

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0046

BETWEEN:

NAM TAI PROPERTY INC
(a company incorporated in the British Virgin Islands)

Appellant

and

WEST RIDGE INVESTMENT COMPANY LIMITED
(a company incorporated in Hong Kong)

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Gertel Thom
The Hon. Mr. Paul Webster

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. David Chivers KC, with him Ms. Arabella di Iorio, Mr. Jack Rivett, and Ms. Jodi-Ann Stephenson for the Appellant
Mr. John Machell KC, with him Ms. Kimberly Crabbe-Adams and Ms. Jhneil Stewart for the Respondent

2023: February 10;
July 27.

Commercial appeal – Section 121 of BVI Business Companies Act 2004 – Duty of directors to exercise powers for a proper purpose – Section 120(1) of BVI Business Companies Act 2004 – Tomlin Orders - The Court's approach to applications to enforce Tomlin Orders and to findings made by the lower court in such applications – Deed of Indemnity – Whether the judge erred in concluding that Nam Tai's claim to set aside the Deed of Indemnity on account of West Ridge's involvement in the unlawful means conspiracy did not have a realistic prospect of success – Whether the judge erred in concluding that Nam Tai's claim that West Ridge dishonestly assisted the Kaisa directors in the conspiracy to maintain control of the

Company did not have a realistic prospect of success – Whether the Deed is void or otherwise unenforceable, if it was issued for the improper purpose of suppressing West Ridge’s evidence and disclosure in the Main Claim - Whether, as a matter of construction, West Ridge’s alleged unlawful conduct in participating in the conspiracy and/or dishonest assistance avoided Nam Tai’s obligation under the Deed- Whether Nam Tai is entitled to recover its costs and expenses associated with the defence of the Main Claim and the Appeal, and the losses suffered from the Greensill investment - Whether Nam Tai is entitled to set off any amount found due to West Ridge by the damages and loss caused by West Ridge’s unlawful conduct - Whether Nam Tai is entitled to a defence of change of position relating to its fees and expenses incurred in the defence of the Main Claim and the losses suffered from the Greensill investment

The appellant, Nam Tai Property Inc. (“Nam Tai” or “the Company”), is a property development and management company incorporated in the Territory of the Virgin Islands (“BVI”). The respondent, West Ridge Investment Company Limited (“West Ridge”), is a registered Hong Kong company. It became a shareholder of Nam Tai in the circumstances set out in this judgment. IsZo Capital LP (“IsZo”) is an investment fund and limited partnership formed under the laws of the state of Delaware in the United States of America. At the material time it owned approximately 8.8% of the shares in Nam Tai. Kaisa Group Holdings Limited (“Kaisa”) is an investment holding company registered on the New York Stock Exchange (“NYSE”). Greater Sail Ltd. (“Greater Sail”) is a shareholder of Nam Tai. Before October 2020, it owned approximately 23.9% of shares in Nam Tai. It is a subsidiary of Kaisa and the second defendant in the Main Claim.

The Kaisa directors were five of the seven directors of Nam Tai until the requisitioned shareholders meeting held on 30th November 2021. The current directors are the directors appointed at the requisitioned shareholders meeting held on 30th November 2021 and two independent directors.

On 11th September 2020, IsZo and other shareholders representing more than 30% of the issued shares of Nam Tai, served a requisition on the Company to convene a meeting of the shareholders (“the Requisition”). The Company did not convene the meeting. Instead, on 5th October 2020, the majority of the directors approved a private investment in public equity (“PIPE”) and allotted 16,051,219 shares to Greater Sail and 2,603,366 shares to West Ridge. The allotment moved Kaisa’s beneficial ownership of the shares in Nam Tai from 23.9% to 43.9%, and West Ridge now owned 4.5% of the shares. The additional shares gave Kaisa sufficient voting power to block the resolutions proposed in the Requisition.

On 13th October 2020, IsZo launched the Main Claim challenging the validity of the PIPE and the allotment of shares to Greater Sail and West Ridge. IsZo claimed that the PIPE was made for an improper purpose in breach of sections 120(1) and 121 of the BVI Business Companies Act 2004 (“the BC Act”). Nam Tai’s response was that the PIPE was made for a proper purpose because it was facing a liquidity crisis and needed the capital input from the PIPE. On 26th November 2020, West Ridge filed an ancillary claim against Nam Tai denying that IsZo was entitled to set aside the allotment of shares and seeking the repayment of the USD\$23,820,798.90 paid to Nam Tai for the 2,603,366 shares allotted to it (“the WR Subscription”) in the event that IsZo’s claim succeeded.

This was followed by negotiations between IsZo, Nam Tai and West Ridge that resulted in a three-way settlement on 14th December 2020 ("Tomlin Order"). In the settlement Nam Tai agreed to indemnify West Ridge for any losses that it suffered as a result of the Main Claim succeeding and the allotment of shares being set aside

The Main Claim was heard by the learned judge ("the Judge") between 29th January and 24th February 2021. By his judgment delivered on 3rd March 2021, the Judge rejected the Kaisa directors' contention that Nam Tai was experiencing a liquidity crisis and needed capital urgently. He found that the Kaisa directors who approved the PIPE did so for the improper purpose of defeating the Requisition and keeping themselves in control of the Company. He also found that in approving the PIPE, the Kaisa directors did not act in the best interest of the Company and its shareholders in breach of their duty under sections 120(1) and 121 of the BC Act. The Judge declared that the purported allotments of shares to Greater Sail and West Ridge were ineffective and void, set aside the allotments and ordered the register of members of Nam Tai be rectified to delete the entries for the shares allotted under the PIPE. The Judge further ordered Nam Tai to convene a shareholders' meeting at 9:00am on 26th April 2021.

Nam Tai appealed against the Judge's decision. On 4th October 2021, the Court of Appeal dismissed the appeal and affirmed the Judge's finding that the PIPE was issued for the improper purpose of defeating the Requisition and keeping the Kaisa directors in de facto control of the Company. The appeal was allowed to the extent of setting aside the finding that the Kaisa directors had breached section 120(1) of the BC Act. The Court of Appeal ordered Nam Tai to convene a shareholders' meeting on Tuesday, 30th November 2021 at 9:00 am to consider passing the resolutions proposed in the Requisition.

On 17th May 2021, West Ridge applied under paragraph 1 of the Tomlin Order and/or under the Civil Procedure Rules 2000 ("CPR") and/or under the inherent jurisdiction of the court for judgment against Nam Tai ("the Application") for: (a) the subscription money of USD \$23,820,798.90; (b) USD\$465,607.06 for legal fees and expenses to their BVI legal practitioners up to 14th May 2021 and USD\$12,875.32 to their English solicitors; (c) costs of the Application; and (d) further costs, expenses, damages and losses associated with the indemnity to be quantified by the court.

Nam Tai opposed the Application on several grounds. The learned judge heard the Application on 16th March 2022 and on 7th April 2022 he found that Nam Tai did not have realistic prospects on its claim to set aside the Tomlin Order and ordered the enforcement of the order.

Being dissatisfied with the Judge's findings, Nam Tai appealed the Judge's order and judgment. West Ridge also filed a counter notice of appeal. The issues that arise from the grounds of the appeal and the counter notice of appeal are: i) The Appellate Court's approach to applications to enforce Tomlin Orders and to findings made by the lower court in such applications; ii) Nam Tai's claim to set aside the Deed of Indemnity on account of West Ridge's involvement in the unlawful means conspiracy to maintain control of the Company and/or its dishonest assistance of the Kaisa directors in the conspiracy; iii) Nam Tai's and West Ridge's purpose for entering into the Deed of indemnity and iv) assuming that the

indemnity is not set aside: a) whether, as a matter of construction, West Ridge's alleged unlawful conduct in participating in the conspiracy and/or dishonest assistance avoided Nam Tai's obligation under the Deed; b) whether Nam Tai is entitled to recover its costs and expenses associated with the defence of the Main Claim and the Appeal, and the losses suffered from the Greensill investment; c) whether Nam Tai is entitled to set off any amount found due to West Ridge by the damages and loss caused by West Ridge's unlawful conduct; d) whether Nam Tai is entitled to a defence of change of position relating to its fees and expenses incurred in the defence of the Main Claim and the losses suffered from the Greensill investment.

Held: dismissing the appeal with costs to West Ridge to be assessed by the court below unless agreed within 21 days and making no order on the counter notice of appeal that:

1. A Tomlin order is a form of consent order that embodies the terms on which the parties to an action have agreed to stay the action. The court will approach an application to set aside a Tomlin Order as if it were an application for summary judgment and will grant the relief sought if it has a realistic, as opposed to fanciful, prospect of success. An application to enforce a Tomlin Order is treated as an application for summary judgment under CPR Part 15.6. The object is to winnow out cases that are not fit for trial. The court must avoid conducting a mini-trial without disclosure and oral evidence. The court should avoid being drawn into an attempt to resolve conflicts of fact. This does not mean that the court must take at face value and without analysis everything that an applicant says in his statements before the court. In some cases it may be clear that there is no real substance in the factual assertions made, particularly if contradicted by contemporaneous documents. The court must carry out its own analysis to see if there is substance in the statement before assuming it in favour of the party making the statement.

Heritage Travel and Tourism Limited and another v Lars Windhorst and others [2021] EWHC 2380 (Comm) applied; **Easyair Ltd (t/a Openair) v Opal Telecom Ltd** [2009] EWHC 339(CH) applied.

2. The tort of unlawful means conspiracy occurs where two or more persons combine and take action that is unlawful in itself with the intention of causing damage to a third party which does cause the intended damage. An improper purpose is not the same thing as a conspiracy. To make the cause of action for conspiracy complete the pleadings must allege a specific intention by the alleged conspirators to cause pecuniary damage. Nothing short of this specific pleading will suffice. What is essential is that the pleaded case must show a realistic prospect of showing that there was an intention to cause pecuniary harm. A power struggle is not unusual in commercial entities and the methods employed by the competing factions to gain or keep control are not necessarily conspiratorial or dishonest. The fact that the methods used by one of the factions turns out to be improper and in breach of their duty to the company does not necessarily mean that they intended to harm the company. The intention to cause harm to the company, as well as the harm so caused, must be clearly

alleged in the pleadings and later proved at the trial. In this case there is no basis to interfere with the Judge's finding that the conspiracy claim failed because the appellant did not plead a proper case of intention to injure and did not have a realistic prospect of showing that the respondent intended to harm the appellant based on the material before the Judge.

