two topics were discussed. These were Topic 1 – discussions with regard to the current crisis faced by Company and solutions; and Topic 2 – discussions with regard to the possibility of holding an EGM of the Company.

Topic 1

[16] In relation to Topic 1, the important matters or issues relative to the alleged crisis with the Company (as gleaned from the written and oral submissions before this Court) and which were recorded as having been discussed, are at paragraphs 1.1, 1.2, and 1.3 of the minutes. These are:

> "1.1 - Vanway was in short of capital, and that there had been a delay in the payment of wages to Hong Kong and domestic employees during the past two months.
>
> 1.2 - As of now [August 2015], Vanway has made every effort to appeal to the China Food and Drug Administration ("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 the Rugao Factory at any time...

[4] Supplemental Core Bundle v2, pages 38-40.

> 1.3 According to the "Notice on Accelerating the Implementation of Relocation Work of Chemical Production Enterprises in the Main Urban Areas" … issued by Office of Jiangsu Work Safety Committee on 10 August 2010, Rugao Factory was listed and was required to relocate before 31 December 2013. After the negotiation with Office of Jiangsu Work Safety Committee for many times, the relocation deadline of Rugao Factory was postponed to 31 December 2016 at the latest."

[17] At paragraphs 1.4 to 1.9 of the minutes of this meeting of the Board, the following are recorded (in brief):

> "1.4 – payment by the Company of severance fee and long service fee to employees on Hong Kong and Mainland China if Rugao Factory is forced to close in the aggregate sum of HK$45,390,000.
>
> 1.5 – a proposal to sell the Rugao Factory as being one of the solutions to reduce loss.
>
> 1.6 - Mr. Lau stating that he would like to acquire the two wholly owned subsidiaries of the Company at the price of one million, and he would be liable for the debts of the Company.
>
> 1.7 - the belief by Zhang Gou Wei and Lung Hung Cheuk (directors) that the possibility of requiring all shareholders to raise funds for the second time was very low, and this advice (Mr. Lau's offer/suggestion to purchase the two subsidiaries) could also reduce the loss to shareholders, and Mr. Cheung Wing Sum's belief that "all relevant suggestions should be notified to all shareholders immediately".
>
> 1.8 - Mr. Chow Cheuk Wah's suggestion to appoint an evaluation expert to make a value assessment of the Company, and Mr. Yeung Yiu Chong pointing out that "the Board had already appointed Alfred Sung & Co to evaluate the value of [the Company's] assets. The relevant report to be provided to shareholders.
>
> 1.9 - The relevant arrangements and suggestions were passed by unanimous consent of all directors".

Topic 2

[18] Under Topic 2 (possibility of convening an EGM), the minutes record at paragraph 2.1 that Mr. Yeung Yiu Chong (a.k.a Mr. Terence Yeung) ("Mr. Yeung") 'raised that the Board should hold an Extraordinary General Meeting to pass the relevant shareholders' resolutions if the value of the [C]ompany's assets sold exceeds 50% of the total asset value in accordance with the relevant provisions of the BVI Business Companies Act'. The minutes also

record at paragraph 2.2 that Mr. Ngai Hin Kwan's ("Mr. Ngai") proposal that a law firm should be appointed to arrange the EGM to ensure it 'is carried out in a lawful and reasonable manner' and at 2.4 that the 'relevant arrangements and suggestions were passed by unanimous consent of all the directors.'

The Alfred Sung & Co. Valuation Report

[19] On 28th August 2015, Mr. Yeung, a director, sent all shareholders an email enclosing the minutes of the Board meeting on 20th August 2015 and a copy of the Alfred Sung & Co. Valuation Report ("the Alfred Sung Report"), dated 17th August 2015, in which he opined that as at 30th June 2015, the net asset value of Vanworld Rugao was about HK$113 million and the net profits after tax for the 6 months to that date were approximately HK$20 million. No mention had been made in the Alfred Sung Report of the 17th August 2015 re-registration documents in conducting and arriving at his valuation. In evidence Mr. Alfred Sung accepted that this fact was highly relevant and pertinent to his valuation of the Company. It is remarkable that Mr. Lau's offer of HK$1 million to purchase the Target Group was less than 1% of the value of Vanworld Rugao stated in the Alfred Sung Report.

[20] It is notable that the Alfred Sung Report is dated 17th August 2015,[5] before the 20th August 2015 Board meeting of the Company, yet it was not produced at the said meeting, and the minutes thereof seem to indicate that it had not yet been completed or produced to the directors of the Company. In this report, Alfred Sung & Co. assessed the value of the Company 'at HK$150,094,114.00 in Deficiency' as detailed in Appendix I to the said report. Admittedly, the Alfred Sung Report did not take account of the re-registration approval dated 17th August 2015 of the drug Analgecine for another 5-year period. This approval, whilst known to the directors, was not tabled or mentioned at the 20th August 2015 Board meeting of the Company. Likewise, the Alfred Sung Report had not taken into account the very substantial receivables in the form of shareholder

[5] Supplemental Core Bundle v2, page 54.

loans in excess of HK$150 million owed by the two wholly owned subsidiaries to the Company.

2nd September 2015 EGM and 3rd & 4th September 2015 Board Meetings

[21] At the EGM held on 2nd September 2015, Mr. Hui offered to purchase the Target Group for HK$1.1 million (slightly more than the offer of HK$1 million from Mr. Lau). This was met with no response. The fact that the Company also held assets of HK$156 million in receivables owed to it by the Target Group was also raised by Mr. Hui at the EGM. The EGM was adjourned. The following day, 3rd September 2015, the Board of Directors of the Company passed a resolution dealing with the receivables. This approach to the receivables had been proposed by Mr. Yeung. It was resolved that 'in the best interest of the Company, the board shall capitalise the Loans owed by each of Vanway and Vanworld by issuing new shares'.[6] It was noted that 'the new combined value of the net worth of [the two subsidiaries] will be increased to HK$5,929,909 after the capitalization of the loans'. It was also noted that the Board had informed Mr. Lau of the new combined value net worth and after due negotiation, both the Board and Mr. Lau agreed to the new consideration of HK$6,000,000 to acquire a total of 128,947,630 ordinary shares in Vanway and a total of 33,076,392 ordinary shares in Vanworld. The Board then unanimously approved to sell the shareholdings in Vanway and Vanworld at a total consideration of HK$6 million.[7]

[22] In passing this resolution, the Board did not obtain the approval of shareholders as required by section 175 of the **BVI Business Companies Act, 2004** ("the BCA")[8] in relation to the disposal of the Company's receivables (i.e. the shareholder's loan to the subsidiaries) which represented more than 50% of the value of the assets of the Company being disposed of not in its usual business. The Board also did not seek or obtain any independent advice with regard to

[6] Minutes of a Meeting of Board of Directors on 3rd September 2015, Supplemental Bundle v2, page 89.
[7] Minutes of a Meeting of Board of Directors on 3rd September 2015, Supplemental Bundle v2, page 91.
[8] Act No. 16 of 2004 of the Laws of the Virgin Islands.

either the sale of the Target Group to Mr. Lau or the capitalisation of the receivables, and whether these major decisions were or could be in the best interest of the Company. The actual capitalisation of receivables took place at a Board meeting on 4th September 2015 whereby the Company was authorised to acquire new shares in Vanway and Vanworld at a consideration of HK$123,947,631 and HK$32,076,393 respectively '**and such considerations be settled by setting off against the Loans in each of the books of Vanway and Vanworld**'.[9] [Emphasis added]

[23] The effect of this resolution was that not only was there a breach of section 175 of the BCA, but the effect of the resolution was that while the Company was intending to dispose of the Target Group because there was an alleged crisis in the Target Group with regard to its manufacturing and sale of Analgecine and thereby creating a corresponding crisis with the Company, and supposedly to prevent the Company having to be wound up, but as a solution to avoid this looming supposed catastrophe, the very Company was disposing of its very valuable receivables owed by the Target Group by way of a capital assignment. This would result or resulted in the Company purchasing (in full liquidation of its very valuable receivables) new shares in its very same two subsidiaries which were said not to be of far less value as a result of the crisis, having just agreed to sell the shares which it already held in those same subsidiaries.

Meeting between Mr. Chau and Mr. Lau and Mr. Chau's resignation as a director

[24] On 10th September 2015, following a contentious meeting between Mr. Chau and Mr. Lau on 9th September 2015 during which Mr. Chau unsuccessfully attempted to persuade Mr. Lau to get a second valuation report or abandon the sale of the Target Group, failing which he (Mr. Chau) would resign as a director, Mr. Chau tendered his resignation to the Company via email to Mr. Yeung. This was followed by a letter dated 14th September 2015 from Mr. Hui's

[9] Minutes of a Meeting of the Board of Directors on 4th September 2015, Supplemental Core Bundle v2 page 93.

lawyers formally objecting to the proposal to sell the Target Group to Mr. Lau for HK$6 million.

