SFC obtains disqualification orders against former directors of EganaGoldpfeil (Holdings) Ltd

11 May 2020

The Securities and Futures Commission (SFC) has obtained disqualification orders in the Court of First Instance against three former directors of EganaGoldpfeil (Holdings) Ltd (EHL) for their roles in the company's misapplication of funds (Notes 1 to 4).

The three former directors, namely, Mr David Wong Wai Kwong, Mr Peter Lee Ka Yue, and Mr Chik Ho Yin, were disqualified from being a director or taking part in the management of any corporation in Hong Kong, without leave of the Court, for a period of nine years, six years and six years respectively, effective from 7 May 2020.

The Court found that the three former directors had approved transactions and signed cheques giving rise to the company's doubtful receivables amounting to about $2.55 billion, including payments to at least seven debtors which were in fact under the control of Wong and the underlying transactions for the payments were in fact not genuine commercial transactions. They failed to carry out proper inquiries and perform appropriate due diligence before causing or permitting EHL to enter into the transactions and make the payments.

The SFC also sought compensation orders against the three former directors for a payment of $622 million to EHL, an amount equivalent to EHL's payment of $622 million to Peninsula International Ltd, a company owned by the family of the EHL's then chairman, to fund its purchase of some of EHL's shares.

In analysing the power of the Court under section 214 of the SFO, the Court accepted that a compensation order can, in an appropriate case, be made irrespective of whether a respondent has received any financial benefits. The Court, however, declined to grant the compensation order being sought in this case, and considered it should remain with the liquidators of EHL to assess the efficacy as to whether it would be beneficial to bring proceedings in the name of EHL against any party (Note 5).

End

Notes:

1. EHL was listed on the Main Board of The Stock Exchange of Hong Kong Limited (SEHK) on 25 June 1993 and 4 January 2012.
2. Under section 214 of the Securities and Futures Ordinance (SFO), the Court of First Instance may make orders disqualifying a person from being a company director or being involved, directly or indirectly, in the management of any corporation for up to 15 years, if the person is found to be wholly or partly responsible for the company's affairs having been conducted in a manner involving defalcation, fraud or other misconduct, resulting in its members or any part of its members not having been given all the information with respect to its business or affairs that they might reasonably expect, or unfairly prejudicial to its members.
3. Please also see the SFC's previous press release dated 1 August 2011. A summary of the SFC's petition can be found on the SFC website (www.sfc.hk).
4. The judgment is available on the Judiciary's website https://www.judiciary.hk/en/home/ (Court Reference: HCMP 1227/2011).
5. Under section 214(2)(e) of the SFO, the Court has the power to make any other order it considers appropriate, whether for regulating the conduct of the business or affairs of the corporation in future, or for the purchase of the shares of any members of the Corporation by other members of the Corporation or by the corporation, or otherwise.

Page last updated : 12 May 2020

HCMP 1227/2011

[2020] HKCFI 727

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO. 1227 OF 2011

IN THE MATTER of EganaGoldpfeil (Holdings) Limited (in Liquidation)

and

IN THE MATTER of Section 214 of the Securities and Futures Ordinance, Cap. 571

BETWEEN

SECURITIES AND FUTURES COMMISSION	Petitioner

and

WONG WAI KWONG DAVID	1st Respondent
LEE KA YUE PETER	2nd Respondent
CHIK HO YIN	3rd Respondent
EGANAGOLDPFEIL (HOLDINGS) LIMITED (IN LIQUIDATION)	4th Respondent
CENTRELINE GROUP LIMITED	5th Respondent
ECO-HARU MFR. HOLDINGS LIMITED	6th Respondent

EGANA OF SWITZERLAND (FAR EAST) LIMITED (IN LIQUIDATION)	7th Respondent
EGANA.COM INC.	8th Respondent
TOWERCHAM LIMITED	9th Respondent
BARTELLI LEATHER PRODUCTS LIMITED (IN LIQUIDATION)	10th Respondent

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Before: Hon Coleman J in Court

Dates of Hearing: 31 October 2019 and 1, 5-7 and 18 November 2019

Date of Judgment: 7 May 2020

J U D G M E N T

A. Introduction

1. These proceedings were commenced by petition dated 30 June 2011, and are brought by the Securities and Futures Commission ("SFC") under section 214 of the Securities and Futures Ordinance Cap 571 ("SFO"). By the time of the trial, the SFC's claim was to be found in the Re-Amended Petition dated 31 August 2015.

2. The proceedings relate to the 4th respondent, EganaGoldpfeil (Holdings) Ltd ("Company"). The Company is a Cayman company, which was formerly listed on the Stock Exchange of Hong Kong Limited ("SEHK"). It has been in liquidation since May 2011, and its listing status was cancelled in January 2012.

3. The individual respondents are all former directors (collectively "Directors") of the Company. They are the 1st respondent Wong Wai Kwong David ("David Wong"), the 2nd respondent Lee Ka Yue Peter ("Peter Lee"), and the 3rd respondent Chik Ho Yin ("Tony Chik"). The SFC seeks against each of the Directors: (1) a disqualification order under section 214(2)(d); and (2) an order for payment of "compensation" under section 214(2)(e).

4. Essentially, the SFC's case is that there was a large-scale misapplication of funds belonging to the Company and its subsidiaries, which gave rise to doubtful receivables of approximately HK$2.55 billion ("Doubtful Receivables"), and that each of the Directors was responsible for that misapplication of funds.

5. As it turned out, and as matters developed during the proceedings including during the trial, the question of disqualification orders became less controversial (save as to the relevant period of disqualification to be ordered). It may, therefore, be fair to say that – though it is necessary to traverse most of the factual matters – by the end of the trial the main battleground related to (1) the length of disqualification, and (2) the making of any order to pay compensation.

6. Though the pleading was originally to a greater or different sums, the sum of compensation which is sought against each Director after trial is HK$622 million.

B. Applicable Principles

B.1 Section 214 of the SFO

7. Before turning to consider the facts, it may be helpful first to consider the legal context.

8. It is not in dispute that for section 214 of the SFO to be engaged, three basic conditions need to be satisfied:

(1) The corporation in question is or was a listed corporation.

(2) The business or affairs complained of must be that of the corporation, though that can include the business or activities of a subsidiary, when the Court will take a "realistic approach" in determining whether the affairs of the subsidiary are the affairs of the holding corporation.

(3) The conduct complained of must fall within one or more of the heads of misconduct specified in section 214(1)(a) to (d).

9. In this case, the SFC relies upon section 214(1)(b), (c) and (d). With focus on those paragraphs, the sub-section materially provides as follows:

> "Where, in relation to a corporation which is or was listed, it appears to the Commission that at any relevant time the business or affairs of the corporation have been conducted in a manner –
>
> (a) …
>
> (b) involving defalcation, fraud, misfeasance or other misconduct towards it or its members or any part of its members;
>
> (c) resulting in its members or any part of its members not having been given all the information with respect to its business or affairs that they might reasonably expect; or

(d) unfairly prejudicial to its members or any part of its members,

the Commission may, subject to subsection (3), by petition apply to the Court of First Instance for an order under this section."

10. The terms used in section 214(1)(b) have been recently considered by DHCJ Hunsworth in *Securities and Futures Commission v Yeung Chung Lung* (unreported, HCMP 205/2013, 17 February 2017).

11. In particular, at §§78-80, he considered the meaning of "defalcation", which is defined in section 1, Part 1 of Schedule 1 of the SFO to mean "misapplication, including misappropriation, of any property". As he noted, this can only refer to misapplication or misappropriation of property of the listed company, and its subsidiaries/affiliates where appropriate. "Misappropriation" is a commonly understood word, meaning the wrongful conversion of or dealing with anything by the person to whom it has been entrusted. Whilst "misappropriation" usually connotes wrongful taking away of property, "misapplication" is wider, in the sense that there is not necessarily an abstraction of property. The term includes, but is not limited to, a disposition of the company's property which the company or the board is forbidden or incompetent or unauthorised to make, or which is carried out by the directors otherwise than in accordance with their duties of good faith to promote the success of the company and for proper purposes. Obviously, "defalcation" is a wide term.

12. Similarly, DHCJ Hunsworth considered that "misfeasance", which is defined as "the performance of an otherwise lawful act in a wrongful manner", is a notion which considerably overlaps with that of breach of fiduciary duty, and is one which has been held to include breach of duty by an officer resulting in an improper application of the company's assets or property.