Clerk and Lindsell on Torts 21st edition, Sweet & Maxwell applied; **OBG Ltd and another v Allan and others** [2008] 1 AC 1 considered; **Lonrho PLC and others v Fayed and others (No. 5)** [1993] 1WLR 148 applied.

3. The general rule is that a person who renders assistance to a breach of fiduciary duty that causes loss to another person can be liable for dishonest assistance. In this case the elements of dishonest assistance that must be satisfied are: (a) there must be a trust or fiduciary duty owed by the Kaisa directors to the target company (Nam Tai) and the Kaisa directors breached that duty; (b) the breach of duty by the Kaisa directors need not be dishonest because it is the dishonesty of the third party (West Ridge) that matters; and (c) West Ridge must have acted dishonestly in procuring or assisting the breach. The first element was satisfied by the findings of the Judge in the Main Claim and by the Court of Appeal that the Kaisa directors acted for an improper purpose in breach of their duty to the Company by approving and implementing the PIPE. However, the Judge erred: (i) in finding that there was an issue estoppel regarding the honesty of the Kaisa directors; (ii) by focusing on the dishonesty of the Kaisa directors instead of on West Ridge's dishonesty; and (iii) by finding that West Ridge had to be found to have procured and assisted in the breach. The Judge therefore erred in his treatment of the elements of the cause of action for dishonest assistance and his findings on this issue are set aside.

FM Capital Partners Ltd. v Frederick Marino and another [2018] EWHC (Comm) 1768 applied; **Madoff Securities International Ltd (In Liquidation) v Raven and others** [2013] EWHC 3147 (Comm) considered.

4. In applying the test of dishonesty, the court must have regard to all the circumstances known to the defendant at the time, and the defendant's personal attributes such as their experience and the reason why they acted as they did. The state of a company's knowledge of the facts and the company's belief in the facts are normally determined by reference to the knowledge and belief of the company's directors and officers. Participating in a project for an improper purpose in breach of section 121 is very different from dishonestly participating in the project in breach of section 120(1). Nam Tai does not have a realistic prospect of showing that the West Ridge's participation in the PIPE was dishonest or that it dishonestly assisted the Kaisa directors in implementing the PIPE for an improper purpose in breach of the Kaisa directors' duty to Nam Tai. The Judge's order that the Deed of Indemnity as incorporated in the Tomlin Order stands to be enforced is therefore affirmed unless Nam Tai can show on other grounds that the Deed is invalid or that it has a defence to the claims made under the Deed.

5. Nam Tai's invitation to the Court to infer from the pleaded facts that the real purpose of the Kaisa directors in giving the indemnity was to keep West Ridge's evidence out of the Main Claim is not accepted. The allegation is speculative and does not meet even the threshold of showing that there is a realistic prospect of showing that the Kaisa directors acted in breach of their duties under sections 120 and 121 of the BC Act by granting a favourable indemnity to West Ridge in order to keep its evidence out of the Main Claim. There is simply not enough on the pleadings to find that there is a realistic prospect of proving these things or that the West Ridge was aware of the real reason for Nam Tai giving the indemnity.

Pussers Ltd et al v CITCO Banking Corporation N.V. BVIHCVAP2003/0008 (delivered 20th September 2004, unreported) applied.

7. There is no factual basis rising to the level of showing a realistic prospect of success that shows that West Ridge was aware of the decision to invest in Greensill, far less that it should be responsible for any part of the resulting loss. Nam Tai is therefore not entitled to a right of equitable set off because it does not have a realistic prospect of being awarded damages against West Ridge.
8. The allegation in paragraph 40 of the defence that West Ridge is not entitled to restitution of the subscription price of USD\$23,820,798.90 for the shares because Nam Tai changed its position by defending the Main Claim and entering into the Greensill investment does not have reasonable prospects. Nam Tai's pleaded position is that the investment in Greensill was made using the subscription monies. There is no pleading that Nam Tai spent the subscription monies in good faith believing the money belonged to the Company, or that it would be inequitable to order them to return the funds. The investment was made at a time when all the parties concerned knew or ought to have known that the subscription money was the subject of a dispute in the Ancillary Claim. Therefore, the defence of change of position does not have reasonable prospects of success.

Lipkin Gorman (A Firm) v Karpnale Ltd [1991] 2 AC 548 applied.

JUDGMENT

- [1] **WEBSTER JA [AG]:** The appellant, Nam Tai Property Inc. and respondent, West Ridge Investment Company Limited are parties to a Tomlin Order dated 14th December 2020 ("the Tomlin Order"). On 17th May 2021, the respondent applied to the Commercial Court to enforce the terms of the Tomlin Order ("the Enforcement Application"). The appellant opposed the Enforcement Application on several

grounds. The learned trial judge, (“the Judge”) heard the Application on 16th March 2022 and on 7th April 2022 delivered his judgment finding that the appellant did not have realistic prospects on its claim to set aside the Tomlin Order and ordered the enforcement of the Order. This is an appeal against the Judge’s order.

Background

- [2] The background to this appeal is set out in detail in previous decisions of this Court and the Commercial Court between these and related parties but it is necessary to repeat some of the background to appreciate the issues that are before the Court. In doing so I will copy some of the details from the earlier judgments.
- [3] There are two sets of proceedings in the Commercial Court that are relevant to this appeal. The first is the claim brought by IsZo Capital LP (“Iszo”) to set aside an allotment of shares by Nam Tai in October 2020 (“the Main Claim”). The second is an ancillary claim by West Ridge in the Main Claim that in the event that Iszo succeeds in the Main Claim it (West Ridge) will claim an indemnity and/or equitable compensation and/or damages against Nam Tai (“the Ancillary Claim”).
- [4] The main participants in this appeal are:
- (a) The appellant, Nam Tai Property Inc. (“Nam Tai” or “the Company”), is a property development and management company incorporated in the Territory of the Virgin Islands (“BVI”) and is traded on the New York Stock Exchange (“NYSE”). It is the first defendant in the Main Claim and the ancillary defendant in the Ancillary Claim.
 - (b) The respondent, West Ridge Investment Company Limited (“West Ridge”), is a company registered in Hong Kong that became a shareholder of Nam Tai in the circumstances outlined below. It is a subsidiary of Haitong International Securities Co Ltd (“Haitong”). West Ridge is the third defendant in the Main Claim and the ancillary claimant in the Ancillary Claim.

- (c) IsZo is an investment fund and limited partnership formed under the laws of the state of Delaware in the United States of America. It is the claimant in the Main Claim. At the material time it owned approximately 8.8% of the shares in Nam Tai. IsZo and those associated with it are sometimes referred to in this judgment as “the IsZo faction”.
- (d) Kaisa Group Holdings Limited (“Kaisa”) is an investment holding company registered on the NYSE. Through its subsidiaries it is principally engaged in property development and management in the People's Republic of China (“PRC”).
- (e) Greater Sail Ltd. (“Greater Sail”) is a shareholder of Nam Tai. Before October 2020 it owned approximately 23.9% of shares in Nam Tai. It is a subsidiary of Kaisa and the second defendant in the Main Claim.
- (f) Haitong is a financial institution based in the PRC. Haitong is the parent of West Ridge.
- (g) The Kaisa directors were five of the seven directors of Nam Tai until the requisitioned shareholders meeting held on 30th November 2021. These former directors and those associated with them are sometimes referred to in this judgment as “the Kaisa faction”.
- (h) The current directors are the directors of Nam Tai appointed at the requisitioned shareholders meeting held on 30th November 2021.

[5] On 11th September 2020, IsZo and other shareholders representing more than 30% of the issued shares of Nam Tai, served a requisition on Nam Tai to convene a meeting of the shareholders (“the Requisition”). The requisitionists were dissatisfied with the way that the directors were conducting the business of Nam Tai and the purpose of the requisitioned meeting was to remove and replace the five Kaisa directors on the board. Nam Tai did not convene the meeting. Instead, on 5th October 2020 the majority of the directors approved a private investment in public

equity (“PIPE”) and allotted 16,051,219 shares to Greater Sail and 2,603,366 shares to West Ridge. The allotment moved Kaisa’s beneficial ownership of the shares in Nam Tai from 23.9% to 43.9%, and West Ridge now owned 4.5% of the shares. This effectively gave Kaisa voting control of Nam Tai and with it the power to determine the composition of the board of directors.

[6] On 13th October 2020 IsZo launched the Main Claim challenging the validity of the PIPE and the allotment of shares to Greater Sail and West Ridge. The defendants to the Claim are Nam Tai, Greater Sail and West Ridge. The essence of IsZo’s claim is that the PIPE was made for an improper purpose in breach of sections 120(1) and 121 of the **BVI Business Companies Act 2004**¹ (“the BC Act”). Nam Tai’s response was that the PIPE was made for a proper purpose in that Nam Tai was facing a liquidity crisis and needed the capital input from the PIPE.

[7] On 26th November 2020, West Ridge filed an ancillary claim against Nam Tai denying that IsZo was entitled to set aside the allotment of shares to West Ridge and seeking the repayment of the USD\$23,820,798.90 paid to Nam Tai for the 2,603,366 shares allotted to it (“the WR Subscription”) in the event that IsZo’s claim succeeded. This was followed by negotiations between IsZo, Nam Tai and West Ridge that resulted in a three-way settlement on 14th December 2020. The components of the settlements are:

- (i) West Ridge and Nam Tai entered into the Deed of Indemnity by which Nam Tai irrevocably undertook, covenanted and agreed that it would indemnify, compensate and hold West Ridge harmless against all costs, damages, claims, losses, associated expenses and any other liability whatsoever that may be incurred if IsZo succeeded in the Main Claim. The Deed recited that West Ridge did not wish to participate any further in the proceedings; by clause 2.3 Nam Tai agreed that it would not enter a defence in West Ridge’s Ancillary Claim; and by clause 6 Nam Tai agreed

¹ Act No. 16 of 2004 Laws of the Virgin Islands.

to pay the indemnified amount within five (5) business days of being requested by West Ridge.