15th September 2015 EGM – the Disposal Resolution

[25] On 15th September 2015, at an EGM of the Company, the majority of members entitled to vote at the meeting approved, confirmed and ratified the sale of the Target Group to Mr. Lau for HK$6 million. The consideration was expressly made payable by instalments and subject to certain stated terms and conditions, the effect of which would significantly reduce the actual sum to be paid by Mr. Lau for the Target Group. These terms and conditions are set out in the minutes of the said meeting[10] and do not necessitate being regurgitated here. Suffice it to be said that the first part payment is in the sum of HK$1 million, with the balance (to be paid within 5 business days from the Adjustment Date) to be ascertained and determined in the manner set out at paragraphs (B) and (C) as the 'adjusted' consideration.[11] Mr. Lau abstained from the vote. Mr. Lung Hung Cheuk ("Mr. Lung") voted his 20% shareholding in favour of the resolution saying, in response to questions from Mr. Tang as to whether he held those shares as Mr. Lau's nominee, that 'officially I am the ultimate beneficial owner', or words to that effect. The respondents voted against the sale, but Mr. Lung's slightly greater number of votes carried the vote. This was the disposal resolution which the respondents complained of before the Commercial Court in BVI. The respondents allege that the sale was effected at a gross undervalue, being at a liquidation value, and in breach by the directors of their duties owed to the Company pursuant to sections 120 to 122 of the BCA.

The Derivative Claim

[26] In the derivative action BVIHC(COM)2017/0086, the respondents alleged that 'the crisis which the Company was facing', which was relied upon as justifying

[10] See Supplemental Core Bundle v2, pages 95-99.
[11] Ibid, page 95 at para 8.1.

the disposal of the Target Group to Mr. Lau, did not in fact exist and was known not to exist by the appellants and the directors or the Board, whether prior to the 20th August 2015 Board Meeting and/or anytime thereafter.[12] The respondents contended that the sale of the Target Group to Mr. Lau was driven by the personal interest of Mr. Lau and the other appellants who acted in concert with him, at the expense of the overall interest of the Company and by extension, its minority shareholders including the respondents.[13]

[27] The respondents further contended that the appellants breached their common law fiduciary duties owed to the Company and their statutory duties as set out in sections 120 to 122 of the BCA. This included the duty to exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances considering, 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. The respondents also contended that the appellants had proceeded to dispose of receivable assets which 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 approval of the shareholders contrary to section 175 of the BCA.

Judgment in the court below

[28] The learned judge heard oral evidence and submissions in three separate sittings between November 2019 and February 2021 over the course of 22 days. In a judgment spanning 82 pages the judge made various findings in favour of the respondents.

[29] The judge was persuaded on the evidence, to the standard of a balance of probabilities, that each of the executive directors (who are the appellants in this appeal) ("the Directors") knew that the drug Analgecine had been re-registered

[12] See BVIHC(COM)2017/0086 (delivered 11th August 2021, unreported) at paragraphs 17 to 20; 21 to 67.
[13] Amended Statement of Claim, Core Bundle, page 712 at para 16.

and approved for production and sale on 17th August 2015 or very soon after that date, if not on that date itself. As to why the re-registration was not mentioned in the minutes of the 20th August 2015 Board meeting or at the 2nd and 15th September 2015 shareholder's meetings, the learned judge concluded at paragraph [266] that although the Directors knew of the re-registration by those dates, it was not mentioned:

> "… because it did not fit the Director [Appellants'] 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 [Appellants] 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 happen. With the reregistration, that tiny step would become an impossible leap."

[30] The learned judge also found that the reason why none of the Directors, including Mr. Angus Chan, even considered seeking an opinion from PRC lawyers in relation to the reality of the perceived crisis:

> "…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…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."[14]

[31] At paragraph [268], the learned judge concluded that it did not make sense 'and none of the Directors could explain how it could do so….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 [Appellants'] own case and Board minutes, it had not'.

[14] See BVIHC(COM)2017/0086 (delivered 11th August 2021, unreported) at para 267.

[32] The judge found that the determination of the Directors to press through with the sale of the Target Group to Mr. Lau 'is demonstrated by their haste in capitalizing the Company's receivables in early September 2015, when the [Respondents] raised questions about them. Their haste and determination were such that they did not even trouble themselves to obtain shareholder approval to do so, pursuant to section 175 of the BCA.' [15] In relation to this issue, the judge accepted 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.'[16] The judge also found that the fact that the Directors did not seek the opinion of PRC lawyers on issues pertaining to the alleged crisis and a more considered valuation, but instead hastened to have the sale put to the vote of the shareholders, 'casts additional doubt upon their *bona fides* and supports a conclusion that they were intent upon effecting a sale to Mr. Lau.'[17] The judge also deduced that the Directors had 'completely overlooked the plain fact that merely changing the owner of the Target Group would not cure the alleged 'crisis' that they had portrayed'[18] and they had overlooked the fact that they owed fiduciary duties to the Company.[19]

[33] As to the alleged crisis itself, the judge outlined at paragraph [275] of the judgment that his primary and secondary findings were that:

> "…it 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 [Appellants] 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."

[34] At paragraph [307] of the judgment, the learned judge stated:

> "The following are the principal issues agreed by the Claimants [now the respondents] and the Sixth Defendant, Mr. Angus Chau, so far as they are presently material...

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[15] Ibid at para 270.
[16] Ibid at para 271.
[17] Ibid at para 272.
[18] Ibid at para 273.
[19] Ibid at para 274.

(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 of 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."

[35] The judge, in considering the minutes of the 20th August, 2015 Board meeting at paragraph 303 to 305 of the judgment, stated that:

> "[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 [Appellants'] 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 (sic) 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 [Appellants'] 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."

[36] The learned judge in considering whether the Directors 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, made a finding of fact that all the appellants knew that there 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, and thus acted dishonestly and in bad faith. The court found that the appellants failed entirely to consider the separate interests of the Company and ultimately held that the respondents' claim succeeded against the appellants.

The Appeal

[37] Being dissatisfied with the judgment of the learned judge, the appellants appealed to this Court. By notice of appeal filed on 17th November 2021, the appellants set out 26 grounds of appeal on which they challenge the decision of the learned judge. Primarily, the appellants allege that the judge erred in law and/or fact and/or was wrong in determining that the respondents' claim against the appellants succeeded and/or there was no or no sufficient evidence to support the judge's findings. The grounds of appeal were however addressed under three broad heads: i) The Crisis and the Board; (ii) Capitalisation of Receivables; and (iii) Ratification. Consequently, I will address the grounds of appeal and issues therein under these heads.

(i) The Crisis and the Board
The Appellants' Case

[38] The claim in the court below centered on the allegation that the crisis which the appellants contended that the Company was facing did not in fact exist and was known to the appellants not to exist. The respondents claimed that the Directors were in breach of their directors' duties by collectively undertaking a series of steps

in pursuit of a scheme to transfer the Target Group to Mr. Lau at a gross undervalue.

[39] The appellants argued that there were five separate critical issues confronting the Company and considered by the Board at its 20th August 2015 meeting as recorded in the minutes. These are: (1) the general shortage of capital and inability to pay employees (Item 1.1); (2) the CFDA crisis (Item 1.2); (3) issues relating to the Rugao Factory (Item 1.3); (4) the fact that a Bank of China loan was in arrears (Item 1.4-A); and (5) the fact that liabilities owed by the Company, other than the Bank of China loan were in arrears (Item 1.4-B). They contend that only the Bank of China loan and the CFDA crisis were addressed by the respondents in their amended statement of claim and no application was made by them to amend to include other elements of the crisis.

[40] The appellants assert that the judge wrongly and impermissibly found that:

(i) each element of the crisis as recorded in the minutes 'was at the very least factually problematic, such that when assessed objectively, there was in fact no crisis;[20]

(ii) each of the Directors knew that each of the separate elements of the crisis did not exist;[21] and

(iii) the minutes were 'mere window-dressing to create the false impression of a crisis and a search for a solution through discussion'. [22]

[41] The appellants also submit that the judge failed to confine and restrict himself to the pleaded case of the respondents as stated in the amended statement of claim. Further, the amended statement of claim only encompassed a limited number of the elements discussed at the Board meeting, but the judge drew no distinction between those elements that were impugned in the amended statement of claim

[20] See BVIHC(COM)2017/0086 (delivered 11th August 2021, unreported) at para 304.
[21] Ibid at para 307 (3).
[22] Ibid at para 305.

and those that were not, and decided the case by reference to matters that were not properly pleaded.

[42] Mr. Richard Hacker, KC, counsel for the appellants, argued orally that the judge adopted the respondents' case wholesale in preference to a fair and balanced assessment of both parties' submissions and the evidence as a whole. Counsel accepted that if the judge's finding that there was no crisis confronting the Company at the time the Board authorised the sale of the Target Group to Mr. Lau is correct and the Board did not have an honest belief that the sale was justified by the crisis, then a prima facie case of liability is established.

[43] Counsel argued that the respondents' case could fail for either one of two reasons:

(1) There was indeed a crisis and thus the judge fell fundamentally into error; and

(2) There was in fact no crisis but the directors honestly believed that there was one.