13. Further, at §82, he considered the phrase "or other misconduct", as something of a belt and braces exercise, presumably to cover the widest range of possible misconduct. By way of example, and in reference to an earlier decision, he accepted that the failure of a director to exercise the requisite degree of skill and care in the management of the company as may reasonably be expected of a person of his knowledge and experience and holding his office and functions within that company was enough to establish misconduct under the paragraph. I acknowledge and agree that point, and note that "other misconduct" has been held to embrace things such as "culpable neglect of duties".

14. As to sub-section 214(1)(c), DHCJ Hunsworth recognised that it can be complimentary to the other sub-sections, but that it is not easy to think of examples where the affairs of the company have been conducted with no suggestion of impropriety on the part of its directors

and with no suggestion of unfair prejudice to the shareholders, yet where it can confidently be said shareholders have been deprived of information which they might reasonably be expected to be given. He therefore felt it unhelpful to hypothesise other than to say such circumstances may arise and will be evident when they do. I agree.

15. As to sub-section 214(1)(d), DHCJ Hunsworth accepted, as I also accept, that conduct which is unfairly prejudicial is conduct which results in harm to the members of the company or part of the membership in their capacity as members of the company. The harm is harm which could either have been avoided or ameliorated without harming the legitimate interests of others who were parties to the particular transaction. It covers a range of conduct. At one end of the scale is fraud. At the other end of the scale the conduct can take the form of neglect or inaction on the part of those to whom the affairs of a company are entrusted. The question to be asked in such circumstances is whether the conduct concerned is that which can be expected from the managers of the company to whom those affairs have been entrusted. The directors, of course, cannot leave their duties to be performed by others.

16. Once section 214 of the SFO is engaged, the principles relating to disqualification orders under section 214(2)(d) are well-established, and do not need reference to authority. Those principles are:

> (1) The power to determine the appropriate period of disqualification is a discretionary power. It is necessary for the Court to be satisfied that the director's involvement in the relevant matter involves a sufficiently serious failure to satisfy his duties that some period of disqualification is justified and fair.
>
> (2) The purpose of imposing a qualification order is twofold. The first, and primary, purpose is that of the protection of the public. The second is the purpose of general deterrence.
>
> (3) In determining the period of disqualification, the Court will adopt a broad-brush approach, where earlier decided cases will be of limited assistance to the exercise of the Court's discretion.
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> (4) The period of disqualification must reflect the gravity of the offence. A starting point of assessment may be fixed by reference to the gravity of the conduct, with a discount given for any mitigating factors.
>
> (5) Previous authorities have identified starting points within brackets, which provide guidelines not tramlines. Those brackets are:

(a) disqualification of over 10 years for particularly serious cases;

(b) disqualification of below 5 years for relatively less serious cases, and

(c) disqualification of between 6 and 10 years for cases in between.

(6) The Court will have regard to a wide range of considerations including the age, state of health and character of the offender, the nature of the breaches, the honesty and competence of the offender, the length of time he has been in jeopardy, whether he appreciates and/or admits the breaches, his general conduct before and after the offence, the periods of disqualification of his co-directors that may have been ordered by other courts, and the interests of shareholders, creditors and employees.

17. As to sub-section 214(2)(e), that empowers the Court to

> "make any other order it considers appropriate, whether for regulating the conduct of the business or affairs of the corporation in future, or for the purchase of the shares of any members of the Corporation by other members of the Corporation or by the corporation (and, in the case of a purchase by the corporation, for the reduction accordingly of the corporation's capital), or otherwise."

18. That sub-section is widely worded. It does not expressly mention an order of compensation, but it has been established in other cases that the Court does have such a power. For example, in *Re Styland Holdings Ltd (No 2)* [2012] 2 HKLRD 325 at §§139 and 141, Barma J considered that there is such a power, though it seemed to him that where the amount of compensation to be paid is not readily ascertainable, the Court should not make such an order. It may be significant that the orders that Barma J did make in that case were for "repayment" of amounts which were readily ascertainable in relation to sums which had been misappropriated by directors for themselves. Also in the *Cheung Chung Lung* case, at §109, DHCJ Hunsworth held that the terms of sub-section 214(2)(e) were clearly intended to provide the court with "the widest powers to do justice". But, again, the order he made related to repayment of money which the particular director had "on the face of it embezzled from" the company in that case.

19. In the *Styland* case, Barma J also recognised, at §138, that the "other order" open to the court under the "or otherwise" limb of the subsection, was similar to the comparable provisions in section 168A of the Companies Ordinance Cap 32, in respect of which the Court of Final Appeal has held that the section was designed to provide the court with a high degree of flexibility in terms of the remedies which it might provide, so that in an

appropriate case, an order requiring payment to be made to the company could be made pursuant to that section: see *Re Chime Corp Ltd* (2004) 7 HKCFAR 546.

20. But the context of the observations made in the *Chime* case was on the argument whether a section 168A petition could deal with and dispose of a cause of action for damages or restitution that was vested in a company, or whether there should be a derivative action. The discussion also canvassed the distinction between the jurisdiction of the court in the strict or theoretical sense as opposed to the jurisdiction in the practical sense, looking at the circumstances in which it was proper for the court or tribunal to entertain a case or to make a particular order.

21. Hence, at §142 of the *Styland* case, Barma J considered that in general where there is a need to ascertain the damages that a company has suffered by reason of breaches of duty amounting to misfeasance, misconduct or defalcation, it would be preferable for this to be done, if it is to be done at all, by making use of the power to order the company to bring proceedings under section 214(2)(b). He also recognised, at §§144-146, that there may be other features which could come into play, such as limitation where there has been a lapse of time since the underlying transactions were entered into, and the likelihood of successful enforcement of any judgment that might be obtained. But his consideration of those points was mainly in the context of whether it would be appropriate in that case to insist on the company bringing such proceedings. In this case, I note that the SFC's pleaded claim to relief under section 214(2)(b) was expressly abandoned in opening submissions.

22. During the trial period of these proceedings, on 6 November 2019 Ng J handed down a judgment in *SFC v Chin Jong Hwa* [2019] HKCFI 2735, in which he granted a compensation order. The judgment dealt with a *Carecraft* disposition of the proceedings: see *Re Carecraft Construction Co Ltd* [1994] 1 WLR 172 and various Hong Kong cases adopting the summary procedure set out in that case. Therefore, the order made was based upon an agreement between the SFC and Mr Chin in that case that, amongst other things, a compensation order should be made. The sum of RMB12 million was agreed to be paid by Mr Chin to the relevant subsidiary company in the case "in full and final settlement of the monetary claim against him". It came from his acceptance that he acted in breach of his fiduciary duties owed, and caused the subsidiary to suffer a loss in that he failed to use his best endeavours to secure the lowest possible price for certain land purchase. Mr Chin's agreement to pay the RMB12 million compensation was expressly accepted as a mitigating factor.

23. I am not sure the discussion flowing from that in the *Chime* case, or the agreed order in the *SFC v Chin* case, particularly assist in the current context. Rather, and without much

real guidance from previous cases, the most that can probably be said of section 214(2)(e) is that it is widely drawn with the intention of providing wide powers to the Court to achieve the requirements of justice on the given facts of any individual case.

24. I accept that a compensation order can, in an appropriate case, be made irrespective of whether a respondent has received any financial benefits. It might also be accepted that a "compensation order" is not necessarily the same thing as a "restitution order" or a "repayment order", where compensation is the usual basis of awarding a monetary sum to a claimant for a loss he has suffered.

25. I think it fair to say that the previous cases where a compensation order has been made, the terminology of restitution or repayment might have been more appropriate. This is of some significance, when it is remembered that the SFC brings these proceedings primarily for public benefit. The SFC does not act merely as a cipher for a company or the liquidators of the company, and the SFC has suffered no loss. Whilst I do not mean to suggest that an order of "compensation", in the form of or akin to an award of "damages", would never be appropriate in section 214 proceedings, such an award or order may not be a necessary exercise of the widest powers to do justice, where the person or persons actually suffering the loss could have brought, or could still bring, an action of the more typical sort in which such forms of compensation are claimed and entitlement proved.