- (ii) West Ridge and Nam Tai entered into the Tomlin Order reflecting the terms of the Deed of Indemnity and containing the usual stipulation in paragraph 1 that “All further proceedings in this ancillary claim be stayed except for the purpose of carrying the terms of the Deed (of Indemnity) into effect AND for that purpose the parties have permission to apply to the Court without the need to issue fresh proceedings.”
- (iii) West Ridge and IsZo entered into a consent order, the effect of which was to stay the Main Claim against West Ridge upon West Ridge agreeing to be bound by the terms of any judgment against Nam Tai (“the Consent Order”). Paragraph 3 of the Consent Order provides that: “[West Ridge] will be bound by, and give effect to, any order in these proceedings that affects the title of the shares that it holds in [Nam Tai]”, and by paragraph 2 IsZo agreed that West Ridge could enter into the Deed of indemnity.

[8] The essence of the three-way settlement is that Nam Tai agreed to indemnify West Ridge for any losses that it suffered as a result of the Main Claim succeeding and the allotment of shares being set aside; Nam Tai would not file a defence to the Ancillary Claim which was stayed except for carrying out the terms of the Tomlin Order; the Main Claim against West Ridge was stayed on the basis of Iszo’s agreement that Nam Tai could enter into the Deed and West Ridge would be bound by the result of the Main Claim. The effect of the three- way settlement for West Ridge is that it received the indemnity, gave up its right to defend the Main Claim on the ground that its subscription was unaffected by any irregularity with the allotment, and it did not need to take any further part in the Main Claim.

[9] The Main Claim was heard by the Judge on an expedited basis over 13 days between 29th January and 24th February 2021. The learned judge delivered his

judgment on 3rd March 2021. He rejected the Kaisa directors' contention that Nam Tai was experiencing a liquidity crisis and needed capital urgently. He found that the Kaisa directors who approved the PIPE did so for the improper purpose of defeating the Requisition and keeping themselves in control of Nam Tai. He also found that in approving the PIPE, the Kaisa directors did not act in the best interest of Nam Tai and its shareholders in breach of their duty under sections 120(1) and 121 of the BC Act. By his order dated 3rd March 2021, the Judge declared that the purported allotments of shares to Greater Sail and West Ridge were ineffective and void and ordered that the said allotments be set aside and the register of members of Nam Tai be rectified to delete the entries for the shares allotted under the PIPE. The Judge further ordered Nam Tai to convene and hold a meeting of the shareholders of the Company at 9:00am on 26th April 2021 with a record date of 15th March 2021.

- [10] Nam Tai appealed against the Judge's decision. The appeal was heard on 14th to 16th June 2021. The Court of Appeal delivered its judgment on 4th October 2021.² The Court dismissed the appeal and affirmed the Judge's finding that the PIPE was for the improper purpose of defeating the Requisition and keeping the Kaisa directors in de facto control of Nam Tai. The appeal was allowed to the extent of setting aside the finding that the Kaisa directors had breached section 120(1) of the BC Act. The unanimous judgment of the court was delivered by Farara JA [Ag]. Farara JA [Ag.] agreed with the Judge that the Kaisa directors deliberately delayed action on the Requisition; that Nam Tai had not made out a case that there was a liquidity crisis requiring the urgent injection of cash from the PIPE; and that the Kaisa directors implemented the PIPE for the improper purpose of keeping the existing directors in place and not for the stated purpose of addressing the liquidity crisis. Farara JA [Ag.]'s conclusions on these issues are conveniently summarised at paragraph 277 of the judgment:

"In my view, the evidence is sufficiently clear that the dominant purpose was to defeat the requisition, to give Kaisa control of NTP both at the Board and shareholder level. This was, on the authorities, an improper exercise by

² BVIHCMAP2021/0010 (delivered 4th October 2021, reissued 6th October 2021, unreported)

these four directors of their powers under section 121 of the Act. The evidence is compelling that these four directors did not act on the Requisition because, were they to do so, the outcome was clear, that Kaisa-connected directors and hence Kaisa would no longer control the Board, and effectively control of NTP. It is clear that in order to ensure that this did not occur, their approach is clearly to delay any action on the requisition, in breach of NTP's articles, while taking steps to put in place and have approved by the Board as then constituted, a PIPE which will give Kaisa de facto control of NTP in circumstances where they did not have such control."

[11] The Court of Appeal ordered Nam Tai to convene and hold a meeting of shareholders on Tuesday, 30th November 2021 at 9:00 am to consider passing the resolutions proposed in the Requisition. The meeting was duly held and the Kaisa directors were removed and replaced by the current directors.

[12] Following the decision of this Court of Appeal, West Ridge found itself in a situation where it had paid \$23,820,798.90 ("the subscription money") for 2,603,366 shares in Nam Tai and it had not received the shares or the return of the subscription money and/or reimbursement of its costs and expenses associated with the failed subscription. On 17th May 2021, West Ridge applied under paragraph 1 of the Tomlin Order³ and/or under the **Civil Procedure Rules 2000** ("CPR") and/or under the inherent jurisdiction of the court for judgment against Nam Tai ("the Application") for:

- (a) The subscription money of USD \$23,820,798.90.
- (b) USD\$465,607.06 for legal fees and expenses to their BVI legal practitioners up to 14th May 2021 and USD\$12,875.32 to their English solicitors.
- (c) Costs of the Application; and
- (d) Further costs, expenses, damages and losses associated with the indemnity to be quantified by the court.

[13] The Application was supported by the witness statement of Mr. Andrew Thorp, a legal practitioner for West Ridge, which deals mainly with background facts. Nam

³ Paragraph 1 of the Tomlin Order is set out in paragraph 7(ii) above.

Tai did not file evidence opposing the application but on 25th January 2022 it filed the affidavit of Mr. Michael Crecenti in support of an application to adjourn the hearing of the Application which was then scheduled for 27th January 2022. The Crecenti affidavit contains statements that are relevant to the Application. Neither party referred to these documents in their written and oral submissions.

[14] At a directions' hearing on 27th January 2022 the Judge, at the request of Nam Tai, ordered Nam Tai to file and serve its points of claim (in response to the Application) by 25th February 2022. This order was treated by Nam Tai as leave to file its defence and counterclaim in the Ancillary Claim without an order lifting the stay of the proceedings in the Ancillary Claim imposed by the Tomlin Order.

[15] Nam Tai, now under the control of the new directors, filed its defence and counterclaim on 20th February 2022. The essence of the defence and counterclaim, and the theme that runs through the main issues in the document, is that the Kaisa directors breached their duties to Nam Tai by approving and implementing the PIPE for an improper purpose in furtherance of an unlawful means conspiracy between Nam Tai and West Ridge to keep the Kaisa directors in control of Nam Tai. Alternatively, that West Ridge dishonestly assisted the Kaisa directors in making the PIPE for an improper purpose. As a result, the allotment is void (as found by the Commercial Court and the Court of Appeal), West Ridge is not entitled to the return of the subscription money, and it is liable to Nam Tai for damages and equitable compensation in an amount to be ascertained. That amount will exceed any amount that is due to West Ridge under the indemnity giving rise to a right to a defence of equitable set off. Nam Tai also pleaded and relied on defences of change of position and breach of public policy.

[16] The defence challenged West Ridge's entitlement to an indemnity from Nam Tai on the ground that it is to be inferred that the Kaisa directors approved the Deed of Indemnity in order to withhold from the court in the Main Claim, disclosure of documents and evidence from West Ridge that would have confirmed that the PIPE

was made for an improper purpose. In doing so the Kaisa directors were protecting their own interests and the interests of Kaisa in breach of their duties to the Company under sections 121 and 120(1) of the BC Act. The indemnity is therefore ineffective and void, and/or not binding on Nam Tai.

- [17] The counterclaim adopted the provisions of the defence, claimed loss and damages totalling USD\$65.5 million, and sought declarations that: (i) the indemnity is ineffective and void and/or not binding on Nam Tai; and (ii) the Tomlin Order by which the proceedings in the Ancillary Claim was stayed, be set aside.

General principles

- [18] A Tomlin order is a form of consent order that embodies the terms on which the parties to an action have agreed to stay the action. The terms of the Tomlin order are usually included in a schedule to the order. In this case the terms of settlement are included in the Deed of Indemnity but, for reasons of confidentiality, were not included in the Tomlin Order.
- [19] The Application by West Ridge to enforce the Tomlin Order was heard by the Judge on the basis of the evidence that had been filed in the Ancillary Claim, the pleadings consisting of the amended ancillary claim form, the particulars of ancillary claim, the defence and counterclaim, and the written and oral submissions of counsel for the parties. Nam Tai's opposition to the Application includes an application for a declaration that the Tomlin Order be set aside.
- [20] In the proceedings in the lower court learned counsel for Nam Tai, Mr. David Chivers KC, submitted, and the Judge agreed, that the approach to an application to set aside a Tomlin Order is to be treated as if it was an application for summary judgment and grant the relief sought if it has a realistic, as opposed to fanciful, prospect of success.⁴ Learned counsel for West Ridge, Mr. John Machell KC,

⁴ Heritage Travel and Tourism Limited and another v Lars Windhorst and others [2021] EWHC 2380 (Comm).

accepted that this is the correct approach. The Judge's approach is set out in paragraph [13] of his judgment:

"[13] ... Before considering these points, I turn to Nam Tai's case in opposition to the relief sought by West Ridge. The test for setting aside a Tomlin order is, I agree, that set out in Mr. Chivers QC's skeleton on Nam Tai's behalf as follows:

"4. An application to enforce a Tomlin Order is treated as an application for summary judgment under CPR Part 15.6 The relevant principles are:

4.1. Does the Defence and Counterclaim have a 'realistic' as opposed to a 'fanciful' prospect of success?

4.2. A claim is 'fanciful' if it is entirely without substance. A 'realistic' prospect of success carries some degree of conviction beyond being merely arguable.

4.3. The object is to winnow out cases that are not fit for trial. The Court must avoid conducting a 'mini-trial' without disclosure and oral evidence. The Court should avoid being drawn into an attempt to resolve conflicts of fact. The Court should bear in mind what evidence can reasonably be expected to be available at trial.

4.4. The Court should be alive to the warning in **Easyair Ltd (t/a Openair) v Opal Telecom Ltd**:⁵ 'If it is possible to show by evidence that although material... is not currently before the Court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment'

4.5. The Court must assume disputed questions of fact in favour of the party against whom the application is made, i.e. in favour of [Nam Tai]. The conclusion that a defence has no real prospect of success ought only to be reached in the clearest of cases, 'where it is clear that a [statement of case] on its face obviously cannot be sustained, or in some other way is an abuse of the process of the court.' This is a high bar."