[44] The appellants relied on **Nada Fadil Al-Medenni v Mars UK Limited**[23] and submitted that the starting point for any trial must always be the pleadings. The pleadings are required to mark out the parameters of the case that is being advanced by each party and are critical to identify the issues and the extent of the dispute between the parties. They submit that the respondents' assertion that the Directors failed to act in good faith was tantamount to an allegation of dishonesty which allegation must be distinctly pleaded, sufficiently articularized, and distinctly proven.[24]

[45] Additionally, the appellants contend that where, in paragraph [307] of the judgment, the judge indicated that the respondents and Mr. Angus Chau had agreed the

[23] [2005] EWCA Civ 1041.
[24] Appellants' Skeleton Argument at para 24.

principal issues which may have gone wider than the respondents' pleaded case, the appellants had not agreed to the list of issues and the judge was in error at paragraph [308] in stating that the list of issues was broadly similar to the other list that the appellants had not agreed to.

[46] The judge at paragraph [308] stated:

> "[308] The other Director [Appellants] 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 [Appellants] 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?"

[47] According to the appellants, in order to appreciate the nature of the CFDA crisis, the judge was obliged to scrutinise the PRC legislation governing pharmaceutical manufacture and licensing. Each party was permitted to present reports from experts in the field. Colonel Zhou was the appellants' expert, and Ms. Yang Fan was the respondents'. Neither expert was able to offer 'live' evidence at trial. In light of this, the appellants requested that the experts be allowed to exchange further reports or answer written questions. The respondents, however, successfully resisted this.[25] Thus, the resolution of this central issue (i.e. whether, by reference to the relevant PRC pharmaceutical laws, the CFDA crisis was real), turned on the written reports of the PRC pharmaceutical experts.

[48] As to the Bank of China loan, said to be in the approximate sum of RMB 9 million (approximately US$1,408,979.00), the appellants argue that this was not pursued

[25] Ibid at paras 32 and 33.

at trial and was not addressed in the respondents' closing submissions at trial.[26] Accordingly, the appellants submit that the respondents 'accepted (at least) this aspect of the crisis and the minutes were genuine.'

[49] As to the CFDA crisis, which lay at the heart of the crisis being considered at the 20th August 2015 Board meeting, the appellants refer to this statement recorded in the minutes of the said meeting:

> "As of now Vanway has made every effort to appeal to China Food and Drug Administraation ("CFDA") with respect to the "official approval of testing standard", but the directors are not optimistic about it. CFDA may suspend the production and sales of Rugao Factory at any time. Please refer to Appendix I to see the approval notice from CFDA for further details."

[50] Furthermore, the appellants argue that in order for the judge to comprehend the nature of the CFDA crisis, it was critical for him to understand (and differentiate between) two fundamental requirements related to the drug Analgecine, namely Drug Approval and Drug Standards. The Drug Approval was a form of 'marketing authorisation' granted for five years for pharmaceuticals manufactured in the PRC. A Drug Approval Certificate was issued once Drug Approval was achieved. What is referred to as 're-registration' was the granting of a renewal for a new five year period of Drug Approval. Analgecine's 're-registration' (renewed Drug Approval) had been approved on 17th August 2015. However, it was the appellants' case that the risk posed by the CFDA crisis existed notwithstanding re-registration, and critically, the crisis confronting the Target Group affected Analgecine's Drug Standard. The Drug Standard was the technical requirements (formulated by the State) as to quality specifications, testing methodologies, manufacturing processes and other factors, in order to ensure the quality of a drug. Drug manufacturers had to comply with registered Drug Standards. In this case, there were two types of Drug Standard, there was a 'trial standard' (or tentative standard) which Analgecine had obtained in 2004, and the 'official standard' which (at all material times) Analgecine had not obtained but was required to obtain. The Target Group

[26] See Appellants' Skeleton Argument at paras 18 and 29.

had applied for the 'official standard' and that application had been rejected by the CFDA Notice.[27]

[51] The appellants further contend that the CFDA Notice concerned the Drug Standard for Analgecine. The language in the notice stated: '[t]he application for "official approval of testing standard" in relation to the Extracts from Rabbit Skin Inflamed by Vaccinia Virus for Injection is hereby rejected.' They also submit that since the CFDA Notice (which, despite being dated 2009, was only brought to the Board's attention in 2015) had the effect that, regardless of the 're-registration' on 17th August 2015, the CFDA could suspend the manufacture and sales of the medicine by the PRC Company at any time. Further, based on the language of the relevant laws and notices in Ms. Yang Fan's expert report, the CFDA appears to have been compelled (rather than just permitted) to revoke both the Target Group's Drug Approval and its trial standards, which would self-evidently have been fatal to its business.

[52] The simple fact is that notwithstanding the CFDA Notice issued in 2009, up to the 20th August 2015 Board meeting and the resolution of the Board on 15th September 2015 to sell the Target Group to Mr. Lau (a period of approximately 8 years), there was no revocation of the Target Group's Drug Approval, which was renewed for another five year period as recent as 17th August 2015. This re-registration was made notwithstanding the rejection by the CFDA Notice of 'official approval of testing standard' for Extracts from Rabbit Skin inflamed by Vaccinia Virus for Injection (Analgecine). It is common ground that this re-registration approval permitted or licensed the Target Group to continue to produce and to sell the drug Analgecine.

[27] See Appellants' Skeleton Argument at para 35.

[53] The appellants also pray in aid the terms of the 2015 Notice (referred to in the judgment as the "Pharmacopeia Announcement") issued by the State Food and Drug Administration, specifically Section V thereof.

[54] The appellants take issue with the judge's conclusion at paragraph [194] of the judgment that the 2015 Notice had not been mentioned by Mr. Ngai in his evidence and his evidence was to the effect that the CFDA Notice was 'the very source, the very fountainhead' of the alleged crisis events that took place in August and September 2015. The judge also observed that the 2015 Notice had not been addressed to any of the companies within the Target Group and did not feature in the minutes of the Board meeting of 20th August 2015. Instead, the appellants argue on appeal that 'the CFDA Crisis was one concerning formalization, and the 2015 Notice concerned precisely the same issue. The notion that the Board made up a crisis, but that there happened to have been a genuine crisis (by reference inter alia to the effect of 2015 Notice) which was unknown to the Board, but which concerned the same issue, is unreal.'[28] Accordingly, the appellants argue that it was wrong for the learned judge to simply ignore the effect of the 2015 Notice and the judge ought objectively to have taken into account the highly material matters including Colonel Zhou's report together with the clear wording of the 2015 Notice, both of which underscored the fallacy of Ms. Yang Fang's conclusion that re-registration cured the crisis.[29]

[55] In my considered judgment, the learned judge was correct to ignore or to place little importance to the 2015 Notice. It is pellucid that it had not been relied on in the 20th August 2015 Board meeting as an element of the alleged crisis. It is clear that with respect to Item 1.2 of the minutes the reference there was to the CFDA Notice and the Removal Notice with regard to the Rugao Factory, both of which were appended to the minutes. Furthermore, the 2015 Notice was not specifically

[28] See Appellants' Skeleton Argument at para 60.
[29] Ibid at para 64.

addressed to any of the companies within the Target Group, and, in my view, the wording of Section V thereof does not necessarily support the interpretation being put on it by the appellants or the prognostication by the appellants' expert Colonel Zhou. Section V expressly states that during the review, examination and approval, the original standard can still be followed. The fact remains that this is a general notice issued by the State Food and Drug Administration, it is not and was not a stop notice addressed to the Target Group. The official standards approval having been rejected by the CFDA Notice, no stop notice with regard to the production, manufacture and sale of Anaglecine was issued to the Target Group by the CFDA or any other relevant authority in the PRC. Furthermore, the CFDA Notice expressly permitted the 'dissenting applicant' to apply for re-examination, administrative review or bring a lawsuit. The Target Group seemed to have exercised its right or entitlement to apply for re-examination, the results of which were still pending. Also, and most importantly, the re-registration approval was issued some 6 years later on 17th August 2015.

[56] In relation to the finding at paragraph 119 of the judgment, the appellants maintain that the judge was incorrect when he stated that 'the Executive Director [Appellants'] expert [Colonel Zhou] did not maintain that the re-registration was only applied for on 17th August 2015, nor that the drug faced a manufacturing suspension.' In support of this assertion the appellants submit that Colonel Zhou clearly maintained in his English, Chinese and Reply reports that Analgecine (the drug) faced a manufacturing suspension. In particular, the appellants argue that the substance of the expert evidence of Colonel Zhou was a significant element of the appellants' defense of the claim but received barely a passing mention in the judgment. Mr. Hacker, KC also argued that the judge misunderstood the critical issue to which the expert evidence was or should have been directed.

[57] Furthermore, the appellants submit that the judge's determination[30] that re-registration effectively cured the CFDA crisis was fundamentally flawed and failed

[30] See BVIHC(COM)2017/0086 (delivered 11th August 2021, unreported) at para 303 (2).

to address the detailed arguments that were made by the appellants in their submissions in the court below. In addition, because neither of the PRC pharmaceutical experts gave oral evidence, it was crucial for the judge to carefully review their reports. Because the judge did not address the arguments advanced by the appellants on this issue at all in the judgment, there is nothing in the judgment to suggest that he gave the Ms. Yang Fang's report the examination that the appellants contend that was clearly required.