B.2 Breach of Fiduciary Duty and Causation

26. In the context of the consideration of a possible compensation order, it may be necessary to consider the issue of breach of fiduciary duty and causation. This was considered by the Court of Final Appeal in *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681, at §§73-83.

27. Where a party undertakes, or is found to have undertaken, an obligation to act in another person's interest, it is necessary to determine what precisely the fiduciary duty owed consists of. This is because the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case.

28. The basic obligation of the fiduciary to act in the interests of another may find expression in various ways, depending on the circumstances. Where a fiduciary has committed a breach of some such fiduciary duty, it may be important to ascertain what impact that breach has had on any relevant trust property. The CFA adopted a previous categorisation, holding that it is possible to distinguish three categories of breach with particular reference to their impact on the trust estate. First, there are breaches leading directly to damage to or loss of the trust property. Second, there are breaches involving an

element of infidelity or disloyalty which engage the conscience of the fiduciary. Third, there are breaches involving a lack of appropriate skill or care. Implicit in the analysis is that breaches of the second kind do not involve loss or damage to the trust property, and breaches of the third kind involve neither lost to the trust property, nor infidelity or disloyalty.

29. Causal connection between breach of trust and the loss must be established for compensation to be recoverable, on the usual basis of fact that the loss would not have occurred "but for" the breach. But the rules on causation are of varying strictness depending on the type of duty and breach in question.

30. The third category merely provides a setting for a duty which is indistinguishable from a common law duty of care. Therefore, although arising in a fiduciary context, the common law rules as to causation, foreseeability and remoteness generally apply to such claims. By way of contrast, cases in the first category require the application of strict rules on causation borrowed from those developed in relation to traditional trusts, requiring the trustee to restore to the trust fund what he has caused it to lose as a result of his breach of trust. Causation is established on a "but for" basis without the constraints of common law causation rules on remoteness and foreseeability, and there is only a limited duty to mitigate. As to the second category, the common law rules on foreseeability and remoteness are inapplicable. This is because policy dictates that fiduciaries be allowed only a narrow escape route from liability based on proof that the loss or damage would have occurred even if there had been no breach.

31. Of course, if the principles relating to matters such as remoteness and causation are to be taken into account, there can be no dispute that a claimant may recover less than the amount which would put him in the position he would have been in had the tort or breach of contract never been committed. The loss for which the claimant will be compensated might be cut down by a variety of factors: see, for example, 'McGregor on Damages' 20th Ed §2-004.

B.3 Approach to Drawing of Inferences

32. The correct approach to drawing of inferences is well-settled. It was considered by the Court of Final Appeal in *Nina Kung v Wong Din Sin* (2005) 8 HKCFAR 387 at §§185-186.

33. Where a court is invited to reach a conclusion as an inference to be drawn on the basis of circumstantial evidence, any such inference must be properly grounded in the primary facts found. The court guards against indulging in conjecture under the guise of drawing an inference, where the primary evidence does not logically and reasonably justify the

particular inference in question.

34. It is impermissible merely to choose what may be considered to be the more likely of two guesses if neither is properly justified by the primary facts found. The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied. As it has been slightly differently put, one does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggests, that is to say provides a reason special to the particular case under consideration, for thinking it likely that in that actual case a specific event happened or a specific state of affairs existed.

C. The Facts

C.1 Introduction

35. A significant part of the factual matrix giving rise to these proceedings is not significantly in dispute between the various parties.

36. As to the witnesses, the SFC called live evidence from: (1) Wong Wing Tze Tiffany, a partner at KPMG, who was the substantive drafter of the KPMG Report (as defined below); (2) Fergal Power, another partner at KPMG and a Liquidator of the Company; (3) Fung Chui Kam Kerie, who had responsibility for matters related to bank accounts of the Company and its subsidiaries; (4) Yeung Man Wai Billy, a Senior Manager of the Enforcement Division of the SFC, who conducted various interviews and investigations and (5) Denise Yip, a Manager of the Enforcement Division of the SFC who provided a fund-flow report relating to certain promissory notes and some other matters.

37. The SFC also sought to rely on the written evidence of Wong Kam Yuk Lillian, contained in various interview records ("ROI"). Lillian Wong did not attend the trial for cross-examination, as the SFC was unable to secure her attendance, despite several attempts to serve a subpoena (the last occasion being on the day before the start of the trial). In the end, the admission of Lillian Wong's ROI was not very controversial. Peter Lee could not object to the SFC's reliance on it, as he relied on it through his Counsel's cross-examination of David Wong. Tony Chik specifically raised no objection. David Wong did not appear to make any objection either. In any event, I have no hesitation in allowing Lillian Wong's ROI to form part of the evidence, subject of course to proper considerations of the weight to be attached to any part of it.

38. David Wong and Peter Lee gave evidence and were subject to cross-examination. Tony Chik chose not to appear to give evidence and be cross-examined at the trial.

39. On 25 October 2019, a Statement of Agreed Facts between the SFC and Tony Chik was filed. Both parties agreed and accepted that both parties might refer to or rely upon the matters admitted in the statement at the hearing of the proceedings. In particular, by reference to some of the agreed facts, Tony Chik accepted that during the relevant period the business and affairs of the Company had been conducted in the manner described in section 214(1)(b) and (d), namely involving misfeasance or other misconduct towards the Company, its members or part of its members and/or unfairly prejudicial to its members or any part of its members.

40. On that basis, the SFC and Tony Chik agreed, and Tony Chik stated he was prepared to accept, that it would be appropriate for a disqualification order to be made against him under section 214(2)(d) for a period of 6 years. I can return to the question of disqualification later in this Judgment, but for present purposes it can be stated that the facts which follow in this section of the Judgment are in essence agreed between the SFC and Tony Chik, unless the context otherwise makes clear.

41. On 6 November 2019, that is on day 4 of the trial, Peter Lee filed a Notice of Admission of Facts, by which he admitted the various facts set out in the Appendices to that Notice, subject to the qualifications or limitations, if any, specified in the Appendices and "saving all just exceptions to the admissibility of such facts, or any of them, as evidence in this action". The Notice was also subject to the proviso that the admissions were made for the purposes of the action only, and not admissions to be used against Peter Lee on any other occasion, or by anyone other than the SFC.

42. In that Notice, Peter Lee also accepted that, by reason of the facts he admitted, the business or affairs of the Company had been conducted in a manner involving misfeasance or other misconduct towards the Company, its members or part of its members and/or unfairly prejudicial to its members or any part of its members. On that basis, Peter Lee accepted that it would be appropriate for him to be made the subject of a disqualification order for a period of not more than 6 years (to be decided by the Court). The facts canvassed in this part of the Judgment can also be taken to be agreed by Peter Lee, unless the context otherwise makes clear.

43. Whilst David Wong did not reach any agreement as to facts with the SFC, nor did he file any notice of admission of facts, it is fair to say that many of the factual matters asserted by the SFC were not significantly disputed by him. In his closing submissions, he also accepted that some period of disqualification might be ordered against him, which he suggested might be for 8 years.

44. Having considered the evidence, I am prepared to accept as facts those which are

agreed or admitted. Insofar as it is necessary to me to make findings on disputed areas of fact, those findings are also included in the Judgment. I make my findings in the usual way, testing the oral and written evidence in particular against available contemporaneous documentation as well as the inherent likelihoods and probabilities.

C.2 The Company and the Group

45. As already stated, the Company is a limited company incorporated in the Cayman Islands. It was incorporated on 7 December 1990 and listed on the Main Board of the SEHK on 25 June 1993, then in the name of Egana International (Holdings) Limited. The registered office of the Company is situated at PO Box 1787, 2nd Floor, One Capital Place, George Town, Grand Cayman, Cayman Islands. Its principal place of business is situated at 8th Floor, Prince's Building, 10 Chater Road, Hong Kong.

46. At the time of its listing, the directors of the Company were:

Title	Name	Nationality
Executive Director (Chairman)	Hans-Joerg Seeberger	German
Executive Director	Siegfried Adalbert Unruh	German
Executive Director	Peter Lee	British
Executive Director	Michael Richard Poix	French
Executive Director	Gisela Schaefer	German
Executive Director	Michiyo Seeberger-Yamada	Japanese
Non-executive Director	David Wong	British
Non-executive Director	Dr. Goetz Reiner Westermeyer	German
Non-executive Director	Professor Udo Glittenberg	German

47. At the request of the Company, trading in its shares was suspended with effect from 9:30am on 12 September 2007 and remained so suspended until 4 January 2012, on which date the listing of the shares of the Company on the SEHK was cancelled.