[21] I will follow this approach and would only add the following qualification from the judgment of Lewison J in **Easyair Ltd (t/a Openair) v Opal Telecom Ltd** (following his reference to the court not conducting a mini trial at this stage):

"(iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents..."⁶

⁵ [2009] EWHC 339 (CH) at paragraph 15(vii).

⁶ Ibid at sub-paragraph 15(iv).

This qualification is important because it is not every statement that a party, against whom summary judgment is sought, makes in its pleading or evidence that the court should assume in favour of that party. The court must carry out its own analysis to see if there is substance in the statement before assuming it in favour of the party making the statement.

Findings by the Judge

[22] The learned judge applied the foregoing guidelines and made the following important findings:

(a) On the issue of the unlawful means conspiracy Nam Tai had reasonable prospects of showing that there was a combination or arrangement between Nam Tai and West Ridge to effect the unlawful allotment of shares and thereby give the *de facto* control of the Company to the Kaisa directors. However, Nam Tai did not have realistic prospects of showing that West Ridge intended to harm the Company. The absence of an intention to harm the Company means that the conspiracy claim failed.

(b) The claim for dishonest assistance failed because of the Court of Appeal's finding regarding the honesty of the Kaisa directors created an issue estoppel regarding the honesty of those directors. And even if West Ridge assisted in the breach of section 121 of the BC Act, there is no evidence that West Ridge procured the breach of section 121. Therefore, the dishonest assistance claim did not have a reasonable prospect of success.

(c) Assuming that there is a realistic prospect of a conspiracy claim, the losses by Nam Tai of the fees and expenses that it incurred for making and defending the allotment, and the costs it was ordered to pay to IsZo on the Main Claim, would be recoverable. However, the loss suffered on Nam Tai's investment in the Greensill Fund would not be

recoverable because it was wholly unconnected with the alleged conspiracy and was caused by a *novus actus interveniens*. Details of the Greensill investment and loss will be dealt with below.

The Appeal

[23] The notice of appeal contains five grounds of appeal which I summarise as follows:

- (a) the judge erred in concluding that Nam Tai's claim against West Ridge for dishonest assistance did not have a realistic prospect of success;
- (b) the judge erred in concluding that Nam Tai's claim against West Ridge for unlawful means conspiracy did not have a realistic prospect of success;
- (c) the judge erred in concluding that Nam Tai's investment in the Greensill Fund was irrecoverable or alternatively the claim to recover such funds had no prospect of success;
- (d) the judge was wrong to conclude that Nam Tai should be bound by the Deed of Indemnity;
- (e) the judge erred by not dealing with Nam Tai's defences of unlawful purpose, public policy and change of position.

[24] The relief sought by Nam Tai is for this Court to set aside the decision of the Judge, find that Nam Tai's defence and counterclaim has a realistic prospect of success, lift the stay imposed by the Tomlin Order and remit the matter to the court below for trial of the Ancillary Claim and the defence and counterclaim.

[25] West Ridge filed a counter notice of appeal claiming that:

- (1) The Judge was right to hold that the Deed of Indemnity was valid for the additional reason that there was no plea by Nam Tai that West Ridge

was on notice of any breach by the Kaisa directors entering into the Deed.

- (2) The Judge should have held that Nam Tai could not have challenged the validity of the Deed of Indemnity unless the stay imposed by the Tomlin Order was lifted and this Court should not exercise discretion by lifting the stay.
- (3) The Judge should have held that:
 - (a) there was no defence to Nam Tai's liability under the Deed; and
 - (b) the claim for damages for unlawful means conspiracy and dishonest assistance cannot be a defence to a claim under the Deed.
- (4) If, contrary to the Judge's finding, there is an arguable case of conspiracy or dishonest assistance, the Judge was wrong to find that there is an arguable claim for the Company's costs in the Main Claim.
- (5) If, contrary to the Judge's finding, there is an arguable case of conspiracy or dishonest assistance, the Judge should have held that the loss was limited by reference to West Ridge's proportion of the total subscriptions.
- (6) The defence of change of position is irrelevant.

[26] The following issues arise from the grounds of the appeal and the counter notice of appeal:

- (a) The Court's approach to applications to enforce Tomlin Orders and to findings made by the lower court in such applications.
- (b) Nam Tai's claim to set aside the Deed of Indemnity on account of West Ridge's involvement in the unlawful means conspiracy.

- (c) Nam Tai's claim that West Ridge dishonestly assisted the Kaisa directors in the conspiracy to maintain control of the Company.
- (d) Nam Tai's claim that the Kaisa directors issued the Deed of indemnity for the improper purpose of suppressing West Ridge's evidence and disclosure in the Main Claim and the Deed is therefore void or otherwise unenforceable, and West Ridge's involvement in this additional improper purpose.
- (e) Assuming that the indemnity is not set aside:
 - (i) whether, as a matter of construction, West Ridge's alleged unlawful conduct in participating in the conspiracy and/or dishonest assistance avoided Nam Tai's obligation under the Deed;
 - (ii) whether Nam Tai is entitled to recover its costs and expenses associated with the defence of the Main Claim and the Appeal, and the losses suffered from the Greensill investment;
 - (iv) whether Nam Tai is entitled to set off any amount found due to West Ridge by the damages and loss caused by West Ridge's unlawful conduct;
 - (v) whether Nam Tai is entitled to a defence of change of position relating to its fees and expenses incurred in the defence of the Main Claim and the losses suffered from the Greensill investment.

The Court's approach to applications to enforce Tomlin orders and to findings made by the lower court on such applications

[27] I have already dealt with the court's general approach to applications to set aside Tomlin orders.⁷ I would only add that in this case the matter came before the court on West Ridge's application to enforce the terms of the Tomlin Order. Nam Tai

⁷ See paragraphs 20-21 above.

opposed the application and applied to set aside the Tomlin Order. In order to succeed Nam Tai had to satisfy the Judge that the issues in its defence and counterclaim have a realistic, as opposed to fanciful, prospect of success.⁸ The Judge found that the issues did not have a realistic prospect of success, and, if this Court comes to a similar conclusion, the appeal must be dismissed and the judgment entered by the Judge be affirmed. On the other hand, if this Court is satisfied that the issues, or any of them, have a realistic prospect of success, those issues will be remitted to the lower court for trial.

[28] The appeal challenges several findings of fact and law made by the Judge. It is trite that this Court is reluctant to interfere with findings of fact. In its simplest form, the test for reviewing findings of fact is that an appellate court will rarely reverse the trial judge's findings because the trial judge had the benefit of hearing and seeing the witnesses give their evidence and is in a far better position than an appellate court to assess their credibility and make findings of fact.⁹ However, the reluctance to interfere is significantly less in cases such as the present where there was no oral evidence and the written evidence consisted of the witness statement by Mr. Andrew Thorp and the affidavit of Mr. Michael Crecenti referred to above.¹⁰ Neither the witness statement or the affidavit was referred to by counsel in their written and oral submissions, or by the Judge in his decision. The Judge's findings and conclusions were based on his evaluation of the pleadings and this Court is in as good a position to evaluate this material and draw conclusions.¹¹ However, this Court will not upset the Judge's findings simply because it disagrees with them. In **Ikana Holdings, S. De R. L and another v Putney Capital Management Ltd and others**,¹² in a similar case of no oral evidence, this Court said at paragraph 27:

"The position remains that even in an appeal such as this case where there was no oral evidence the appellate court will have due regard to the judge's evaluation of the evidence and his findings of fact and will not interfere simply because it would have come to a different conclusion on the facts.

⁸ BVIHMAP2021/0010 (delivered 4th October 2021, reissued 6th October 2021, unreported).

⁹ Watt v Thomas [1947] AC 484.

¹⁰ See paragraph 13 above.

¹¹ Beacon Insurance Ltd v Maharaj Bookstores Ltd [2014] UKPC 21 per Lord Hoge at paragraph 17.

¹² BVIHMAP2021/0027 (delivered 24th January 2022, unreported).

The disagreement must be so wide that the appellate court can feel satisfied that it can legitimately interfere, but the disagreement does not have to be so strong that the appellate court thinks that the judge of the lower court was blatantly wrong.”

I will have due regard and pay the deference to the Judge’s findings because he was deeply immersed in the proceedings in the lower court and is generally more familiar with the details of the case than this Court. He presided over the 12-day trial of the Main Claim and numerous interlocutory applications and case management conferences in proceedings between Nam Tai and West Ridge, Nam Tai and Greater Sail, and Nam Tai and IsZo. His deeper knowledge of the case and the general principle that ‘[d]uplication of the trial judge’s role on appeal is a disproportionate use of the limited resources ...’¹³ will guide this Court in assessing the findings by the Judge.

Unlawful means conspiracy

[29] Nam Tai’s attempt to set aside the Deed of Indemnity is on two bases: the Deed was the result of an unlawful means conspiracy and West Ridge dishonestly assisted Nam Tai in the unlawful means conspiracy.

[30] The unlawful means conspiracy is the claim that Nam Tai combined with others including West Ridge unlawfully to create and implement the PIPE. The tort of unlawful means conspiracy occurs where two or more persons come together and take action that is unlawful in itself with the intention of causing damage to a third party which does cause the intended damage.¹⁴ The elements of the tort as applied to this case are:

- (a) a combination, arrangement or understanding between two or more persons. The allegation in this case is that West Ridge joined a combination or arrangement with Nam Tai and Greater Sail to effect a dilutive allotment of the shares of Nam Tai to Greater Sail (which is a

¹³ Per Lewison LJ in *FAGE UK Limited and another v Chobani UK Limited and another* [2013] EWHC 630 (Ch).

¹⁴ Clerk and Lindsell on Torts 21st edition, Sweet & Maxwell Ltd, paragraphs 24–98.

Kaisa controlled company) and West Ridge which would give Kaisa de facto control of Nam Tai;

- (b) the alleged conspirators intended to injure Nam Tai by subverting the constitutional arrangements of the Company for the improper allotment of shares thus keeping the Kaisa directors in office and the actions of those directors damaged and continue to damage Nam Tai; and
- (c) use of an unlawful means as part of the concerted action, in this case the PIPE.