[58] Another area in which the appellants submit that the judge fell into error was the finding that the Alfred Sung Report was backdated. They assert that Mr. Sung is a certified public accountant and valuer who was not a party to the proceedings but was a witness and was cross-examined. They assert that the judge appears to have accepted, in the absence of expert evidence, that the differences between the 'final' report and the version dated 21st August 2015 took place after 17th August 2015. Further, where the judge stated at paragraph [340] of the judgment that the Alfred Sung Report 'was not a true report' but had been prepared 'to depress the true value of the Company and to create the pretence of having sought professional advice' was not a finding which was open to the Judge to make and/or was not supported by the evidence.

The Respondents' Case

[59] The respondents contend that the appellants' pleading points regarding the elements of the alleged crisis are unmeritorious or a bad point. They argue that these points were properly dealt with by the learned judge, who was correct in concluding that 'there was nothing in substance to them', and the respondents' (previously the claimants in the court below) case was sufficiently clear for the appellants to know the case against them. In this regard, they also rely on the observations of the judge at paragraph [306] of the judgment, which does not necessitate repeating here

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[60] As to the modern approach to the scope and purpose of pleadings, the respondents cite the dicta at paragraph [38] of this Court's decision in **Shaista Trading Company Limited d.b.a. Diamond Republic v First Caribbean International Bank (Barbados) Ltd**.[31] There it is emphasised that pleadings are required to be sufficiently detailed 'to make the general nature of a party's case clear to the other side', and 'much of the specific detail of a party's case will be set out in the witness statements which are exchanged in advance of the trial.' The respondents contend that much of their case was further developed through the witness statements, as also was the case with the appellants, and there can be no doubt that the appellants had fair notice of the case they were required to meet.

[61] The respondents also argue in answer to the appellants' pleading points, that their pleading in the amended statement of claim was broad enough to encompass the entirety of the alleged crisis addressed in the 20th August 2015 Board meeting minutes. In this regard they refer specifically to paragraphs 17 and 18 of the amended statement of claim. The contend that the use of the term '*inter alia*' in paragraph 17 'makes clear that the "Alleged Crisis" was defined not solely by reference to the items at (a), (b) and (c) of paragraph 17, but by reference to the alleged crisis that the Board meeting was ostensibly scheduled to resolve.' Also, at paragraph 18 of the amended statement of claim it was pleaded that each of the appellants knew that the alleged crisis, as broadly defined in paragraph 17, did not exist.

[62] The respondents submit that there is no merit to the grounds of appeal which challenge the findings of fact in relation to the alleged crisis,[32] and that the respondents' case at trial was that *even if* the alleged crisis did exist (which was denied), the appellants were still liable since the disposal of the Target Group to Mr. Lau at a gross undervalue was a clear breach of their duties as

[31] ANUHCVAP2018/0021 (delivered 26th April 2021, unreported).
[32] Respondent's skeleton arguments filed on 28th February 2022 at paragraphs 61 and 62.

directors. In this regard, the respondents emphasise what they see as the 'big picture',[33] that is, that all the appellants endorsed the Company's disposal of the Target Group to Mr. Lau at liquidation value and none of them could explain how this was in the best interest of the Company. In this regard, they refer to the findings at paragraph [268] of the judgment. It is therefore the respondents' case on appeal, that it follows that even if the judge's finding that the alleged crisis did not exist was one that no reasonable judge would have reached, the appeal should still fail as the appellants cannot, and have not, rationalised 'a disposal which was, at worst, part of a fraudulent scheme, and at best, patently irrational and in breach of their duty of skill and care.'[34]

[63] As to the elements of the alleged crisis, the respondents submit that there were three questions for the court, with the Bank of China loan and other liabilities and arrears being subsumed within the second question. All three questions were addressed by the learned judge before reaching his overall conclusion that there was no crisis, and the appellants knew that there was none. These three questions are:[35]

> "Alleged Crisis 1 – Was the PRC Company [Vanworld Rugao], prohibited from manufacturing, selling and/or distributing Analgecine during the period 20 August 2015 to 15 September 2015?" ("the CFDA Crisis")
> "Alleged Crisis 2 – Did the Target Group have significant liabilities and arrears as of 20 August 2015?" – ("the Financial Position of the Company")
> "Alleged Crisis 3 – Was there a requirement under the Removal Notice for the PRC Company to relocate its factory premises and if so, on what terms?" – ("the Rugao Factory Relocation")

Alleged Crisis 1- the CFDA Crisis

[64] Counsel for the respondents Mr. Jern-Fei Ng, KC in his oral submissions argued that the foremost element of the alleged crisis was the CFDA Crisis. Counsel posited that there were nine factual components to the CFDA Crisis and liability generally which were:

[33] Ibid at para 58.
[34] Ibid at para 59.
[35] Respondents' Skeleton Arguments at para 71.

(i)The contents of the CFDA notice and when it was received.

(iii) Mr. Lau's serial and repeated purchases of shares in the Company shortly before and after the Board meeting on 20th August 2015 and how this was inconsistent with crisis in the Company.

(iv) Mr. Lung's purported 20% shareholding, the voting rights for which were decisive in the disposal of the Target Group at liquidation value.

(v) The fact that none of the appellants, all of whom gave oral testimony at trial, could explain how disposal of the Target Group at the liquidation price of HKD$ 6,000,000.00 would have solved the alleged crisis faced by the Company.

(vi) The judge's preference for the evidence of the respondents' PRC law expert Ms. Yang Fang, and the findings which the judge made in relation to the appellants' expert Colonel Zhou and why the judge preferred Ms. Fang's expert evidence to the views expressed by Colonel Zhou.

(vii) The appellants' denial for most of the trial that the re-registration document was one document that consisted of two pages until the end of the trial when they were two documents.

(viii) The appellants' refusal to concede until all closing submissions were delivered that Analgecine had been re-registered on 17th August 2015.

(ix) The ex post facto reliance placed by the appellants on the 2015 Notice or the Pharmacopeia Announcement and the findings made by the judge as to how this fails to stack up with a complete absence of any reference to this in the contemporary

evidence, whether in the Board minutes of 20th August 2015 or indeed in any other contemporaneous documentation.

(x) The fact that the Alfred Sung Report was backdated to 17th August 2015 and the findings which the judge made about the serious shortcomings in relation to the Report, not just in relation to the content but also in relation to the allegation of backdating.

[65] Mr. Ng, KC submits that the appellants, in bringing this challenge to the findings of facts made by the judge, were essentially 'island hopping from topic to topic' in the course of examining what was presented to the judge at trial, without actually giving a sufficiently broad survey of the sea of evidence which the judge had presented to him in order to justify why he was entitled to make the findings of fact which were set out in his judgment.

[66] Counsel further contends that the documentary and witness evidence, including but not limited to, but in particular, the judge's analysis of the oral testimony of the facts presented at trial on each of the nine components, are interconnected and form a cogent tapestry of evidence from which the judge was entitled to and did find that the CFDA crisis and the alleged crisis did not exist, and that there was no crisis that justified the sale of the Target Group at liquidation value. Thus, it was open to the learned judge on the evidence before him to conclude as he did, and it cannot be said to be a conclusion which no reasonable judge could have made on the evidence that was presented at trial.

[67] Further, counsel argues that as part of the judge's assessment as to whether the Company was indeed facing a crisis as alleged by the appellants, one of the key issues which the judge had to consider was the evidence of Mr. Lau having, on a number of occasions, purchased shares even after his meeting with the CFDA in April 2015 when the problem of formalisation was said to have first emerged.

[68] Counsel also argued that the evidence of the respondents' expert, Ms. Yang Fang, a highly qualified lawyer, should be preferred. Her evidence was that the CFDA should not have allowed the PRC Company's renewal application if the CFDA had any reason to revoke Analgecine's Drug Approval based on the 2009 CFDA rejection. Colonel Zhou, on the other hand, was not a certified lawyer, thus it was unclear how he could speak on PRC law since PRC law was the field of expertise in which the court below had granted permission to adduce expert testimony in the case management order.

[69] The respondents further contend that Mr. Lau ensured that Mr. Lung, his trusted friend and proxy, had 20% of the Company's shares vested in him, and thus created what the judge described at paragraph 259 of the judgment as '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.[36] Furthermore, it was contended, the other directors, who were loyal to Mr. Lau, were willing to assist him in putting this scheme into action. Thus, despite Mr. Hui offering a better offer to acquire the Target Group for a higher price than Mr. Lau's proposal, no response to that offer was received.

[70] Further, the appellants in relying upon the Alfred Sung Report as a basis for calculation and approval of HK$6 million as the consideration for the disposal, were in breach of their duties as directors under sections 120 and 122 of the BCA. In any event, the judge's criticisms of the Alfred Sung Report were grounded in far more than his conclusion that it had been deliberately backdated, but the judge considered that:

(i) Mr. Sung did not come across as a reliable witness, rather, one who was wily and calculating.[37]

(ii) Mr. Sung did not take into account the 17th August 2015 re-registration document in conducting his valuation and had to admit

[36] See BVIHC(COM)2017/0086 (delivered 11th August 2021, unreported) at paras 257 and 258.
[37] Ibid at para 230.

that that would entail a very fundamental change to the whole basis on which he approached his report and he would have had to reconsider his valuation approach.[38]

(iii) Mr. Sung had been misinformed by Mr. Yeung and Mr. Lau that the Target Group companies did not hold any patents.[39]

(iv) Mr. Sung acknowledged that the executive directors tried to influence his views. Moreover, the judge's observation 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)' was not incorrect.