48. On 6 March 2009, the Court appointed Edward Middleton and Fergal Power, both of KPMG, to act jointly and severally as provisional liquidators of the Company. On 9 May

2011, the Court ordered that the Company be wound up. On 9 September 2011, the provisional liquidators of the Company were appointed as joint and several liquidators ("Liquidators") of the Company.

49. According to the Company's profile on the website of the SEHK as at 29 June 2011, the Company's authorised share capital was HK$500,000,000 divided into 50,000,000,000 shares with a par value of HK$0.01 each. The Company had 1,464,001,524 issued shares as at 31 March 2009.

50. The Company was an investment holding company. Its subsidiaries were principally engaged in (1) design, assembly, manufacturing and distribution of timepieces, jewellery, leather and lifestyle products, (2) licensing or assignment of brand names or trademarks to third parties, (3) trading of timepiece components, jewellery and consumer electronic products, (4) distribution of branded timepieces, leather and lifestyle products through franchises under the franchising arrangement, and (5) holding of investments.

51. The subsidiaries of the Company (collectively, together with the Company, "Group" or "Group Companies") included the following:

(1) Centreline Group Limited ("Centreline"), the 5th respondent. Centreline was a company incorporated in the British Virgin Islands on 28 August 1998 and 100% indirectly owned by the Company. It was dissolved on 30 April 2017.

(2) Eco-Haru Mfr Holdings Limited ("Eco-Haru"), the 6th respondent. Eco-Haru was a company incorporated in the British Virgin Islands on 2 December 1991 and 100% directly owned by the Company. It was dissolved on 30 April 2017.

(3) Egana of Switzerland (Far East) Limited ("Egana of Switzerland"), the 7th respondent. Egana of Switzerland (in liquidation) is a company incorporated in Hong Kong on 1 December 1978 and was 100% indirectly owned by the Company. In April or July 2009, Edward Middleton and Fergal Power of KPMG were appointed as the joint and several provisional liquidators of Egana of Switzerland. On 29 July 2009, the Court ordered that Egana of Switzerland be wound up

(4) Egana.com Inc. ("Egana.Com"), the 8th respondent. Egana.Com was a company incorporated in the British Virgin Islands on 25 November 1999 and 100% indirectly owned by the Company. It was dissolved on 30 April 2017.

(5) Towercham Limited ("Towercham"), the 9th respondent. Towercham was a

company incorporated in the Republic of Ireland on 10 January 1990. It transferred its domicile to the Island of Nevis, West Indies, on 27 August 1999 and is 100% indirectly owned by the Company.

(6) Bartelli Leather Products Limited ("Bartelli"), the 10th Respondent. Bartelli (in liquidation) is a company incorporated in Hong Kong on 6 October 1994 and 100% indirectly owned by the Company. In April or July 2009, Edward Middleton and Fergal Power of KPMG were appointed as the joint and several provisional liquidators of Bartelli. On 29 July 2009, the High Court of the HKSAR ordered that Bartelli be wound up.

(7) Egana Investments (Pacific) Limited ("Egana Investments"). Egana Investments is a company incorporated in the Cook Islands on 17 December 1992 and 100% indirectly owned by the Company.

(8) Egana Marketing (Suisse) Incorporation ("Egana Marketing"). Egana Marketing is a company incorporated in the Cook Islands on 19 August 1994 and 100% indirectly owned by the Company.

C.3 The Former Management of the Company

52. As stated in the Company's Annual Report for 2005/2006, published on 3 October 2006, the following were the executive directors of the Company: (1) Hans-Joerg Seeberger (Chairman and Chief Executive); (2) David Wong; (3) Peter Lee; (4) Tony Chik; and (5) Michael Richard Poix.

53. As to those directors, and mainly based on information in the Company's 2005/2006:

(1) Hans-Joerg Seeberger was the founder of the Group and has been the Chairman and Chief Executive of the Company since the Company was listed in 1993. He was responsible for the Group's overall strategic planning, objectives setting and corporate development. He also oversaw the Group's business development worldwide. As the Chairman, he was responsible for managing Board affairs and ensuring the Board discharged its functions effectively. According to the Company's Annual Report 2006/2007, Hans-Joerg Seeberger passed away on 19 October 2007.

(2) David Wong, had over 25 years' experience in finance, accounting, corporate and taxation affairs. He had been a Director of the Company since 1992. He oversaw the Group's corporate planning and strategic alliance project as well as the internal control and risk management functions.

(3) Peter Lee joined the Group in 1978 and had been an Executive Director of the Company since December 1990. He was responsible for the operational and general management of the Group's Hong Kong and Mainland China operations. Before joining the Group, he had worked as an executive in marketing and corporate management in several international companies in the consumer and manufacturing industries.

(4) Tony Chik, joined the Group in 1985. Tony Chik first joined Lien Chow Limited (the former name of the Egana of Switzerland) as an Accounting Supervisor and continued to work in the Group since then. Mr Seeberger, the founder of the Group, was the Chief Executive of Lien Chow Limited at the time when Tony Chik joined. Tony Chik was promoted to be one of the Executive Directors of the Company in November 2003. He was the Group Treasurer from 1997 and was responsible for the financial and treasury operations of the Group. He had over 25 years' experience in auditing, financial and treasury fields. He was a fellow member of the Association of Chartered Certified Public Accountant. Tony Chik also held a Degree of Bachelor of Commerce from the University of Southern Queensland awarded in 1998, as well as a Master of Business Administration awarded in 2007 and a Master of Corporate Governance awarded in 2012 from The Open University of Hong Kong.

(5) Michael Richard Poix joined the Group in 1988 and had been an Executive Director of the Company since 1992. He was responsible for the day-to-day operations of the Group's business and ensuring compliance with the Group's obligations under its brand name licences.

54. According to the Annual Report of the Company for 2006-2007, that is the year immediately before trading of its shares were suspended, the executive directors of the Company were: (1) Peter Lee (Deputy Chairman); (2) Michael Richard Poix (Chief Executive Officer); (3) Tony Chik; (4) Wolfgang Heinz Pfeifer; and (5) Juergen Ludwig Holzchuh.

55. Peter Lee says that he was appointed Deputy Chairman in November 2006 following the separation of Mr Seeberger's duties as Chairman and CEO, but his (Peter Lee's) duties remained the same and he continued to be in charge of managing the operational and administrative affairs in Hong Kong and China.

56. David Wong resigned as director of the Company on 13 August 2007. Peter Lee retired as director of the Company on 1 August 2008. Tony Chik resigned as director of

the Company on 16 November 2007.

57. Particulars of the directors of the Group Companies during the period from 1 January 2005 to 31 December 2008 are set out in Appendix A to this Judgment.

58. At all material times, the Chairman of the Group, Hans-Joerg Seeberger, Michael Richard Poix, and each of the Directors, in their capacity as directors of the Company, owed to each of the Group Companies the fiduciary duty to act in good faith and in the best interests of the Group Companies. Further, each of them owed to the Group Companies the duty of care at common law to exercise due and reasonable skill, care and diligence. The Directors were also obliged to comply with *inter alia*, Rules 3.08 and 3.09 of the Rules Governing the Listing of Securities on the SEHK ("Listing Rules").

59. It seems that Mr Seeberger started a sabbatical in April 2007 when his duties were at least in part delegated to other executive directors. This was for health reasons. However, Mr Seeberger was recorded to have participated in the decision to increase the syndicated loan facility to HK$1 billion (see below). There was no particular evidence as to Mr Seeberger's health in June or July 2007.

C.4 Public disclosure of Doubtful Receivables

60. In July 2007, certain public queries were raised about the Company's finances. This resulted in: (1) the suspension of trading in the Company's shares; and (2) KPMG being appointed by the Company to conduct an independent review of the Company's financial position.

61. On 7 August 2007, the Company announced that on 1 August 2007 KPMG had been appointed to conduct that independent review of the Company's financial position, based on an agreed scope and procedure, in the interests of the stakeholders of the Company. The scope of KPMG's work included a review and comment on the Group's receivables.