[31] The Judge found that there was combination or arrangement between West Ridge and Nam Tai to effect the PIPE (point (a) above), and that the PIPE was effected for an improper purpose in breach of the directors duties under section 121 of the BCA (point (c) above). However, he found that Nam Tai did not have a realistic prospect of showing that West Ridge intended to harm the Company and the conspiracy claim therefore failed. Nam Tai strenuously disputed the latter finding.

Background to the conspiracy claim

[32] Nam Tai's challenge to the Judge's finding that the unlawful means conspiracy claim had no realistic prospect of success is carefully articulated in the defence and counterclaim, and in Mr. Chivers KC's written and oral submissions in this court.

[33] By way of background to the conspiracy claim (as well as the dishonest assistance claim) Mr. Chivers KC pointed to the close relationship between the officers of Kaisa and the Kaisa directors of Nam Tai who were involved in the negotiations leading up to the implementation of the PIPE. Paragraph 6 of the defence refers to an open letter dated 27th May 2020 from IsZo to Nam Tai which is critical of the management of the Company and advocated replacing the Kaisa directors on the board with the new directors. At the time, the IsZo faction commanded sufficient

votes to carry a resolution removing the Kaisa directors and appointing the new directors.

- [34] The pleaded background facts include electronic messages between officers of Kaisa and Nam Tai which suggest that the real reason for the PIPE was to maintain control of Nam Tai. Put another way, to ensure that the directors being proposed by the IsZo faction were not elected to the board. For example, on 29th May 2020, Mr. David Wan of Nam Tai sent a message to Ms. Yu Zhan, also an officer of Nam Tai, saying: 'If they [IsZo] have enough votes, they are going to change the board. Prosecution [i.e. the institution of proceedings] (sic) would come later. Our status is very dangerous'. Ms. Zhan replied 'Don't worry. The Chairman has his solution'.¹⁵ Nam Tai asserts that the reference to the chairman's solution is a reference to the PIPE. The defence also asserts that both Mr. Wan and Ms. Zhan are former employees of Kaisa who are now working for Nam Tai.
- [35] There is another We Chat exchange between Mr. Wan and Ms. Zhan in paragraph 12 of the defence with Mr. Wan saying 'the idea of the chairman is so brilliant', Ms. Zhan responding '[Trick] [Trick] (sic)' and another message to Ms. Zhan '[o]f course we have to keep it a secret and let a bank customer vendor do it'.¹⁶ The messages are meant to show that the real purpose of the PIPE was to maintain the Kaisa directors in control of the Company.
- [36] The defence further pleads that by 29th September 2020, Haitong confirmed its willingness to subscribe for shares without having had any or any adequate opportunity to conduct due diligence into the company. Further, that Nam Tai opened an account with Haitong on 30th September 2020. On the same day Mr. Kevin Leung of Haitong exchanged We Chat messages with Mr. Wan regarding Haitong's subscription for the shares and emphasised the urgency of the situation 'as the other side may go to the BVI court any time'.¹⁷

¹⁵ Recited in paragraph 7 of the defence and counterclaim.

¹⁶ Recited in paragraph 12 of the defence and counterclaim.

¹⁷ Recited in paragraph 8 of the defence and counterclaim.

[37] It was proposed that Haitong would subscribe for the shares in the name of Golden Leaf Investment Limited, a BVI company. It is not clear from the pleadings why West Ridge, and not Golden Leaf, signed the subscription agreement and subscribed for the shares. There is no pleading as to who were the directors and officers of West Ridge at the material time. The defence asserts in paragraph 22 that it is to be inferred that West Ridge entered into the subscription agreement and subscribed for the shares at the instigation of officers of Haitong and that their knowledge must be attributed to West Ridge. The inference that the knowledge of Haitong is attributable to West Ridge based on Haitong's apparent ownership and control of West Ridge has realistic prospects if the matter goes to trial and the missing evidence is supplied. This would show (if proved) that West Ridge knew the real reason for the subscription and participated in the plan to maintain the Kaisa directors in control of Nam Tai.

[38] The foregoing review of the defence supports the findings by the Judge that Nam Tai has a realistic prospect of showing that West Ridge combined with Nam Tai to the effect the PIPE and to do so for an improper purpose. But an improper purpose is not the same thing as a conspiracy and there still remains the question whether West Ridge acted with the intention of causing pecuniary harm to Nam Tai.

[39] Mr. Machell KC submitted that to make the cause of action for conspiracy complete the pleadings must allege a specific intention by the alleged conspirators to cause pecuniary damage to Nam Tai. Nothing short of this specific pleading will suffice. He relied on **OBG Ltd and another v Allan and others**,¹⁸ where Lord Nicholls, after dealing with the specific intention needed to satisfy the tort of inducing breach of contract, continued:

“[166] Lesser states of mind do not suffice. A high degree of blameworthiness is called for, because intention serves as the factor which justifies imposing liability on the defendant for loss caused by a wrong otherwise not actionable by the claimant against the defendant. The defendant's conduct in relation to the loss must be deliberate. In particular, a defendant's foresight that his unlawful conduct may or will probably

¹⁸ [2008] 1 AC 1.

damage the claimant cannot be equated with intention for this purpose. The defendant must *intend* to injure the claimant. This intent must be a cause of the defendant's conduct, in the words of Cooke J in *Van Camp Chocolates Ltd v Aulsebrooks Ltd* [1984] 1 NZLR 354, 360. The majority of the Court of Appeal fell into error on this point in the interlocutory case of *Miller v Bassey* [1994] EMLR 44. Miss Bassey did not breach her recording contract with the intention of thereby injuring any of the plaintiffs.

[167] I add one explanatory gloss to the above. Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words, a case where loss to the claimant is the obverse side of the coin from gain to the defendant. The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort."

[40] Counsel for both parties also relied on the Court of Appeal decision in **Lonrho PLC and others v Fayed and others (No. 5)**,¹⁹ a claim for conspiracy for causing injury to reputation and pecuniary losses, and for the need to allege and prove intention to cause pecuniary loss. Evans LJ said at page 1508:

"Second, and following on from the first, is the question, what kind of damage must the plaintiffs prove in order to succeed, and allege in order to avoid their claim being struck out? It is common ground that this must include pecuniary loss, which I take to mean loss that is capable of being measured in money terms, and not merely capable of being assessed as financial compensation for some other kind of injury, as general damages for personal injury or for loss of reputation in defamation actions are. Where the plaintiffs allege facts which, if proved, will establish damage of this kind, as with the alleged loss of immensely valuable contracts (or contacts) in Iran, then the claim cannot be struck out unless the proceedings are brought for some improper or collateral motive. Where, however, the pleading itself asserts that the plaintiffs are presently unable to identify any such loss, or to allege that any measurable loss has occurred, then the claim is defective because it fails to describe a factual situation which gives rise to the cause of action upon which the plaintiffs rely. In such cases, the claim is not necessarily struck out at once. A proper opportunity to amend or to add to particulars may well be given, as it has been given here. The failure to allege damage of an appropriate kind may be explained and it may be apparent that existing defects are not only understandable but will be remedied before the trial, e.g., if further time for investigations is required

¹⁹ [1993] 1 WLR 1489.

or if documents have first to be disclosed by the defendants or obtained from other persons. But no such factors operate here. The plaintiffs, despite their huge resources, cannot even say that any identifiable loss has occurred which is pecuniary in the sense described above. In my judgment, these other claims should properly be struck out on these grounds.”

[41] As we are dealing with an application to enforce a Tomlin Order and a response by way of a defence and counterclaim seeking to set aside the order, what is essential is that Nam Tai’s pleaded case must show that it has a realistic prospect that West Ridge intended to cause pecuniary harm to Nam Tai. The alleged harm is pleaded in paragraph 27 of the defence. It consists of three elements:

- a) The combination was inherently harmful to the Company because it was designed to subvert the Company’s constitutional arrangements pursuant to which it determines the composition of its board of directors.
- b) The purpose of the combination was to keep the Kaisa directors in control of the Company whose actions have damaged and continue to damage the Company as described in IsZo’s open letter dated 27th May 2020.
- c) The Kaisa directors and West Ridge knew that there was a substantial risk that the PIPE would result in litigation and substantial costs to the Company.

[42] There is no allegation of a pecuniary loss in subparagraphs (a) and (b), far less of an intention to cause pecuniary loss. What is pleaded is that the purpose of the alleged conspiracy, and the intention of the conspirators, was to keep control of the board of Nam Tai in the hands of the Kaisa directors, not to cause pecuniary damage to the Company. As to subparagraph (c) the allegation that the conspirators knew that there was a substantial risk that the PIPE would result in litigation that the Company would have to defend and thereby incur substantial costs is a foreseeable consequence of the PIPE. It was not the intention of the Kaisa directors, far less West Ridge, to cause the Company to incur substantial costs in litigation that might follow the PIPE. The potential costs to Nam Tai were nothing more than a foreseeable risk. It was not, to use Lord Nichols language in

the **OBG**, ‘the obverse of the side of the coin’²⁰ to maintain the status quo by keeping the Kaisa directors in control of the Company. If Nam Tai chose to defend a claim brought against it and incur costs that could be the foreseeable consequence of the PIPE, but not the intention of the Kaisa directors, nor of West Ridge.

[43] The Judge’s finding that there was no intention to injure Nam Tai is set out at paragraphs 27 to 29 of his judgment. He noted firstly that in the trial of the Main Claim IsZo had asserted that the shares were being issued at a price very much below their value and that Haitong and West Ridge would have seen the investment as being attractive. He then referred to his own judgment in the Main Claim where he made the important observation that:

“The root of the dispute between the parties is the future direction of Nam Tai’s business. Dr. Sheehy’s view [on behalf of IsZo] is that Nam Tai should realise the extra-ordinarily large profits from the existing Shenzhen land and buy back shares. He strongly opposed the purchase of the Dongguan land, because, having been bought at market price, it will not be as profitable as the Shenzhen land. The current management of Nam Tai take the view that Nam Tai should develop a long-term business of property development. Pursuing that strategy inevitably involved buying more land, otherwise the business would simply peter out. It is not for the Court to determine which policy is better: that is a matter for the shareholders.”

[44] The Judge recognised, no doubt because of his familiarity with the case, that there was an ongoing struggle between the Kaisa faction and the IsZo faction regarding how the Company was being managed and will continue to be managed. He concluded on this point that the root of the dispute between the two factions was over who should control the Company and chart its course going forward. This finding echoes the Judge’s observation in the opening sentence of the main judgment that ‘[t]his is a shareholder dispute concerned with the control of the first defendant (Nam Tai), a BVI company listed on the New York Stock Exchange’.