[71] The respondents submit that, in any event, the argument for the alleged crisis cannot be maintained or substantiated since the Company's subsidiary, Vanworld Rugao, had gross assets of HK$113 million, which dwarfed the alleged liabilities and arrears, and had made HK$23.5 million in operating profits in the first six months of 2015.

Alleged Crisis 2 – the Financial Position of the Company

[72] The respondents contend that, in terms of the Company's obligations and liabilities, contemporaneous documentation show that the PRC Company's financial status was relatively robust as of August 2015. They argue that Mr. Ngai asserted in paragraph 43 of his witness statement that the PRC Company was in a terrible position and could go bankrupt despite dramatically increasing sales. However, according to the PRC Company's unaudited profit and loss records as of 30th June 2015, the PRC Company had gross assets of over HK$113 million and made HK$23.5 million in the first six months of 2015. In 2015, the PRC Company had monthly operating profits of more than HK$5 million. The most significant liability indicated was a loan from the Bank of China in the sum of

[38] Ibid at paras 137 and 234.
[39] Ibid at para 138.

HK$18,750,000. However, when compared to the PRC Company's profits for the first six months of 2015, this was not a huge sum. Furthermore, Mr. Yeung, the Company's Chief Financial Officer, was taken through the accounts of the companies that comprised the Target Group in detail and agreed that putting those accounts of the subsidiaries together after adjustments would mean that the Target Group was still in a positive financial position by 'several millions'.

Alleged Crisis 3 – the Rugao Factory Relocation

[73] The respondents submit that following the 15th September 2015 EGM, the sale of the Target Group to Mr. Lau was finalised, but the alleged crises never materialised. The Rugao Factory has not had to relocate and is still in the same location, production continued and was not stopped on account of the alleged CFDA issue, and the PRC Company remains a going concern. Furthermore, whilst Mr. Lau sought to give the impression at paragraph 56 of his witness statement that he was forced to stop production in 2016 because of the alleged CFDA crisis, this was plainly untrue and was a deliberate mischaracterisation.

[74] The respondents further argue that even though the PRC Company was forced to halt production in January 2017 due to the usage of the incorrect type of rabbit, the PRC Company remained functioning and profitable, as evidenced by the Rugao Project Feasibility Report dated March 2017. According to the respondents, on 15th June 2017, the PRC Company received approval to manufacture the drug at the official standard, and while Mr. Lau attempted to maintain in oral evidence that the drug approved in 2017 was an entirely different product, documentary evidence clearly shows that both drugs have the same registration number.

Analysis and Conclusion

[75] It is common ground that the duties owed by the directors of a BVI company are set out in the BCA. Sections 120 to 122 state:

"**Duties of directors**

120. (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.

(2) A director of a company that is a wholly owned subsidiary may, when exercising powers or performing duties as a director, if expressly permitted to do so by the memorandum or articles of the company, act in a manner which he believes is in the best interests of that company's holding company even though it may not be in the best interests of the company.

(3) A director of a company that is a subsidiary, but not a wholly-owned subsidiary, may, when exercising powers or performing duties as a director, if expressly permitted to do so by the memorandum or articles of the company and with the prior agreement of the shareholders, other than its holding company, act in a manner which he believes is in the best interests of that company's holding company even though it may not be in the best interests of the company.

(4) A director of a company that is carrying out a joint venture between the shareholders may, when exercising powers or performing duties as a director in connection with the carrying out of the joint venture, if expressly permitted to do so by the memorandum or articles of the company, act in a manner which he believes is in the best interests of a shareholder or shareholders, even though it may not be in the best interests of the company.

Powers to be exercised for proper purpose

121. 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.

Standard of care

122. 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."

[76] The English Chancery Division court in **Mitchell and others v Al Jaber and others**[40] at paragraph 294, in considering the statutory duty of care under the BCA, stated:

> "The scope of the statutory duty of care under section 122 BCA 2004 is tempered by section 123 which provides that a director is entitled to rely upon the books and records of the Company and on professional or expert advice, subject to the caveat that the director is acting in good faith, has made proper inquiry where appropriate and has no knowledge that such reliance is not warranted."

[77] The test for whether directors acted for an improper purpose under section 121 was discussed in **Antow Holdings Limited v Best Nation Investments Limited et al**,[41] where the Court stated at paragraphs 25 and 26:

> "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 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."

[78] Where there has been a failure by directors 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 Ltd. And Another**,[42] 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; Eaton Bray Ltd and another v Palmer and others**,[43] '[t]he effect is therefore to substitute an objective test for the normal subjective one'.

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[40] [2023] EWHC 364 (Ch).
[41] BVIHCMAP2017/0010 (delivered on 21st September 2018, unreported).
[42] [1970] Ch. 62.
[43] [2002] All ER (D) 226 (Dec).

[79] In paragraph 51 of **Antow** Pereira CJ stated:

> "[51] Before one can say that a fiduciary power has been exercised for the purpose for which it was conferred, a wider investigation may have to be made. Where directors can be shown to have exercised a power conferred by the articles for a purpose other than that for which it was given, their conduct is open to challenge. In the Privy Council case of *Howard Smith Ltd v Ampol Petroleum Ltd* it was stated that when a dispute arises as to whether directors of a company made a particular decision for one purpose or for another, or whether, there being more than one purpose, one or another purpose was the substantial or primary purpose, the court is entitled to look at the situation objectively in order to estimate how critical or pressing, or substantial, or per contra insubstantial, an alleged requirement may have been. If it finds that a particular requirement, though real, was not urgent, or critical, at the relevant time, it may have reason to doubt, or discount the assertions of individuals, that they acted solely in order to deal with it, particularly when the action they took was unusual or even extreme. Their Lordships quoted an oft cited passage from the case of *Hindle v John Cotton Ltd*:
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> "Where the question is one of abuse of powers, the state of mind of those who acted, and the motive on which they acted, are all important, and you may go into the question of what their intention was, collecting from the surrounding circumstances all the materials which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly acting in discharge of their powers in the interests of the company or were acting from some bye-motive, possibly of personal advantage, or for any other reason."

[80] In **Nam Tai Property Inc v IsZo Capital LP et al**[44] this Court at paragraphs 159 and 160 held that:

> "[159] Once the court determines that the directors acted for a purpose which was 'objectively proper, not improper', the court will not go on to review the decision as to its reasonableness or unreasonableness, and potentially substitute its own view 'as to the judgment the directors should have reached in managing the company'. This is so even where the judge forms the view that the opinions of the directors as to the then financial needs (capital raising) of the company when exercising the power to issue new shares, 'was imprecise, probably intuitive and maybe erroneous…'.
>
> [160] …Accordingly, in the exercise of the power given to them, directors may take into account a range of factors and other practical considerations applicable to the company and its business. In the

[44] BVIHCMAP2021/0010 (re-issued 6th October 2021, unreported).

discharge of their duties, they may factor into their assessment of what is in the best interest of the company, the fact that their intended action or decision may frustrate the ambitions of some shareholders or group of shareholders, including their ability to enlarge their interest in or control over the company. However, so long as they discharge their duty honestly, in good faith and in what they decide to be in the best interest of the company and its shareholders, their decisions are not open to review by the courts…"

[81] The learned judge at paragraph [244] of the judgment stated:

"[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)

[82] The judge went on to find at paragraphs [316] to [322]:

"[316] By section 121 of the BCA, all the Director [Appellants] 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 [Appellants] 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. …

[319] In considering whether the Director [Appellants] 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 [Appellants] knew there 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**, I must first ascertain whether there has been a failure by each of the Director [Appellants] to consider the separate interests of the company or whether there has been a challenge by the Claimants to their 'good faith'. Both apply here.

[321] The Director [Appellants] 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 [Appellants] 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 [Appellants] 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 [Appellants] was thus acting in breach of their section 120 statutory duties."

[83] In the instant matter, the judge heard oral evidence and submissions and made findings in relation to the discharge by the Directors of their duties to the Company under the BCA. Having regard to the pleaded issues and to the issues of fact which underpin any proper determination of the questions of improper purpose and unfairly prejudicial conduct, it cannot be said that the learned judge erred in making the determination that the Directors breached their section 120 and 121 duties. The issues in this case concern important questions of fact to be determined by the court who heard and saw the

witnesses and with the benefit of cross-examination at a trial. The judge further stated at paragraphs [340] to [342] that:

> "[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).
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> [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…"

[84] In my judgment, where directors are alleged to have taken actions that resulted in detriment to the Company, the crucial issue is whether the directors neglected or omitted to consider 'whether a proposed transaction is in the company's best interests?' Consequently, applying the test in **Antow** which has been approved by the Privy Council in **Kathryn Ma Waii Fong v Wong Kie Yik and others**,[45] the judge found that the Directors of the Company undertook a series of steps in pursuit of a scheme to transfer the Target Group to Mr. Lau at a gross undervalue.