62. On 31 August 2007, the Company announced that based on KPMG's review up to that date, it appeared that the recoverability of certain receivables totalling, as at 31 August 2007, approximately HK$2.28 billion (comprising approximately HK$605 million in trade receivables and approximately HK$1.67 billion in interest bearing deposits) was sufficiently uncertain as to make it likely that provisions would need to be made in the Group's accounts in relation to at least a proportion of those receivables.

63. By 10 September 2007, further doubtful receivables amounting to HK$272.55 million were identified bringing the total amount of the doubtful receivables to approximately HK$2,547.55 million (being in total the "Doubtful Receivables").

64. In the Company's Annual Report 2006/2007 released on 6 November 2007, incorporating the financial results of the Group up to 31 May 2007, it was stated that KPMG had completed its review on 16 October 2007 and expressed serious reservations on the recoverability of certain receivables, promissory notes and cash equivalents totalling approximately HK$l.6 billion as at 31 May 2007 and approximately HK$1.0 billion arising subsequent to that date. As a result, the board considered it prudent to make full provisions for the doubtful receivables and promissory notes, with approximately HK$1.6 billion having been charged to the profit and loss account during the financial year ended 31 May 2007 and approximately HK$1.0 billion to be charged in the following financial period beginning on 1 June 2007.

65. In the Corporate Governance Report section of the Annual Report 2006/2007, under the heading 'Internal Control and Risk Management', it was noted that it had become apparent from a review of the Group's receivables carried out with the assistance of KPMG as independent accountants, which review had resulted in the significant reported provisions for asset impairment, that a number of high-value transactions had occurred without reference to or approval by the Company's board. It was further noted that the fact that such transactions could have occurred without the Board reviewing them and assessing the risks involved had revealed significant weaknesses and failings in the Company's internal control and risk management system.

66. In the Interim Report 2007/2008 of the Company released on 28 February 2008 incorporating the financial results of the Group for the 6 months up to 31 November 2007, it was stated that the board considered it prudent to make full impairment provisions for the doubtful receivables identified by KPMG with approximately HK$1.0 billion provision being made to the unaudited consolidated profit and loss account for the six months ended 30 November 2007. Those provisions were above and beyond the provisions made in the audited accounts of the Group for the year ended 31 May 2007. It was further stated that the trading operations which gave rise to those provisions had all substantially ceased by 30 November 2007 and no further material provisions in that respect were expected by the board.

67. In the premises, total provisions in the amount of approximately HK$2.6 billion were made in the consolidated accounts of the Company. To put the size of those provisions in the proper context, they may be compared to the consolidated net assets and consolidated profits/loss of the Group in the periods before the making of the provisions:

	Consolidated Net Assets	**Consolidated Profits / Loss**

Annual Report 2005/2006	HK$2,211 million	HK$339 million
Interim Report 2006/2007 (6 months to 30.11.06)	HK$2,435 million	HK$206 million
Annual Report 2006/2007	HK$327 million	(HK$1,940 million)
Interim Report 2007/2008 (6 months to 30.11.07)	(HK$1.034 million)	(HK$1,265 million)

68. The Company was therefore insolvent, as a result of the Doubtful Receivables being irrecoverable.

C.5 The Doubtful Receivables

69. According to KPMG's Report dated 16 October 2007 ("KPMG Report"), which contains KPMG's analysis of the Doubtful Receivables, the Doubtful Receivables are classified into 4 broad categories: (1) Trading Business; (2) Promissory Notes; (3) Strategic Investments; and (4) Richemont Transaction.

70. A total of 8 debtors ("Debtors") were identified as being indebted to the Group in respect of the Doubtful Receivables: (1) Luen Fung Limited ("Luen Fung"); (2) Global Kent Limited ("Global Kent"); (3) House of Brands Inc. ("House of Brands"); (4) Goloda Enterprises Limited ("Goloda"); (5) Upbest Asia Company Limited ("Upbest Asia"); (6) Uni-Star Corporation ("Uni-Star"); (7) Asia Top Group Holdings Limited ("Asia Top"); and (8) Elite Choice Group Limited ("Elite Choice").

71. At paragraph 3.1.4 of the KPMG Report, a breakdown of the Doubtful Receivables by nature and category is shown, as reproduced in the table below:

Debtor	Trading Business (HK$m)	Promissory Notes [1] (HK$m)	Strategic Investments (HK$m)	Richemont Transaction (HK$m)	Total (HK$m)
Luen Fung	258.64				258.64
Global Kent	198.71				198.71
House of	79.17				79.17

Brands					
Goloda	69.38		134.5	360	563.88
Upbest Asia		439.50	265.00		704.50
Uni-Star		34.00		229.80	263.80
Asia Top		36.30			36.30
Elite Choice				170.00	170.00
	605.90	509.80	399.50	759.80	2,275.00
Further doubtful receivables identified post-31 Aug 2007					
House of Brands	12.85				12.85
Elite Choice			259.70		259.70
	618.75	509.80	659.20	759.80	**2,547.55**

72. Among the 4 categories of the Doubtful Receivables:

(1) Trading Business: Approximately HK$618.75 million was related to the trading business of the Group. The total unaudited revenue of the trading business was HK$l.8 billion for the year up to 31 May 2007. The receivable balances was made up of amounts due from Luen Fung, Global Kent, House of Brands and Goloda.

(2) Promissory Notes: HK$509.80 million was related to 16 promissory notes issued by Upbest Asia, Asia Top and Uni-Star. All 16 promissory notes are overdue.

(3) Strategic Investments: HK$659.20 million was earnest money and other payments made in relation to certain proposed investments, paid to Goloda, Upbest Asia and Elite Choice.

(4) Richemont Transaction: HK$759.80 million was related to (i) three deeds of debt (“Deeds of Debt”), two of which (amounting to HK$229.80 million) were executed by Uni-Star and the remaining one (HK$360 million) was executed by Goloda, with Egana.com, Egana Investments and Centreline as creditors, and (ii) a memorandum of agreement (“Memorandum of Agreement”) entered into by Centreline and Elite Choice concerning Centreline’s proposed purchase from Elite Choice of a two year fixed licence and the right of option for renewal of a certain trademark licence, and acquisition of the Goldpfeil shops operated by Maedler Koffer GmbH, a wholly owned subsidiary of Elite Choice, for a consideration of HK$170 million, which sum was paid as escrow money by

Centreline to Elite Choice.

C.6 HK$1 billion Syndicated Loan

73. On 15 June 2007, the Company entered into a 3-year loan agreement with a syndicate of banks for a HK$1 billion term loan facility (the **"Syndicated Loan"**). The Co-ordinating Arrangers of the loan were originally mandated to arrange a HK$400 million facility to re-finance existing borrowings of some HK$300 million and for general working capital. In the event, the facility was over-subscribed and was subsequently increased to HK$1 billion.

74. The Syndicated Loan (after payment of fees and loan re-refinancing) of approximately HK$681.12 million was first transferred to the Company's bank account held with CITIC Ka Wah Bank Limited on 25 June 2007. HK$622 million of the Syndicated Loan was subsequently transferred from the Company's account and was paid to the 3 Debtors (Uni-Star, Goloda and Elite Choice) involved in the "Richemont Transaction" through various subsidiaries in the Group. Some of these transfers were made via a web of inter-company transfers among Group subsidiaries and through different bank accounts of the Company.

75. The Richemont Transaction refers to a transaction in which Compagnie Financiere Richemont SA ("Richemont"), in a period of less than one year in 2006/07, first acquired from the Seeberger family a stake in the Company for HK$430 million and then sold it back to the family for approximately HK$760 million. The Seeberger family was, in August 2006, before Richemont acquired the stake, the controlling shareholder of the Company, holding about 37.22% of all the issued share capital of the Company through The Captive Insurance Trust and a BVI company called Peninsula International Limited ("Peninsula").

76. It is the SFC's case that despite the Doubtful Receivables of HK$759.80 million being related to the 3 Deeds of Debt executed by Uni-Star and Goloda, and the Memorandum of Agreement entered into with Elite Choice, that sum of approximately HK$760 million paid by the Group to the 3 Debtors was in fact used in the Richemont Transaction. The sum total of HK$759.80 million received by Uni-Star, Goloda and Elite Choice from the Group was eventually remitted to Peninsula and then by Peninsula to Richemont/Richemont Luxury Asia Pacific Limited. The monies were used by Peninsula to fund its buy-back of the interest in the Company held by Richemont.