[45] On the related issue of West Ridge’s intention to harm Nam Tai, the Judge found that ‘it is fanciful to suppose that West Ridge wanted to harm Nam Tai: it was

²⁰ See paragraph 39 above.

investing \$23 million in order to make a profit from Nam Tai's success'. This is an understandable observation by the Judge – it is not logical to invest millions of dollars in a company with the intention of harming the company. The Kaisa directors and West Ridge did not intend to harm Nam Tai. They wanted to keep control of the Company but went about it using an improper procedure that has been found to have breached their section 121 duties to the Company.

[46] The findings by the Judge set out in the preceding paragraphs epitomise the real cause of the disputes between the parties – control of Nam Tai. The Kaisa directors had and sought to maintain control of the Company by effecting the PIPE which would keep them on the board. The IsZo faction sought to seize power by appointing the new directors. This kind of power struggle is not unusual in successful commercial entities and the methods employed by the competing factions to gain or keep control are not necessarily conspiratorial or dishonest. The fact that the methods used by one of the factions turns out to be improper and in breach of their duty to the Company does not necessarily mean that they intended to harm the Company. The intention to cause harm to the company, as well as the harm so caused, must be clearly alleged in the pleadings and later proved at the trial.

[47] The Judge concluded on the material before him that Nam Tai did not have a realistic prospect of showing that West Ridge intended to harm Nam Tai and the conspiracy claim therefore failed. There is no basis to interfere with the Judge's finding.

Dishonest Assistance

[48] It is generally accepted that a person who renders assistance to a breach of fiduciary duty that causes loss to another person can be liable for dishonest assistance. The elements of dishonest assistance are set out in the judgment of

Cockerill J in **FM Capital Partners Ltd v Frederic Marino and another** ²¹ which I summarise as follows:

- (a) there must be a trust or fiduciary duty owed by the Kaisa directors to the target company (Nam Tai) and the Kaisa directors breached that duty;
- (b) the breach of duty by the Kaisa directors need not be dishonest because it is the dishonesty of the third party (West Ridge) that matters; and
- (c) West Ridge must have procured or assisted the breach and did so dishonestly.

[49] In this case the first element is satisfied by the findings of the Judge in the Main Claim and by the Court of Appeal that the Kaisa directors acted for an improper purpose in breach of section 121 of the BC Act by approving and implementing the PIPE.

[50] The Judge found that the second element was not satisfied because ‘there is in my judgment an issue estoppel that the directors of Nam Tai were not dishonest’.²² The Judge came to this conclusion after referring to the finding of the Court of Appeal in paragraph 278 of its judgment that the finding by the Judge in the Main Claim that the Kaisa directors had breached ‘their statutory duty under section 120(1) of the Act to act honestly and in good faith and in what they believed to be in the best interest of NTP, was not made out on IsZo’s case as pleaded and as conducted’. (Emphasis added) The Judge treated this finding by the Court of Appeal as saying that the Kaisa directors did not act dishonestly in effecting the PIPE.

²¹ [2018] EWHC (Comm) 1768.

²² Paragraph 18 of the [Tomlin] judgment.

[51] This finding by the Judge was criticised by Mr. Chivers KC on the following grounds:

- (a) The Court of Appeal's conclusion was not a finding that the Kaisa directors did not act dishonestly, only that on the evidence and the pleading before the court in the Main Claim the allegation of dishonesty was not made out.
- (b) The finding by the Court of Appeal was a finding between IsZo and Nam Tai which could not form the basis of an estoppel in the present claim because it was not a finding between the same parties.
- (c) The judge erred in paragraph 20 by saying that the dishonest assistance claim failed because the Kaisa directors were not dishonest.
- (d) The Judge erred in effectively finding that Nam Tai had to prove that West Ridge assisted and procured the breach of duty by the Kaisa directors.

[52] There is merit in these points. I agree with Mr. Chivers KC that there was no finding that the Kaisa directors did not act dishonestly, only that the dishonesty was not proved on the facts and pleadings in the Main Claim. No doubt West Ridge will be able to take advantage of the Court of Appeal's finding that the dishonesty of the Kaisa directors had not been proved in the Main Claim if the Ancillary Claim proceeds to a full trial. But that is not the point here. This is a new claim between different parties and it is open to Nam Tai Nam to prove in this claim that the Kaisa directors were dishonest.

[53] For essentially the same reason the finding by the Court of Appeal does not create an estoppel between Nam Tai and West Ridge in the present proceedings because it was not a finding between the same parties. The issue of the dishonesty of West Ridge is therefore still at large in these proceedings, but if it is raised it will probably be answered by West Ridge by referring to the principles in

Henderson v Henderson.²³ Mr. Chivers KC said as much in his oral submissions in this Court.

[54] The Judge's statement in paragraph 20 of the judgment is also open to criticism. What he said in paragraph 20 is that:

"It follows in my judgment that the claim of dishonest assistance against West Ridge fails under the first limb of this passage [referring to the passage from Lewin on Trust set out in the preceding paragraph [19] of the judgment], because the Nam Tai directors were not dishonest."

This statement suggests that the dishonesty of the Kaisa directors was an element of the cause of action. In this case it is the dishonesty of West Ridge that is important and Nam Tai does not have to prove that the Kaisa directors were dishonest in effecting the PIPE.²⁴

[55] Mr. Chivers KC also submitted that the Judge erred in effectively finding in paragraphs 18 to 20 of the judgment that Nam Tai had to prove that West Ridge assisted and procured the breach of duty by the Kaisa directors. He submitted that it is common ground that West Ridge assisted in the breach of section 120(1) by the Kaisa directors and Nam Tai did not have to prove that West Ridge procured the breach of the section.

[56] Mr. Machell KC accepted that the Judge erred in saying that the claim failed because the Kaisa directors were not found to be dishonest – it is the dishonesty of West Ridge that has to be established. Mr. Machell KC also conceded that if Nam Tai proved assistance in the breach that was sufficient to satisfy the fourth element of the test they did not have to go on to prove procuring.

[57] Having found that the Judge erred in his treatment of the elements of the cause of action for dishonest assistance I would set aside his findings and review the matter

²³ (1843) 3 Hare 100.

²⁴ *Madoff Securities International Ltd (In Liquidation) v Raven and others* [2013] EWHC 3147 (Comm) at paragraph 350.

afresh to see if Nam Tai had satisfied the threshold of showing that the claim for dishonest assistance has a realistic prospect of success if the matter proceeds to trial.

Dishonesty

- [58] In dealing with dishonesty the Judge relied on the UK Supreme Court decision in **Ivey v Genting Casinos (UK) Ltd t/a Crockfords Clubs**²⁵ as follows:

“...When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.”

The Judge also relied on the following dictum by Cockerill J in **FM Capital Partners Ltd**²⁶ (although attributing it to the Supreme Court in **Ivey v Genting**):

“However, the standards in question are those of an ordinary honest person in the circumstances of the defendant. Thus, in applying the test of dishonesty, the Court must have regard to all the circumstances known to the defendant at the time, and have regard to the defendant’s personal attributes, such as their experience and the reason why they acted as they did.”

- [59] The state of a company’s knowledge of the facts and the company’s belief in the facts are normally determined by reference to the knowledge and belief of the company’s directors and officers. In this case there is no direct evidence of who are the directors and officers of West Ridge, but as I said above, it is reasonable to infer that they are persons nominated by Haitong. The Court must also find that the knowledge and belief of the unknown West Ridge directors and officers are

²⁵ [2018] AC 391 at [74].

²⁶ Supra note 21 at paragraph 47.

genuinely held and whether West Ridge's knowledge and belief meet the standards of honest persons in the circumstances of the Company.

[60] Nam Tai relies on the matters pleaded in paragraphs 26 to 28 of the defence to show that there is a realistic prospect of showing that West Ridge's participation in the PIPE was dishonest. Most of these matters are briefly described in paragraphs 3 to 8 above and I will not repeat them here. Nam Tai also relies on the additional circumstance of West Ridge's alleged unwillingness to provide disclosure or give evidence in the Main Claim. I will deal with this issue below when I come to deal with the allegation that the Kaisa directors and West Ridge entered into the Deed for the improper purpose of keeping West Ridge's disclosure and evidence out of the Main Claim.

[61] In my opinion, the matters outlined in paragraphs 26 to 28 of the defence do not satisfy the threshold of proving that there is a realistic prospect of showing that West Ridge's participation in the PIPE was dishonest. Nam Tai is a long- established company listed on the NYSE. It was selling shares at what appears to have been a reasonable though low price, and West Ridge decided to invest in what the Judge found to be a reasonable commercial venture reached at arms-length by sophisticated businesspersons advised by lawyers at all stages.

[62] I find that Nam Tai does not have a realistic prospect of showing that West Ridge's participation in the PIPE was dishonest or that it dishonestly assisted the Kaisa directors in implementing the PIPE for an improper purpose in breach of the Kaisa directors' duty to Nam Tai. Participating in a project for an improper purpose in breach of section 121 is very different from dishonestly participating in the project in breach of section 120(1).

[63] The findings that Nam Tai does not have a realistic prospect of success on its claims for unlawful means conspiracy and/or dishonest assistance against West Ridge means that the Judge's order that the Deed of Indemnity as incorporated in the

Tomlin Order stands to be enforced is affirmed unless Nam Tai can show on other grounds that the Deed is invalid.

Agreement not to give evidence and disclosure

- [64] Nam Tai's alternative case for setting aside the Deed of Indemnity is that its terms weighed heavily in favour of West Ridge. The favourable terms were given to West Ridge in exchange for its agreement not to give evidence or disclosure in the Main Claim, which evidence would go towards proving the improper purpose of the PIPE. The indemnity was therefore given for an improper purpose in breach of the Kaisa directors' duty to the Company under sections 120 and 121 of the BC Act, and it is ineffective, void and not binding on the Company. This allegation is pleaded in paragraph 49 of the defence:

"Further or alternatively, in procuring the Company to enter into the Purported Indemnity, it is to be inferred that Dr Tam and such other directors of the Company who approved the Purported Indemnity acted for the purpose, or substantially for the purpose, of preventing West Ridge from providing disclosure and giving evidence which, if honestly given, would confirm that the Unlawful Allotment was void on the grounds that it had been made for an improper purpose."