[85] In assessing whether directors have acted in good faith, the court will consider all the evidence concerning the directors' decision-making processes. Minutes of board and shareholder meetings and reports are examples of evidence that will be considered. The court should further assess whether any one or more factors under the BCA are particularly relevant to the directors' decision. When

[45] [2022] UKPC 14.

a directors' decision is challenged, the reviewing court will expect such material to exist to assist it in reaching a determination. The Privy Council in **Smith (Howard) v Ampol Petroleum Ltd**[46] made some observations which I find useful in this case. Lord Wilberforce stated:

> "…it would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management's decision, on such a question, if bona fide arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.
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> But accepting all of this, when a dispute arises whether directors of a company made a particular decision for one purpose or for another, or whether, there being more than one purpose, one or another purpose was the substantial or primary purpose, the court, in their Lordships' opinion, is entitled to look at the situation objectively in order to estimate how critical or pressing, or substantial or, per contra, insubstantial an alleged requirement may have been. **If it finds that a particular requirement, though real, was not urgent, or critical, at the relevant time, it may have reason to doubt, or discount, the assertions of individuals that they acted solely in order to deal with it, particularly when the action they took was unusual or even extreme.**"[47] [Emphasis added]

[86] In this case, the sale of the Company to Mr. Lau at an alleged undervalue can be regarded as an unusual and extreme decision. In all the circumstances, having reviewed the judgment and submissions of the parties (oral and written), I am persuaded that the judge properly and carefully evaluated the evidence before him in coming to his finding that 'in reality there was no crisis'. In my judgment, there was in reality no crisis neither of a financial nature or in relation to the manufacture and sale of the drug Analgecine by the Target Group, including the PRC Company, Vanworld Rugao. The matter of the 2009 CFDA Notice existed some 6 years before the alleged crisis was said to have arisen or existed with the Company and its subsidiaries. The rejection of official approval by way of this notice was being addressed by the Target Group by way of an appeal or re-examination or review. This is what prudent business

[46] [1974] AC 821.
[47] Ibid at 832.

persons would be expected to do. In spite of this notice, the ability of the Rugao Factory to continue to operate, to manufacture and to produce for sale Analgecine, was never stopped, suspended or haulted by the CFDA or by any other relevant authority in the PRC. Further, on 17th August 2015, approval of the drug and its continued manufacture was re-registered for another 5-year period. The 2015 Notice regarding the implementation of a new legal technical standard did not result in a change in the status quo with regard to the approval issued to Vanworld Rugao to continue to manufacture Analgecine. Similarly, the 2010 Removal Notice with respect to the Rugao Factory, while understandably a matter of concern, perhaps serious concern, to the Company, was also being properly and adequately addressed by the Directors who on behalf of the Company and its subsidiaries had secured a delay in its implementation until 31st December 2016. A period of one and a half months approximately from when the Board acted to agree to permit Mr. Lau to acquire the subsidiaries initially for HK$1 million, but only after questions were raised about the Company's very valuable receivables, at HK$6 million, and even then, upon terms and conditions that can only be described as being very generous, and which could result in Mr. Lau in fact having to pay less than the consideration of HK$6 million.

[87] In my considered judgment, the learned judge was correct to find that the Directors had breached their statutory duties owed to the Company under and pursuant to section 120, 121 and 122 of the BCA. The Directors, in resolving to approve the sale of the subsidiaries to Mr. Lau, did not seek the most basic and independent advice as to either the true financial status of the Company or the true value of its assets. The Alfred Sung Report was at minimum, clearly defective and grossly diminished in consideration of important relevant factors such as the 17th August 2015 re-registration approval, and the very valuable receivables amounting to some HK$156 million. The said valuation report was therefore faulty in its assessment of the value of the Company and in large measure unreliable and thus not capable of serious and objective consideration

and reliance by the Directors in determining whether the alleged crisis with the Company did exist or not. The Directors sought no independent legal advice on the issues of the existence of such a crisis, taking into consideration that much of the alleged CFDA crisis is said to be grounded on legal documents issued by the relevant arms of the Government of the PRC. They did not seek independent legal advice on how to treat with the receivables of the Company and appeared to be in such a determined posture to solidify by appropriate resolutions, at Board and shareholder levels, the acquisition of the subsidiaries by Mr. Lau that they did not obtain an appropriate resolution of shareholders under section 175 of the BCA. This provision is mandatory and a legal requirement precedent to the disposal of more than 50% in value of the assets of a company other than in the usual or regular course of its business. Any breach by directors of this section 175 requirement is, in my view, important evidence that the directors have acted in breach of their duty to the Company under section 122 of the BCA (failure to exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances), such that the said resolution ought to be set aside.

[88] There is also ample evidence supportive of the learned judge's finding that the sale of the subsidiaries to Mr. Lau was done at a liquidation price – at a gross undervalue. This is an especially stark conclusion when one considers that initially the deal was for Mr. Lau to pay just HK$1 million for the shares in the subsidiaries (the Target Group) and the Board was apparently prepared to go forward with approval at that price at the 20th August 2015 Board meeting even before the Alfred Sung Report had been completed and produced to the Board. It was not enough to say that once completed it would be provided to all shareholders, since the directors, the Board itself ought properly to have before them an independent valuation of the company before approving the sale to Mr. Lau, and before conducting the kind of assessment to determine whether there was indeed a crisis and whether such a sale was in the best interest of the Company. When produced, the Alfred Sung Report showed a value of HK$ 150

million 'in deficiency' as of the date of assessment at 30th June 2015. However, for the reasons already mentioned and for those given by the learned judge, this valuation report was deficient and unreliable. Additionally, the evidence given, documentary and otherwise, as to the actions of Mr. Lau, both prior to and even around the time of the Removal Notice in relation to the Rugao Factory, in purchasing new shares in the Company support a valuation much higher than the HK$6 million, as does the evidence as to the performance of Vanworld Rugao and its financial position. As counsel for the respondents submit, the fact that the sale was at a gross undervalue has not been explained and no rational reason or purpose advanced by the directors justifying it has been given. In those circumstances the appellant directors who approved the sale clearly acted for an improper purpose in breach of their duty under section 121 and also in breach of their duties of care, diligence and skill owed to the Company under section 122 of the **BCA**. For these reasons, the grounds of appeal against these findings by the judge are therefore dismissed.

(ii)Capitalisation of Receivables
The Appellants' Case

[89] The appellants contend that the judge incorrectly determined that the capitalisation of receivables was not carried out for a proper purpose but was a deliberate step in Mr. Lau's scheme to have the Company transfer the Target Group to him through a sale at a gross undervalue. The appellants argue that the judge failed to take into account the fact that there was no pleaded claim for damages in the amended statement of claim for any violation of section 175. The duties alleged in the amended statement of claim and the breaches alleged therein did not refer to a duty not to act in a manner that contravenes the BCA. Accordingly, if the respondents wished to allege a breach of duty on the part of the Directors resulting from a technical breach of section 175 that rendered them liable to respondents, they should have pleaded the duty, the breach, and any knowledge that rendered the Directors at fault.

[90] Furthermore, the appellants argue that the judge erred in his findings in relation to the appellants' conduct in relation to the capitalisation of receivables in failing to have any proper regard to:

(i) the fact that legal advice was obtained and in particular, Mr. Yeung took advice from Ms. Cheung of ONC Lawyers and conveyed that advice to the Board;

(ii) the judge failed to adequately or at all consider the evidence concerning the nature of the receivables (and/or that the Directors believed them to have been capital investments), and their value (which did not consist of more than 50 percent in value of the assets of the Company), and that section 175 of the BCA was not engaged and/or section 175 was enacted for the benefit of shareholders and not the company.

The Respondents' Case

[91] The respondents however argue that the amended statement of case dealt with the capitalisation of the receivables and alleged that the capitalisation of the receivables 'was in breach of section 175 of the Act'. The respondents indicated that they alleged in the pleadings that 'the Capitalisation of the Receivables was a deliberate step by the first appellant and/or the Board, acting on the instructions of the first appellant, or alternatively, with his approval, encouragement, influence and at his instigation, in furtherance of the first appellant's scheme to dispose the Target Group to himself personally by way of a sale at gross undervalue'.

[92] Additionally, the alternative allegation that 'the Capitalisation of the Receivables was invalid, void, and of no legal effect on the basis that it was carried out in breach of section 175 of the Act' was also pleaded in the amended statement of claim, thus there is no merit in this argument taken by the appellants. The judge found that the capitalisation of receivables was in

breach of section 175 of the **BCA**. The respondents' reason that the receivables equated to more than 50% of the Company's assets as at 3rd and 4th September 2015 and that the capitalisation was not made in the regular course of business but 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 capitalisation (in fact they were not even informed of it before the capitalisation was done) and no majority, nor indeed any, shareholders approved it.

[93] Further, the respondents argue that the assertion by the appellants that there was no pleaded claim for damages in the amended statement of case in respect of any breach of section 175 was misconceived. They contend that the trial only concerned liability, so questions of relief come later and are not relevant to findings of breach. Secondly, the amended statement of case declares in multiple places that the respondents were seeking damages and/or other relief due to the appellants' breaches.