77. It is alleged by the SFC, and I accept, that the sum of HK$759.80 million so transferred to the 3 Debtors (Uni-Star, Goloda and Elite Choice) was eventually transferred to Peninsula, out of which HK$622 million originated from monies received by the Company under the Syndicated Loan.

78. David Wong, Tony Chik and Peter Lee were authorised bank signatories of the bank accounts of, and/or a director of, one or more of the Group Companies through which the transfers of the Syndicated Loan proceeds were made.

79. According to an announcement dated 15 June 2007 made by David Wong on behalf of the Company, the proceeds of the Syndicated Loan would be used "*for refinancing existing bank loans of approximately HK$300 million and for general working capital requirements*". Apart from the amount used for loan refinancing, the later use of the Syndicated Loan proceeds by the Group was inconsistent with the purpose as stated in the Company's announcement.

80. Indeed, the subsequent use of the HK$622 million was also in breach of the stated purpose of the lending facility as provided for in the Syndicated Loan Agreement. That agreement required the proceeds of the facility to be "used exclusively to refinance the Borrower's existing indebtedness and to finance the general working capital requirements of the Group". The Syndicated Loan Agreement was signed on behalf of the Company by Peter Lee and Tony Chik.

81. The terms of the agreement were also consistent with the minutes of a meeting of the Directors of the Company, said to have been held in Germany on 15 June 2007, which noted the intended exclusive use of the facility, and where the Board was noted to have formed the view that entering into the Syndicated Loan was in the commercial interests and benefits of the Company. (As an aside, and though it probably does not matter to the overall analysis, I do not think it was properly explained in evidence why it was thought to be in the commercial interests and benefits of the Company to take a much larger loan than had originally been envisaged, though some general reference was made to potential expansion and acquisitions.)

C.7 Doubtful Receivables Arising from Trading Business

82. The trading business gave rise to receivables in the total amount of approximately HK$618.75 million ("Trade Receivables") which were owed by four Debtors, namely Luen Fung, Global Kent, Goloda and House of Brands ("Trading Business"). The Group Companies to whom the Trade Receivables were owed were Towercham, Egana of Switzerland, Egana Marketing and Bartelli.

83. A summary of the Trade Receivables appears in the following table:

(in HK$ m)	Debtor				
	Luen	Global	House of	Goloda	Total

	Fune	Kent	Brands		
Towercham	89.94	208.57	-	-	298.51
Egana of Switzerland	257.92	-	-	-	257.92
Egana Marketing	-	-	-	165.85	165.85
Bartelli	-	-	85.33	-	85.33
Balance as at 31.5.2007	347.86	208.57	85.33	165.85	807.61
Transactions between 1.6.2007 and 31.8.2007					
Sales	-	-	48.69	5.00	53.69
Settlements	(89.22)	(9.86)	(42.00)	(101.47)	(242.55)
Balance as at 31.8.2007	258.64	198.71	92.02 [2]	69.38	618.75

84. I accept the SFC's submissions that there were myriad dubious features of these various transactions. When the Group's relationship with them came under scrutiny, all three Debtors seemingly for the first time suddenly and simultaneously experienced difficulties in meeting their repayment obligations. None of the Debtors were truly independent third parties. They were all related companies with each other and with the Group, and I accept that they were directly or indirectly acting under the instructions of David Wong (see below). The Debtors could not be located at their purported Hong Kong addresses, and when phone calls were made to them, they were devoted apparently to mobile phones, sometimes even the same individual for different Debtors. There were consistent spelling mistakes on the purchase orders that were supposed to have been generated by different external customers, and on the corresponding delivery notes and invoices issued to the group. All of the Group's apparent Trading Business partners (except Towercham) maintained accounts at the same branch of Wing Hang Bank in Hong Kong.

85. David Wong's explanation was that there were tax reasons for the transactions. He says that they were genuine sales to independent third parties and structured for tax purposes with sales made from PRC manufacturers to PRC customers with the Group acting as an intermediary. However, I do not accept this explanation as credible. Little detail has been given by David Wong as to how this supposedly tax structure was to work. There is no documentary evidence to corroborate this explanation. In any event, the explanation does not work for the parts of the Trading Business which related to US-based

company (House of Brands).

C.8 Doubtful Receivables Arising from Promissory Notes

86. A total of sixteen Promissory Notes were for the sum of HK$519.80 million. They were all issued between May and July 2007. The total amount of these sixteen Promissory Notes outstanding was HK$509.80 million, excluding interest to the stated maturity dates of the Promissory Notes.

87. Fourteen of the sixteen outstanding Promissory Notes were issued by Upbest Asia, with a total amount of HK$449.50 million (excluding interest). A total of HK$10 million by two banker's drafts of HK$5 million each was received on 16 and 21 August 2007 from David Wong, which reduced the outstanding sum owed by Upbest Asia to HK$439.5 million.

88. The remaining two Promissory Notes were issued by Asia Top and Uni-Star on 28 May 2007 and 11 July 2007 in the amounts of HK$36.30 million and HK$34.00 million (excluding interest) respectively.

89. Each of the sixteen Promissory Notes was for a term of 3 months and bore interest at the identical rate of 7% pa. All of the Promissory Notes are identical in forms of layout, style and font size, despite supposedly being issued by three separate companies. Some of the Promissory Notes were issued to replace earlier promissory notes which the Company had renewed or replaced with new ones upon maturity. Each of the sixteen Promissory Notes, or the earlier promissory note(s) replaced by them, was issued in relation to a loan advanced by a Group Company in the principal amount of the note, as evidenced by a cheque signed by David Wong and/or Peter Lee and/or Tony Chik on behalf of the relevant Group Company. There is no evidence of any legal advice taken by the Group, or other due diligence on the entities with whom the Group chose to place such large sums of money.

90. As to the person(s) who signed the relevant cheques on behalf of the Group Companies, being the loans in respect of each Promissory Note: (1) David Wong co-signed ten of the sixteen cheques signed on behalf of the Group Companies, and the relevant amount concerned totalled HK$359 million; (2) Peter Lee co-signed thirteen of the sixteen cheques on behalf of the Group Companies, and the relevant amount concerned totalled HK$417.80 million; (3) Tony Chik signed one and co-signed seven of the sixteen cheques on behalf of the Group Companies, and the relevant amount concerned totalled HK$190,800,000.

91. On their original cases, David Wong claimed that he was ignorant as to the Promissory

Notes, and that they were the responsibility of Tony Chik. But Tony Chik claimed he signed the relevant documents and cheques upon the instructions of David Wong. Peter Lee also relied on David Wong.

92. Upbest Asia was incorporated in Macau. Its registered capital was MPO 25,000 and its shareholders were originally Song Ieong Kong and his spouse Lam In Heng and later Mr Song and Lee Chi Chuen. The records of the Macau Companies Registry show that a shareholders' resolution was passed on 1 August 2007 to dissolve and de-register the company purportedly on the ground that the company had no assets and no liabilities. Despite letters of demand dated 8 August and 13 August 2007 sent by the Company, and further effort by KPMG, no repayment was made by Upbest Asia, save that on 16 and 21 August 2007 David Wong produced two bankers' cheques each in the sum of HK$5 million which he said represented repayments by Upbest Asia. The provenance of Upbest Asia's payments is questionable in view of the fact that a shareholders' resolution had been passed on 1 August 2007 to dissolve and de-register the company.

93. Asia Top is a BVI company incorporated on 23 February 2000. Lai Luen Wai ("Gary Lai") and Wong Wing Hong ("Benny Wong") were described as directors of Asia Top in its bank account opening documents with Wing Hang Bank. Its audited accounts for the year ended 31 March 2005 was signed by Gary Lai and Benny Wong as directors of the company. The Company held 29.60% of Asia Top via Centreline. Despite a demand letter dated 3 September 2007 sent by Egana Investments and further effort by KPMG, no repayment was made by Asia Top in respect of its outstanding Promissory Note.

94. Uni-Star is a BVI company incorporated on 24 September 2001. Gary Lai and Benny Wong were described as directors of Uni-Star in its bank account opening documents with Wing Hang Bank. According to information provided by David Wong, Uni-Star was an affiliate of Asia Top. Despite a letter dated 11 October 2007 from Egana Investments, no repayment has been made by Uni-Star in respect of its outstanding Promissory Note.