Further, at paragraph 49.2.3:

"The provision of the Purported Indemnity meant that West Ridge would no longer participate in the proceedings as to which, either, such assistance as might have been useful to the Company would not be provided, or, to suppress evidence that supported IsZo's case, the provision of such indemnity would have been improper, both as being in furtherance of the Improper Purpose and in any event."

- [65] Nam Tai's position is summed up in paragraph 50 of the defence:

"By so acting, Dr Tam and the directors who approved the Purported Indemnity breached their duty under section 121 of the Business Companies Act, 2000 to exercise their powers as a director for a proper purpose and/or their duty under section 120(1) of the Act to act honestly and in good faith and in what they believed to be in the best interests of the Company. In particular, by so doing, they exercised their powers for the purposes of protecting their own interests and the interests of Kaisa. In the premises, the purported indemnity is ineffective and void and/or not binding on the Company."

[66] By its pleading Nam Tai invited the Court to infer that the Company's real purpose for giving the indemnity to West Ridge on favourable terms was to keep West Ridge's evidence out of the Main Claim. There is no pleading of the actual evidence that West Ridge would have given to support Nam Tai's case. Therefore, there is no way of knowing how that evidence would either help or hurt Nam Tai's case (a point that was noted by the Judge in paragraph 10 of the judgment). As to the terms of the indemnity, I am reluctant to attribute an improper purpose to Nam Tai and West Ridge for entering into what appears to be a reasonable commercial transaction. The Judge observed at paragraph 10 of the judgment that *'It would not be an unusual litigation strategy to limit both the number of parties and the issues in order to save costs and reduce the risk of unpleasant surprises'*, and at paragraph 11 that the three documents entered into on 14th December 2020 represent a *'reasonable arm's length commercial settlement of a shareholder dispute'*. The Judge's observations are consistent with the general principle that courts are always slow to interfere in the affairs and decisions of businesspersons. I am guided by this principle and I would also heed the warning of this Court in **Pussers Ltd et al v CITCO Banking Corporation N.V.**²⁷ that the court should not step into the commercial arena to determine commercial issues.²⁸ In the circumstances I do not accept Nam Tai's invitation to infer from the pleaded facts that the real purpose of the Kaisa directors in giving the indemnity was to keep West Ridge's evidence out of the Main Claim. The allegation is speculative and does not meet even the low threshold of showing that there is a realistic prospect of showing that the Kaisa directors acted in breach of their duties under sections 120 and 121 of the BC Act by granting a favourable indemnity to West Ridge in order to keep its evidence out of the Main Claim.

[67] This aspect of the claim against West Ridge is even more tenuous. There is simply not enough on the pleadings to find that there is a realistic prospect of proving that West Ridge accepted the indemnity to avoid giving evidence and disclosure in the

²⁷ BVIHCVAP2003/0008 delivered 20th September 2004, unreported).

²⁸ Ibid at paragraph 16.

Main Claim for the purpose of enhancing Nam Tai's defence of the Main Claim, or that West Ridge was aware of the 'real' reason for Nam Tai giving the indemnity.

- [68] The thrust of Nam Tai's case on this point is that knowledge of the Kaisa directors can be attributed to West Ridge. The only allegation against West Ridge is in paragraph 45 of the defence in a cryptic reference to West Ridge's role:

"Notwithstanding such advice, Mr. Wan confirmed that it had been agreed with West Ridge that it was not necessary for West Ridge to provide a witness statement in return for the indemnity, and asked for Walkers (the Company's then lawyers) to procure IsZo's consent to allow West Ridge to exit the litigation. In the circumstances, it is to be inferred that West Ridge had notice of the improper purpose for which the Unlawful Allotment was made."

This is a weak allegation, coming from a Nam Tai director, that West Ridge had agreed to accept the indemnity in exchange for not having to give evidence in the Main Claim. The invited inference is that West Ridge knew that the indemnity was being offered in exchange for their silence. There is no other allegation that any director or officer of West Ridge agreed to or knew of the 'real' reason for Nam Tai offering the indemnity. This is the type of pleading that a court in a summary judgment application does not have to resolve in favour of Nam Tai because there is no real substance in the allegation.²⁹

- [69] Nam Tai returned to the issue of West Ridge's knowledge in paragraph 7.5 of its reply skeleton argument by suggesting that 'West Ridge did have knowledge that they were acting in breach of duty in entering into the purported indemnity, having regard to (*inter alia*) the matters pleaded in paragraphs 26, 43, 45 and 49 of the D&CC'. It is not clear which duty West Ridge, a Hong Kong company, would know that it was breaching by entering into the Deed. The matters pleaded in paragraphs 26, 43 and 45 relate to the Kaisa directors' alleged breach of section 121 of the BC Act in effecting the PIPE for an improper purpose and West Ridge's involvement

²⁹ See paragraph 21 above.

in the improper allotment. The paragraphs do not deal with the reason for Nam Tai issuing the indemnity.

[70] This Court does not need to speculate or infer West Ridge's reason for agreeing to the indemnity. It is set out in preamble (I) of the Deed of Indemnity:

"West Ridge does not wish to participate further in the Proceedings (in the Main Claim) and proposes that the Proceedings against it and the Ancillary Claim be stayed on terms that Nam Tai will indemnify West Ridge in the terms set out in this Agreement and Nam Tai has agreed to indemnify West Ridge on those terms."

This is a clear statement by West Ridge that it does not wish to participate in the Main Claim. It is not unusual for litigants to withdraw from litigation if they can do so on reasonable terms. Litigation drains the financial and emotional resources of litigants. By the Deed, the Tomlin Order and the Consent Order, West Ridge, which had paid over \$23 million for shares in Nam Tai but had not received the shares or the return of the monies paid for the shares, decided to withdraw from the proceedings on terms that it obviously found reasonable. The Deed confirmed that West Ridge would receive the shares if Nam Tai's defence of the Main Claim succeeded, or would be reimbursed the subscription monies for the shares plus their reasonable expenses if Nam Tai was not successful and the allotment of shares was set aside. In effect, they were leaving the defence of the allotment up to Nam Tai, the company that had sold them the shares but may not be able to, or could not, deliver the shares. It also seems quite reasonable that Nam Tai would have wanted to make good on its contractual obligation to sell the shares to West Ridge. The Judge found, and I agree, that 'it would not be an unusual litigation strategy to limit both the number of parties and the issues in order to save costs and reduce the risk of unpleasant surprises'.³⁰

[71] The Deed did not deal specifically with West Ridge's agreement not to file a witness statement or to give disclosure in the Main Claim, but in the ordinary course this would seem to be a reasonable extension of their agreement to withdraw from the

³⁰ Paragraph [10] of the judgment.

Main Claim on terms, leaving Nam Tai 'to take the fight' to IsZo. Implicit in an agreement to withdraw from a case is that the person withdrawing will avoid having to undertake the onerous obligations of a trial such as giving evidence, giving disclosure, retaining lawyers and the trial itself. But that is a long distance from saying that the true reason for West Ridge entering into the Deed of Indemnity 'was to suppress evidence that supported IsZo's case'.³¹

- [72] In the circumstances I find that Nam Tai does not have a realistic prospect of proving that West Ridge entered into the Deed of Indemnity for the purpose of deliberately suppressing evidence which may be harmful to Nam Tai's case in the Main Claim. The Deed represents a reasonable attempt by a litigant to limit its role on reasonable terms in heavily contested litigation. No good reason has been shown, even to the low standard of realistic prospects of success, that West Ridge made the agreement for an improper purpose, far less dishonestly, such that it should not be able to claim its entitlements under the Deed.

Conclusions on challenges to the validity of the Deed of Indemnity

- [73] I have found that the claims to set aside the Deed for unlawful means conspiracy, dishonest assistance and/or Nam Tai giving the indemnity to keep West Ridge's evidence out of the Main Claim do not meet the threshold of showing a realistic prospect of success. This also means that it is not necessary for this Court to make an order lifting the stay imposed by the Tomlin Order. If, contrary to my findings, any of the three listed claims have a realistic prospect of success and the claims proceed to trial, the trial judge will deal with any application by Nam Tai to lift the stay.

Defences to claims under the Indemnity

- [74] Nam Tai has pleaded defences to its liability under the Deed of Indemnity on the assumption that the Deed is not declared invalid or void. It is not necessary for the Company to lift the stay to pursue these defences. The additional defences are:

³¹ Paragraph 49.3 of the defence.

- (a) As a matter of construction of the Deed, West Ridge cannot rely on the indemnity because of its wrongful participation in the PIPE and/or its agreement not to give evidence or disclosure in the Main Claim.
- (b) Nam Tai is entitled to set off against any amount found due to West Ridge the damages and losses occasioned to Nam Tai by West Ridge's unlawful participation in the PIPE.
- (c) Nam Tai is entitled to a defence of change of position relating to the fees and expenses incurred in the defence of the Main Claim and the losses suffered from the Greensill investment.

Reliance on the Deed of Indemnity

[75] Nam Tai claimed in ground 5 of the notice of appeal that West Ridge's claim fails for the additional reasons that: (i) the claim in contract was made for an unlawful purpose, and (ii) the claim for an indemnity is contrary to public policy. Both reasons involve construing the Deed. Nam Tai asserted in paragraphs 47 and 48 of the defence that in construing the Deed and the issue of public policy it is West Ridge's dishonest wrongdoing in participating in the PIPE that matters because a person should not benefit from its dishonest wrongdoing. The indemnity would only apply if it expressly stated that it covers dishonest wrongdoing.³²

[76] The brief background to the indemnity is set out in paragraphs 7 and 8 above. It was made shortly after the Main Claim was filed. Clause 2.1 of the Deed states that:

“Nam Tai hereby irrevocably undertakes, covenants and agrees that, in the event that IsZo succeeds on its claim, or in any part of its claim made within the Proceedings, it will indemnify, compensate and hold harmless the West Ridge parties from and against all costs, damages, claims, losses, Associated Expenses and any other liability whatsoever that may be incurred in relation to or arising out of [the PIPE].”

³² Paragraphs 47 and 48 of the defence.