[94] As it pertains to the appellants objection to the judge's finding that the appellants also breached section 121 of the BCA by breaching section 175, the respondents submit that there is no merit in this objection. They argue that it was axiomatic that the appellants had breached section 121, since the appellants had necessarily acted 'in a manner that contravenes the BCA by breaching section 175'. Additionally, the respondents suggest that the appellants' criticism of the judge's handling of the evidence was contradicted by Mr. Yeung who admitted that 'the receivables being capitalized must have been worth more than half of the value of the assets of the Company'. The respondents maintain that the evidence that the capitalisation of the receivables was a deliberate step in the appellants' fraudulent scheme was overwhelming, consequently the judge did not err in his findings.

Analysis and Conclusion

[95] The judge determined that the capitalisation of receivables was done in breach of section 175 of the BCA. He further found that the receivables equated to more than 50% of the Company's assets as at 3rd and 4th September 2015, and that the capitalisation was not made in the regular course of business but was a one-off event to facilitate a sale of the target Group to Mr. Lau.[48]

[96] Section 175 of the BCA deals with dispositions of assets of a company and provides:

> "**Disposition of assets.**
>
> 175. 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), if not made in the usual or regular course of the business carried out 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."

[97] It was determined by the judge that the shareholders did not receive adequate details of the proposed capitalisation (in fact they were not even informed of it before the capitalisation was done) and no majority, nor indeed

[48] See BVIHC(COM)2017/0086 (delivered 11th August 2021, unreported) at paras 307[9] and [10].

any, shareholders approved it, in contravention of section 175. Additionally, it was the judge's ultimate conclusion that the capitalisation of receivables was not carried out for a proper purpose but was a deliberate step in Mr. Lau's scheme to have the Company transfer the Target Group to him by way of a sale at a gross undervalue.

[98] This Court's ruling in **Fang Ankong et al v Green Elite Limited (in Liquidation)**[49] sets out the important purpose and application of section 175 of the BCA. This clause is designed to protect the value of members' shareholdings by requiring members to approve any sale of more than 50% of a company's assets that occurs outside of the normal course of business. Smith JA [Ag.] at paragraph 55 of **Green Elite** states:

> "Section 175 applies where there is a disposition by a company of more than 50% in value of its assets which is not made in the usual or regular course of the business carried on by the company. Such a disposition must not only be approved by the directors but also authorised by a resolution of members of the company.[50] The purpose of section 175 was stated by Wallbank J [Ag] in [51] (sic) at paragraph 286:
>
> > "…section 175 of the Act creates an important check. The check operates by requiring the company's directors to provide details of a proposed disposal to the members so that the members can then authorise the disposal by way of a resolution of members. Inherently this requires that the directors must give sufficient details pertaining to the proposed disposal to all the company's members to enable all the company's members to decide whether or not to authorise the disposal."

Smith JA [Ag.] goes on to state at paragraph 58 and 64:

> "[58] Having determined that section 175 was engaged, the next question is whether the transaction was one that was in the usual or regular course of business. The approval and authorisation requirements in section 175 do not apply to

[49] BVIHCMAP2022/0013 (delivered 9th January 2023, unreported).
[50] Kathryn Ma Wai Fong v Wong Kie Yik and others [2022] UKPC 14.
[51] BVIHC(Com) 2020/147 (formerly BVIHCM 2018/0114) (delivered 25th October 2021, unreported).

dispositions that are made 'in the usual or regular course of the business carried out by the company'….

[64] There may, conceivably, be situations in which a company's disposal of 50% or more of the total value of its assets is in the usual and regular course of its business. Consider a real estate holding company whose sole purpose is to buy up properties cheaply and "flip" them – to use the jargon of the industry – at a higher price. In such a scenario, the shareholders of the company are not interested in holding on to the real estate assets but rather to convert them into cash profits. If at a given point in time, such a company disposes of properties in its portfolio valued at more than 50% of the company's total assets in a particular transaction, such a disposition would be in the usual and regular course of its business and would not engage section 175 and would not require shareholder authorization. In such a company, the shareholders would expect the directors to make such dispositions because that is precisely the usual and regular business or trade of the company…"

[99] In this case the judge found that the capitalisation of receivables was not carried out for a proper purpose but 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. The test for proper purpose as indicated above was considered by the Court in **Antow.** Section 121 of the BCA required the Directors to exercise their powers for proper purposes and not to act or accede to the Company acting in a manner that violated the BCA. The judge at paragraph [329] determined that '[i]n this regard the Director [Appellants] 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'. The judge then considered[52] the UK Supreme Court case of **Eclairs Group Ltd and another v JKX Oil & Gas plc**[53] as the leading authority when discussing section 121 of the BCA:

> "[331] The English Supreme Court held that the 'proper or improper purpose' rule:

[52] BVIHC(COM)2017/0086 (delivered 11th August 2021, unreported) at para 331.
[53] [2015] UKSC 71.

> "…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".[54]

[100] The judge concluded on this issue at paragraphs [332] and [333] and found:

> "[332] Applying these principles, it can immediately be seen that the issue of whether the Director [Appellants] 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 [Appellants'] 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 [Appellants] 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.

[54] [2015] UKSC 71 at para 15.

[101] The learned judge was therefore correct in finding that the capitalisation of receivables was not for a proper purpose, there was a clear basis for the learned judge to so find and this Court will not disturb his finding on this issue. I would simply add that capitalisation of receivables in the manner deployed here by the Directors, resulted in the Company's valuable receivables in the form of a shareholder's loan to the two subsidiaries which would be acquired by Mr. Lau, being wiped out, but in the subsidiaries then to be owned by Mr. Lau, being free of the debt of that liability. This was not only done without the benefit of independent accounting and legal advice, as none was sought by the Directors, but resulted in the minority shares held by the respondents in the Company being virtually worthless.

(iii)Ratification

The Appellants' Case

[102] The issue of ratification arose on the pleaded case of the appellants as to, firstly, the effect in law of the resolutions of the shareholders of the Company passed at its EGM on 15th September 2015 concerning the capitalisation of receivables, the sale of the Target Group to Mr. Lau, and the conduct of the director appellants; and, secondly, as to the effect of the said resolutions, in particular, clause (h) on page 4 thereof, purportedly expressly approving, confirming and ratifying 'any and all actions and any other documents in connection with the Agreement, Transactions and the Disposals, or of any one Director or officer … prior to the execution hereof.'[55] The judge accepted the respondents' submissions (summarised at paragraphs [355] of the judgment) on the issue of ratification and made certain findings at paragraph [356], which paragraph is set out almost in full at paragraph 109 below.

[103] It was submitted by the appellants in relation to the issue of ratification that the judge's findings regarding ratification and his assessments of the Directors (and their evidence), were all materially infected by his (erroneous) assessment of the

[55] BVIHC(COM)2017/0086 (delivered 11th August 2021, unreported) at paras 353 and 354.

crisis and other matters arising in this appeal. Once it is appreciated that there was a crisis, the actions of the Board and of Mr. Lung *qua* shareholder (including as regards when Mr. Lung acquired his shares) take on a radically different complexion. Thus, in determining that Mr. Lung acquired his shares only in 2015 and as nominee for Mr. Lau, the judge had failed to take proper account of the evidence of: (i) Mr. Lung and Mr. Lau on the nature of their arrangement (which was one between friends) and the circumstances surrounding Mr. Lung's investment (which was at a time when the Target Group was in dire need of funding); and (ii) Mr. Yeung on the shareholder list, which was in fact provided to him by Mr. Lavender Sze, and on the process by which he caused the Company's share register to be updated (which included that he was told by the BVI agents to update it in stages).

[104] The appellants also assert that there were contemporaneous records supporting many of the payments that were made by Mr. Lung and, in any event, the shareholders and/or Mr. Lung had all the information that was necessary for fully informed consent and/or for the ratification resolution to be effective. In response to the respondents' complaints that certain financial information had not been provided, the appellants contend that Mr. Yeung's evidence was that he had sent such information as he had, including draft audited financial statements for the Company, Vanway and Vanworld for the period 1st January 2010 to 31st December 2014, and management accounts to June 2015. It was submitted that based on the statements of principle by Neuberger J in **EIC Services Ltd v Phipps**[56] it is the shareholders who are said to have assented or waived who must have the appropriate or full knowledge, and in this case that was Mr. Lung.

The Respondents' Case

[105] The respondents argue that the judge was correct in finding that Mr. Lung's purported ratification of: (a) the capitalisation of receivables; (b) the sale of the Target Group to Mr. Lau; and (c) the conduct of the appellant directors, was

[56] [2003] EWHC 1507 (ch) at 135.

ineffective to relieve the Directors from liability for breach of duty. It was ineffective for two independent reasons: firstly, 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. Secondly, because 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. Thus, the judge was correct to conclude, based on the evidence, that the appellants failed to comply with this duty.

Analysis and Conclusion

[106] The learned judge at paragraph [250] distilled the relevant principles on ratification and breach of directors' duties which he considered in arriving at his findings and stated:

> "[250] The relevant principles governing ratification of breaches of directors' duties can de distilled as follows:
>
> (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**.[57]
>
> (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**;[58] **Atwool v Merryweather**;[59] **Mason v Harris**.[60]"

[107] The judge ultimately made findings of fact against the appellants at paragraphs [251] to [262] of the judgment. At paragraphs [251],[252], [258], [259], [260], [261] and [262] the judge made these crucial findings of fact:

> "[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.