95. The matters relating to the Promissory Notes were part of the subject of fund-flow analysis by Denise Yip. From her review of the bank and accounting records, she identified that out of the total of HK$519.8 million paid out to doubtful debtors in relation to the promissory notes issued, approximately HK$335.65 million was – after several layers of transfers via third parties (that is, persons or companies outside the Group) – later remitted to the same or different Group companies on the same day. Approximately HK$149.77 million was – after several layers of transfers through third parties – remitted to two other third parties, namely Upbest Finance Co Ltd and Upbest Securities Co Ltd, both subsidiaries of a listed company in Hong Kong called Upbest Group Limited. As to

the remaining HK$34.39 million, they were last found to be transferred to some third parties, but Ms Yip was unable to draw conclusions in relation to tracing those funds to any further recipients.

96. Almost all of the various third-party recipients were somehow connected with each other either by having been identified as one of the doubtful debtors, or by sharing the same person's bank signatory, same telephone or fax number, and/or the same address. Therefore, Ms Yip identified that the fund flows in relation to payments made for Promissory Notes issued by the doubtful debtors could be classified into categories, being:

(1) Round Robin Transactions, in which the full amount of the funds were, after several layers of transfers via third parties, remitted back to Group companies on the same day;

(2) Partial Round Robin Transactions, in which part of the funds were, after several layers of transfers via third parties, remitted back to Group companies on the same day;

(3) Funds to Third Parties Transactions, in which all of the funds were transferred to third parties; and

(4) Inconclusive Transactions in which, on the basis of the information provided, funds were noted to be transferred to third parties, but where there was insufficient information for further tracing of the funds into the final recipients.

97. By way of example only, reference can be made to the fund flow relevant to the Promissory Note in the sum of HK$36 million issued by Upbeat Asia on 3 January 2007. The sum of HK$36 million was transferred by Eco-Haru to Upbest Asia on 3 January 2007. On the same day, that HK$36 million was transferred by Upbest Asia to Uni-Star. Also on the same day, Upbest Asia transferred two further sums of HK$20 million and HK$45 million to Uni-Star. Further, on the same day, HK$3.3 million was transferred by Upbest Finance to Uni-Star, so that Uni-Star received a total of HK$104.3 million. Still on the same day, Uni-Star transferred that sum of HK$104.3 million to Goloda in two tranches of HK$56 million and HK$48.3 million. Then, still on the same day, Goloda transferred almost exactly HK$104.3 million to Egana Investments in two tranches of HK$56 million and HK$48,289,425. This was one of the Round Robin Transactions, but there are many similar examples in relation both to the Round Robin Transactions and the Partial Round Robin Transactions.

C.9 Doubtful Receivables Arising from Strategic Investments

98. The Strategic Investments gave rise to receivables in the total amount of HK$659.20 million which were owed by 3 Debtors, namely, Goloda, Upbest Asia and Elite Choice. The Group Companies to whom the receivables were owed are Eco-Haru and Centreline. A summary of the receivables appears in the following table:

Debtor	Relevant Group Company	Principal Amount (HK$ m)
Goloda	Eco-Haru	134.50
Upbest Asia	Eco-Haru	265.00
Elite Choice	Centreline/Eco-Haru	259.70
		659.20

99. The first matter related to an intended investment in House of Brands by Eco-Haru, where HK$134.5 million was paid to Goloda by Eco-Haru on 27 June 2007 as "escrow sums". The second matter related to an intended investment in the Fortunoff Project by Eco-Haru on 13 June 2007 as "earnest money". The last matter is divided into two aspects: one an intended acquisition of Elite Choice's Goldpfeil shops by Centreline, where a total of HK$111.5 million was paid to Elite Choice by Centreline in March 2005 and May 2009; and the other an intended investment in Garant AG by Eco-Haru, where HK$148.2 million was paid to Elite Choice by Eco-Haru on 29 February 2007 as "escrow sum". More detail on those matters is as follows.

100. According to an Escrow Agreement dated 27 June 2007 between Eco-Haru and Goloda, Eco-Haru intended to acquire a further 13.45% holding in House of Brands, a company in which, through Centreline, the Group already held a 15% stake. Three payments totalling HK$134.5 million were made to Goloda on 27 June 2007 as "escrow sums" for which "*Goloda would avail the exclusivity of the negotiation for completion of the acquisition of the 13.45% interests, for a period of 6 months effective from the date of full receipt of the escrow sums*".

101. The Escrow Agreement was approved as evidenced by the minutes of a board meeting of Eco-Haru held on 27 June 2007. According to the board minutes, the meeting was attended by Peter Lee and Tony Chik. The three payments were made by cheques drawn on the bank account of Eco-Haru at Wing Hang Bank and co-signed by the David Wong and Tony Chik. On 5 August 2007, the Group decided that it would not proceed with the proposed investment in House of Brands. A demand letter dated 6 August 2007 was sent by Eco-Haru to Goloda seeking the return of HK$134.5 million within five business days. However, no repayment has been made by Goloda. The relevant agreement was not

drafted by lawyers, notwithstanding the large sums of money involved in the transaction. Also, no legal advisers were engaged throughout the Group's negotiation and documentation of this proposed investment.

102. Pursuant to an agreement contained in or evidenced by a letter dated 13 June 2007 from Upbest Asia to Eco-Haru, a payment of €25 million (equivalent to HK$265 million) was made by Eco-Haru to Upbest Asia which was to "*serve as a base for [Upbest Asia] to issue certain confirmatory letter evidencing [Eco-Haru's] setting aside of the said sum as earnest money for the Fortunoff Project ...*". It was further stated in that letter that the Group was to set aside €25 million (equivalent to HK$265 million) as earnest money serving as the base for receiving a "*3 months exclusive period of mutual exchange of information and idea on the Fortunoff transaction*", and it was on that premise that the money was to be retained by Upbest Asia for the 3-month period. The letter also provided that, upon written notice by Eco-Haru, if the transaction was not to be pursued further within the period, the earnest money was to be returned to Eco-Haru with interest, within 5 business days.

103. The payment of HK$265 million was made up of funds from two sources:

(1) an assignment of a receivable due from Hover Technologies Limited ("Hover") – a subsidiary of Incutech until November 2006 – to Upbest Asia, pursuant to a "Notice of Assignment of Payee" dated 12 June 2007 issued by Eco-Haru to Hover instructing the latter to pay over the amount due to it in respect of the promissory note in the sum of HK$229.94 million to Upbest Asia on 13 June 2007; and

(2) a cheque in the amount of HK$35.06 million drawn on the account of Eco-Haru at Wing Hang Bank dated 13 June 2007. The cheque bore the signatures of Peter Lee and Tony Chik.

104. This transaction was approved as evidenced by the minutes of a meeting of the board of directors of Eco-Haru held on 13 June 2007. According to the board minutes, the meeting was attended by Peter Lee and Tony Chik. On 3 August 2007, the Group decided that it would not proceed with the proposed investment in the Fortunoff Project and requested Upbest Asia to return HK$265 million plus interest. No repayment was made by Upbest Asia. As already mentioned, Upbest Asia had already been liquidated and dissolved in early August 2007. As in the case of the proposed further investment in House of Brands, there was no involvement of any legal advisers throughout the Group's negotiation and documentation of this transaction, notwithstanding the nature of the transaction and the

large sum of money involved.

105. Elite Choice is a BVI company incorporated on 23 March 2003. Pursuant to a Memorandum of Agreement dated 22 March 2005 between Centreline and Elite Choice, an Addendum thereto dated 31 March 2006 and a letter issued by Centreline to Elite Choice dated 8 May 2006, a total of HK$38 million was paid by Centreline to Elite Choice on 23 and 24 March 2005 being "*earnest money for securing the first right of refusal and call option right*" in respect of Elite Choice's Goldpfeil shop network and franchising right under the Memorandum of Agreement. A further HK$21.5 million was paid by Centreline to Elite Choice on 29 March 2005 as "*extended credit, on an interest free basis, in support of the business cooperation arrangement*" between Centreline and Elite Choice as mentioned in the Memorandum of Agreement.

106. The Memorandum of Agreement provided for its expiration in a number of circumstances, one of which was upon the expiration of l year from 1 April 2005 (Clause 22.1). This time limit was extended by the Addendum to 1 October 2006. On 8 May 2006, Centreline made two further payments totalling HK$52 million to Elite Choice to exercise the call option.