- [77] In the events that unfolded in the Main Claim, IsZo was successful and the PIPE was set aside. This is the event that was contemplated by clause 2.1 of the Deed and, as a matter of construction, the indemnity was triggered when the Judge set aside the PIPE and the Court of Appeal confirmed the setting aside. Nam Tai is therefore liable to indemnify West Ridge in accordance with the terms of the Deed. The Court of Appeal found that the allegation of dishonesty by Nam Tai in the execution of the PIPE was not proved and I have found above that on the pleadings, the allegations of dishonesty against West Ridge in terms of its participation in the PIPE, and in securing the indemnity, do not have a realistic prospect of success. Therefore, as a matter of construction, the claim for indemnity falls within the four corners of the Deed and prima facie the amounts claimed under the Deed are due and payable.
- [78] Nam Tai pleaded in paragraph 39 of the defence that the contract claim fails because the subscription agreement was entered into for an unlawful purpose. This was developed in sub-paragraph 45.1 and footnote 15 of Nam Tai's skeleton argument filed on 30th June 2022 as saying that the unlawful purpose was an illegality (in the **Tinsley v Milligan**³³ sense) which could result in the striking out of the (ancillary) claim and therefore the issue of illegality should not be dealt with summarily. This does not raise an issue with realistic prospects because: (1) the issue is not particularised and pleaded and therefore does not merit serious consideration; and (2) West Ridge's claim for an indemnity is not based on its alleged wrongdoing. As stated in the preceding paragraph, the claim for an indemnity is based on the Deed of Indemnity which, on a proper construction, contemplates and covers the event that triggered the indemnity – the setting aside of the PIPE by the courts. Following the setting aside of the PIPE, West Ridge could claim its entitlement under the Deed as a matter of contract, which it did.
- [79] The public policy challenge also fails because there is no realistic prospect of a finding that West Ridge was dishonest. I agree with Mr. Machell KC's submission

³³ [1994] 1 A.C. 340.

that it cannot be contrary to public policy to record in a Deed of Indemnity for the allotment of shares that the indemnifier will repay the subscription payment if the court declares the allotment invalid.³⁴ This is exactly what happened and West Ridge is entitled to rely on the express terms of the Deed to recover the amounts due.

The claimed losses by Nam Tai and the right of set-off

[80] Nam Tai claimed in paragraph 52 of the defence and counterclaim the following losses from West Ridge as a result of its conduct as outlined in the defence:

- (a) USD\$10.5 million in effecting the PIPE, including defending the Main Claim and the appeal;
- (b) USD\$3,266,961 as IsZo's costs ordered to be paid jointly and severally with Greater Sail on the Main Claim;
- (c) 80% of IsZo's costs of the appeal; and
- (d) approximately USD\$51 million as the loss suffered by Nam Tai on the Greensill investment.

[81] Nam Tai claims these sums in paragraph 54 of the counterclaim as damages for unlawful means conspiracy and/or for equitable compensation for dishonest assistance. Having found that Nam Tai does not have realistic prospects of success on these claims it is not necessary for me to deal with these losses as damages for conspiracy or for dishonest assistance. However, I note that ground 3 of the notice of appeal asserts that Nam Tai claims the losses from the Greensill investment on the alternative ground of West Ridge's participation in the PIPE for the improper purpose of keeping the Kaisa directors in control of the Company. Put another way, if the Kaisa directors had not been left in control of the Company they would not have made the investment and suffered the loss. Having raised the matter in this way I will deal with it.

³⁴ Paragraph 38 of the West Ridge skeleton argument.

The Greensill investment and change of position

- [82] Following the implementation of the PIPE on 5th October 2020 the Kaisa directors invested USD\$150 million of the subscription monies in the Greensill Fund on 7th December 2020. There is no allegation or even a suggestion that West Ridge knew about or participated in the decision to invest in the Greensill Fund. Greensill became insolvent in March 2021 and as at the time of filing the defence and counterclaim Nam Tai asserted that it had lost up to USD\$51 million on the investment. Nam Tai claimed the loss as damages for conspiracy and/or dishonest assistance in the defence and counterclaim, and alternatively, in ground 3 of the notice of appeal as a loss caused by West Ridge's wrongful participation in the PIPE which kept the Kaisa directors in control of the Company and in a position to make the failed investment. The latter allegation does not appear to include an allegation of dishonesty against West Ridge.
- [83] The Judge treated the Greensill loss in the way that it was pleaded in the defence and counterclaim – as a claim for damages for conspiracy and dishonest assistance. He found that the loss on the investment was 'wholly unconnected with the alleged conspiracy'³⁵ and that '*West Ridge provided no assistance, dishonest or otherwise, in making the Greensill investment*'.³⁶ The Judge also found that the decision by the Kaisa directors to invest in the fund was a *novus actus interveniens* that broke the chain of causation. These findings were made in the context of considering the torts of unlawful means conspiracy and dishonest assistance.
- [84] In dealing with the claim for the Greensill loss based on West Ridge's alleged participation in the improper allotment of shares, it is even more difficult to infer that there is a realistic prospect of showing that Nam Tai is entitled to recover the USD\$51 million or any part of it from West Ridge. There is no factual basis rising to even the low threshold of realistic prospect of success showing that West Ridge

³⁵ Paragraph 34 of the judgment.

³⁶ Paragraph 40 of the judgment

was aware of the decision to invest in Greensill, far less that it should be responsible for any part of the resulting loss.

[85] Similarly, the allegation in paragraph 40 of the defence that West Ridge is not entitled to restitution of the subscription price of USD\$23,820,798.90 for the shares because Nam Tai changed its position by defending the Main Claim and entering into the Greensill investment does not have reasonable prospects. Nam Tai's pleaded position is that the investment in Greensill was made using the subscription monies. The source of the funds for defending the Main Claim is not as clear but that does not matter for the purpose of considering the change of position defence. All the expenditures were made after the Main Claim was filed challenging the PIPE.

[86] The weakness of Nam Tai's change of position defence can be seen by a brief reference to the basic principles of the defence. The defence allows a party facing an unjust enrichment claim to reduce the amount of money that he would otherwise have to return if he had, in good faith and believing the money was his, spent the money that he had received, and it would be inequitable in all the circumstances to require him to make restitution.³⁷ There is no pleading that Nam Tai spent the subscription monies in good faith believing the money belonged to the Company, or that it would be inequitable to order them to return the funds. That is enough to dispose of the defence, but I go further.

[87] Applied to the facts of this case, Nam Tai must show that when it spent the subscription monies it had no reason to believe that any other person had a claim to the money. In December 2020 when the Kaisa directors decided to invest in the Greensill Fund it was evident that proceedings were on foot in the Main Claim to determine the validity of the PIPE and by extension whether Nam Tai was entitled to retain the subscription monies. That knowledge must be attributed to those making the decision to defend the Main Claim. If Nam Tai was successful in its

³⁷ *Lipkin Gorman (A Firm) v Karpnale Ltd* [1991] 2 AC 548 per Lord Goff at page 580 C-F.

defence the validity of the PIPE would have been upheld and Nam Tai would keep the subscription monies. However, as happened, Nam Tai's defence of the PIPE failed and the allotments of shares to Greater Sail and West Ridge were declared invalid. It follows that the subscription monies do not belong to Nam Tai.

[88] Nam Tai was the defendant in the Main Claim and is presumed to be aware of the possibility that the allotments could be set aside and the subscription monies be repaid. It is inconceivable that when the Company made the Greensill investment using the subscription monies it did so in good faith with a genuine belief that no other person had or would have a claim to those funds. The same can be said of the funds used to defend the Main Claim. As such, Nam Tai fails the test in **Lipkin Gorman (A Firm) v Karpnale Limited**³⁸ and it would not be inequitable, subject to any other defences, to order the Company to repay the subscription money to West Ridge without regard to any change of position defence. In short, Nam Tai does not have a realistic prospect of setting up a change of position defence.

[89] If Nam Tai is unhappy with the decisions of the Kaisa directors regarding the use of the funds, it can pursue those directors for relief.

[90] It follows from my findings above that Nam Tai is not entitled to a right of equitable set off because I have not found that it has a realistic prospect of being awarded damages against West Ridge.

Conclusion

[91] This is a case where the three main protagonists, Nam Tai, IsZo and West Ridge, who were represented by experienced counsel in December 2020, entered into a three-way settlement regarding the Main Claim and the Ancillary Claim. West Ridge gave up of its right to defend the Main Claim in exchange for an agreement by Nam Tai to indemnify it in respect of any losses suffered as a result of the court setting aside PIPE. In the events that happened, Nam Tai now seeks to avoid

³⁸ [1991] 2 AC 548.

liability under the Deed based on allegations that West Ridge and Nam Tai conspired to effect the PIPE for the improper purpose of maintaining the Kaisa directors in control of Nam Tai with the intention to harm the Company, and/or that West Ridge dishonestly assisted the Kaisa directors in their wrongful breach of duty to the Company. I have not found any basis for interfering with the Judge's findings that the claims for unlawful means conspiracy and dishonest assistance do not rise to the level of having a realistic prospect of success if the matter proceeds the trial. I have also found that Nam Tai does not have a realistic prospect of showing that the Kaisa directors (on behalf of Nam Tai) entered into the Deed for an improper purpose. In the circumstances I do not need to make an order regarding the lifting of the stay imposed by the Tomlin Order.

- [92] I have also found that West Ridge's entitlement to rely on the Deed of Indemnity is not barred because Nam Tai does not have a realistic prospect of showing that Nam Tai issued the Deed for an improper purpose in breach of section 121 of the BC Act, or that West Ridge assisted in the alleged breach.
- [93] In the circumstances I would dismiss the appeal and affirm the finding of the Judge that the terms of the Deed of Indemnity as incorporated into the Tomlin Order stand to be enforced.
- [94] The issues raised by the counter notice of appeal are covered by the findings in this judgment. Insofar as I have not dealt with any of the issues in the counter notice of appeal (such as ground 5) it is because they are not necessary for the disposal of the appeal. I would not make an order on the counter notice of appeal.
- [95] Finally, I acknowledge the very helpful, careful and skilful written and oral submissions of lead counsel and those assisting them and apologise for the delay in the delivery of this judgment due in large part to the enormous demands on judicial time and internal administrative challenges.

Order

[96] I would dismiss the appeal with costs to West Ridge to be assessed by the court below unless agreed within 21 days.

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Gertel Thom
Justice of Appeal

By the Court

Chief Registrar