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[57] [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).
[58] [1916] 1 AC 554.
[59] (1867) LR 5 Eq 464n.
[60] (1879) 11 ChD 97.

[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 [Appellants], 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 [Appellants], 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."

…

"[258] It is extremely probable, and I find as a fact, that Mr. Lung held his shares in the Company as a nominee of 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 [Appellants] 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….
>
> [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 not 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." (Emphasis as in original)

[108] Having considered the applicable principles, the judge concluded 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. The judge further accepted the submissions of the respondents summarised at paragraph [355] and held at paragraph [356] of the judgment that:

> "[356] … 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 [Appellants] from liability for breach of duty."

[109] The UK Supreme Court in **BTI 2014 LLC v Sequana SA and others**[61] stated:

> "23. It has long been established that a company is normally bound in a matter which is intra vires the company by a resolution of the shareholders in general meeting. Authorisation in advance of the directors' act **or ratification after the event by the shareholders in general meeting, after full disclosure,** results in the treatment of the directors' act as the act of the company, on principles of the law of agency, and therefore eliminates the possibility of the company bringing a claim against the directors for breach of their duties to the company." [Emphasis added]

[110] It is trite that full disclosure must be given to furnish the shareholders with the full knowledge they need to enable them to assent to or ratify the breaches of directors' duties. The judge's conclusion that, based on the evidence, the appellants failed to comply with their duty, was clearly open to him to make on the evidence and is not one that no reasonable court would have reached. The judge was entitled to decide that full disclosure was not provided. The learned judge was also entitled to conclude on the evidence that in breach of their duty, the Directors approved a sale of the Target Group to Mr. Lau at a gross undervalues. This is a most stark and gross breach of duty by the Directors who voted for that resolution.

Appeals against findings of fact

The Appellants' Case

[111] The appellants acknowledge the advantages that a first instance judge will have over the appellate court when dealing with appeals against findings of fact. However, they submit that whilst this appeal involves challenges to numerous factual findings made by the judge, this is not a case of simply seeking to have a re-run of the entire trial and to impeach a trial judge's findings made on the basis of his assessment of the credibility of the witnesses, but rather a challenge to the conclusions drawn by the judge from the entire body of evidence before him, namely the witnesses of fact, the expert witnesses and the contemporaneous documents. They argue that: there are demonstrable errors in the judge's

[61] [2022] 3 WLR 709.

reasoning and handling of the evidence; the judge failed to address the appellants' central arguments, still less explain why they were rejected; the judge relied on and/or incorporated extensively the respondents closing submissions and adopted many of the respondents arguments and submissions as his own; and there was serious delay in the delivery of the judgment both after the evidence was given and after closing submissions.

Respondents' Case

[112] The respondents in answer contend that the appeal against the factual findings in the judgment are without merit and fails to discharge the burden placed on the appellants to demonstrate that this case falls within the exception to the principle of appellate restraint. Therefore, the question is not whether the Court of Appeal would have reached a different view, but rather whether no reasonable judge would have reached the learned judge's findings and decision.

Applicable principles of appellate restraint

[113] There is a consistent stream of jurisprudence in which this Court has applied the well-known principles of the appellate court's restraint in its review of a trial judge's findings of facts and the inferences drawn from them.

[114] In **Yates Associates Construction Company Ltd v Blue Sand Investments Limited**,[62] this Court held that:

> "[46] …The Court of Appeal should apply restraint not only to the judge's findings of fact but also the evaluation of those facts and the inferences drawn from them. It is axiomatic that the critical question which is before this Court is whether there was evidence before the learned trial judge from which she could properly have reached the conclusions that she did or whether on the evidence the reliability of which it was for her to assess, she was plainly wrong."

[115] Also, in **Shankar Khushalani et al v Lindsay Mason (Trading as Tropical Home Designs Architectural & Construction Services)**[63] Blenman JA in

[62] BVIHCVAP2012/0028 (delivered on 20th April 2016 unreported) at para 46.
[63] GDAHCVAP2016/0017 (delivered 11th June 2021, unreported).

reviewing a number of cases which has been decided by this court on the issue of appellate restraint held:

> "[30] I remain resolute in this view, that the appellate court should show restraint in review of findings of facts of the learned trial judge.
>
> [31] Most recently, this principle has been confirmed by the Privy Council in **Ming Siu Hung and others v JF Ming Inc and another**. In **Ming Siu Hung**, Lord Briggs delivering the judgment of the Board stated:
>
> > "It is necessary at this point to bear in mind the well-settled constraints upon the appellate jurisdiction, when asked to re-exercise a discretion conferred upon the first instance judge. These constraints form part of a package, developed over many years, which ensure that the benefit of finality which should normally follow from the judicial determination of the parties' dispute is not rendered ineffective by undue appellate activism. The general reasons for appellate restraint are well summarised by Lewison LJ in his well-known judgment in Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5; [2014] FSR 29, para 114, as follows:
> >
> > > "114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: Biogen Inc v Medeva plc [1977] RPC 1; Piglowska v Piglowski [1999] 1 WLR 1360; Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23; [2007] 1 WLR 1325; In re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33; [2013] 1 WLR 1911 and most recently and comprehensively McGraddie v McGraddie [2013] UKSC 58; [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court…"

[116] In **Capital WW Investment Limited (in liquidation) acting through its Directors v Tall Trade Limited**[64] the Court affirmed:

> "[65] It is settled law that an appellate court must show fidelity to the well-settled principles that govern the appellate review of a trial judge's findings of facts, the evaluation of those facts and the inferences drawn from them by the trial judge. In relation to appellate restraint in relation to the exercise of discretion by the judge, the law is settled.

[64] BVIHCMAP2020/0025 and BVIHCMAP2020/0026 (delivered on 24th January 2022, unreported) at paras 65 and 66.

> [66] In relation to the appellate court's review of the exercise of discretion by the first instance judge, in **Michel Dufour and others v Helenair Corporation Ltd. and others** Sir Vincent Floissac, former Chief Justice, enunciated that the appellate court could only interfere if it is satisfied:
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> > "that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or degree of error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

Delay

[117] The appellants complained that there was a delay of well over 5 months from the close of the trial to when judgment was rendered in this appeal. More importantly, there was a delay of around 20 months after the judge first heard evidence, and of almost a year after the close of evidence. They rely on the case of **NatWest Markets Plc and another v Bilta (UK) Ltd (in liquidation) and others**,[65] where the court at paragraphs 43 to 44 stated that:

> "43. The danger posed by a seriously delayed judgment in a case which involves assessments of fact and which depends at least in part on the oral evidence of witnesses, is that the delay may have so adversely affected the quality of the decision that it cannot be allowed to stand….
>
> 44…. the general, albeit unwritten, rule is that a judgment should be delivered within 3 months of the hearing. That rule should be adhered to even in long and complex cases..."

[118] The respondents submit however that 5 months was neither an excessive nor an unjustifiable length of time for the judge to produce his judgment in a factually complex case like this.

[119] Upon consideration of this issue raised by the appellants in the context of this case and the judgment of the court below, I find the criticisms of the learned judge with respect to delay unfortunate, regrettable and completely without

[65] [2021] EWCA Civ 680.

merit. Indeed, these criticisms were quite properly subsequently withdrawn or expressly not relied upon by counsel for the appellants. It cannot be said that the time between the end of the trial and delivery of the 82 page judgment by the judge was so inordinate to be inexcusable. Furthermore, the court in **Natwest** was faced with a situation where the judgment was delayed for a period of 19 months. The court also stated at paragraph 45 that 'it is quite clear from the authorities that delay alone will be insufficient to afford a ground for setting a judgment aside.'

[120] The learned judge at paragraph 3 of the judgment noted:

> "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."

[121] Also, at paragraph 21 he stated:

> "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."

[122] It is accepted that a judge must offer a well-reasoned judgment that covers all essential factual and legal factors relevant to the court's finding in order to render a fair and just decision, particularly following a trial involving factual witnesses. However, a decision is not required to address every single point, legal or factual, submitted by the parties or every argument presented by counsel. The primary consideration is that the decision must demonstrate the judge's thorough examination and appraisal of the admissible evidence's cogency, dependability, and relevance. This requires the judge to ensure that the admissible evidence is logically ordered in respect to the key issues in the case.

[123] Upon review of the judge's decision and the evidence which was before him, I cannot conclude that the findings made by the judge was plainly wrong nor findings that no reasonable judge would have reached or that the period of 5 months affected adversely his assessment of the oral evidence and his findings and decision. The judge gave a detailed judgment which highlighted the salient issues and addressed the law and facts arising therefrom. An appellate court's role is not to substitute its own conclusions for those of the lower court. In the absence of some other identifiable error, such as a material error of law, or making a critical finding of fact that has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will only interfere with a trial judge's findings of fact if it is satisfied that the trial judge's decision cannot reasonably be explained or justified.

Disposition

[124] For these reasons, I would make the following orders:

(1) The appeal is dismissed and the judgment and order of the learned trial judge is affirmed.

(2) Costs are awarded to the respondents to be assessed in the court below, if not agreed within 21 days from the date of this judgment.

I concur.
Hon. Mario Michel
Justice of Appeal

I concur.
Hon. Vicki Ann Ellis
Justice of Appeal

By the Court

Deputy Chief Registrar