107. The Memorandum of Agreement was approved as evidenced by the minutes of a meeting of the board of directors of Centreline on 22 March 2005. According to the board minutes, Peter Lee, Tony Chik and Philipp Wilhelm Goetz were present. The decision to exercise the call option was approved at a meeting of the board of directors of Centreline on 8 May 2006 at which Peter Lee and Mr Goetz were present.

108. The five payments mentioned were made by cheques drawn on the account of Centreline at Wing Hang Bank totalling HK$111.5 million and co-signed by Peter Lee and Tony Chik. There was no involvement of any legal advisers throughout the Group's negotiation and documentation of this transaction, notwithstanding the nature of the transaction and the large sum of money involved.

109. Notwithstanding those matters, including the exercise of the call option, the proposed acquisition of Elite Choice's Goldpfeil shop network and franchising right was not completed, but the earnest and other monies mentioned above were not returned by Elite Choice to Centreline.

110. As to the investment in Garant AG, according to an Escrow Agreement dated 29 January 2007 between Eco-Haru and Elite Choice, Eco-Haru was desirous of investing in Garant AG, which was said to be a leading retail operator in footwear and leather accessories headquartered in Germany with network extending throughout Europe. By the

agreement, Elite Choice agreed to procure an exclusivity of 6 months for Eco-Haru to "*do due diligence and to assess the participation possibility in Garant AG*", and in consideration of this exclusivity period Eco-Haru was to credit in favour of Elite Choice an escrow sum of €14.82 million (equivalent to HK$148.2 million). The escrow sum was to bear interest at 3% p.a. calculated on a daily basis, and was to be returned (together with interest thereon) should Eco-Haru decide not to proceed with the investment.

111. The Escrow Agreement was approved as evidenced by the minutes of a meeting of the board of directors of Eco-Haru held on 29 January 2007. According to the board minutes, the meeting was attended by Peter Lee and Tony Chik. Pursuant to the Escrow Agreement, Eco-Haru made 3 payments totalling HK$148.2 million to Elite Choice by cheques drawn on Eco-Haru's account at Wing Hang Bank all dated 29 January 2007 and co-signed by Peter Lee and Tony Chik.

112. No progress had been made in the proposed investment in Garant AG by the expiry of the 6 months' exclusivity period from the date of the Escrow Agreement, but no refund was made by Elite Choice to Eco-Haru.

113. Ms Yip also performed the fund-flow analysis relating to Strategic Investments. As regards the actual fund outflow of $429.26 million (that being the only actual fund outflow, because part of the payment in relation to the Fortunoff Project was made by assigning the receivable due from Hover, valued at HK$229.94 million on 13 June 2007 to Upbest Asia), approximately HK$280.1 million was, after several layers of transfers via third parties, later remitted back to the same or different Group companies on the same day.

C.10 Doubtful Receivables Arising from Richemont Transaction

114. The Richemont Transaction gave rise to HK$759.80 million of the Doubtful Receivables, made up as follows:

(1) two "Deeds of Debt", executed by Gary Lai on behalf of Uni-Star, in the amounts HK$140 million and HK$89.80 million (totalling HK$229.80 million) to Egana.Com and Egana Investments respectively;

(2) a "Deed of Debt" in the amount of HK$360 million executed by Goloda to Centreline; and

(3) a Memorandum of Agreement entered into by Centreline and Elite Choice concerning the proposed acquisition from Elite Choice's wholly owned subsidiary, Maedler Koffer GmbH ("Maedler"), of a two year fixed licence and right of option for renewal of a certain trademark licence and acquisition of the

Goldpfeil shops operated by Maedler in Germany, pursuant to which an escrow sum of HK$170 million was paid by Centreline to Elite Choice.

115. The source of the monies paid in respect of the three Deeds of Debt and the Memorandum of Agreement which gave rise to the HK$759.80 million Doubtful Receivables owed by Uni-Star, Goloda and Elite Choice originated, in part as to HK$622 million, from the Syndicated Loan.

116. Though the HK$622 million came from the Syndicated Loan, I accept that the Syndicated Loan was not obtained for the purposes of financing the Peninsula transaction. The sudden increase available to take as a Syndicated Loan, due to oversubscription and the loan market appetite in the making of a loan, may have facilitated the arrangements, but that was not its purpose.

117. Ms Yip also performed some fund-flow analysis in relation to the Deeds of Debts, including how funds flowed from Group companies through various companies including Goloda, Uni-Star, Upbest Asia and Elite Choice, as well as individuals such as Benny Wong and Gary Lai.

118. According to David Wong, the total sum of approximately HK$760 million paid by the Group in respect of the above-mentioned Deeds of Debt and escrow money was eventually remitted to Peninsula and was used by Peninsula to fund its buy-back of the interest held by Richemont in the Group. According to the announcement dated 11 July 2007, the Company "*has been notified by [Peninsula], the controlling shareholder of the Company, that it has on 11 July 2007 entered into a Sale and Purchase Agreement with [Richemont] pursuant to which [Richemont], shall sell and [Peninsula] shall purchase the 30% of the issued share capital of Joint Asset not already owned by [Peninsula]*".

119. As admitted by Peter Lee, the Richemont Transaction refers to a transaction in which Richemont, in a period of less than one year in 2006/07, first acquired from the Seeberger family a stake in the Company for HK$430 million and then sold it back to the family for approximately HK$760 million. The Seeberger family was, in August 2006, before Richemont acquired that stake, the controlling shareholder of the Company, holding about 37.22% of all the issued share capital of the Company through The Captive Insurance Trust and a BVI company being Peninsula.

120. In relation to the two Deeds of Debt involving Uni-Star, they were approved as evidenced by the minutes of board meetings of Egana.Com and Egana Investments on 11 July 2007 and 13 July 2007 respectively. According to the relevant board minutes, David Wong, Peter Lee and Tony Chik were present. However, Peter Lee does not admit that he

had or has any knowledge about the Deeds of Debt and/or he had attended the relevant board meetings. One of the relevant payments of HK$89.80 million was made by way of a cheque drawn on the account of Egana Investments at Wing Hang Bank dated 13 July 2007 and co-signed by David Wong and Tony Chik. Both Deeds of Debt were signed by Tony Chik on behalf of the creditor.

121. In relation to the Deed of Debt involving Goloda, it was approved as evidenced by the minutes of a board meeting of Centreline on 11 July 2007. According to the board minutes, David Wong, Tony Chik and Mr Goetz were present. The relevant payment of HK$360 million was made by way of a cheque drawn on the account of Centreline at Wing Hang Bank dated 11 July 2007, which bore the signatures of Peter Lee and Tony Chik. However, Peter Lee does not admit that he had or has any knowledge about the Deed of Debt, or that when the relevant cheque was signed by him, he knew or contemplated the purpose for which the cheque was eventually used.

122. The minutes of the board meetings revealed no information with regard to the rationale for advancing such substantial sums to Uni-Star and Goloda, nor any evidence that enquiries had been made into the parties' ability to repay them. No legal adviser was engaged by any party despite the substantial sums of money involved. Other than the HK$89.80 million Deed of Debt which was sealed by Egana Investments as creditor, all other parties did not affix their company's common seals on the Deeds as stated, but simply signed the documents. Also, no board minutes or documentation was obtained by the Group from the debtors before payment was made to ensure that the persons who executed the Deeds of Debt on behalf of the debtors were properly authorised to do so.

123. The Deeds of Debt are highly questionable, and there was a clear failure to recognize that the validity and enforceability of the Deeds of Debt were in serious doubt. This was despite the fact of the massive amounts of money involved; the absence of involvement from any legal advisers; the Group's core business was not moneylending; there were no documents to support the commercial rationale for advancing such sums, and the board minutes make no mention of any rationale behind the transactions; the Deeds of Debt were produced in a standardised format and wording, on a single piece of plain A4 paper; and perhaps in particular where the debtors (Uni-Star and Goloda) were only obliged to make "best endeavours" to repay the debts.

124. As to the earnest money of HK$170 million, by a Memorandum of Agreement dated 12 July 2007 between Centreline and Elite Choice, Centreline, having expressed a desire to acquire from Maedler a two year fixed licence and "right of option for renewal" of a certain trademark licence and the Goldpfeil shops operated by Maedler in Germany, agreed to

place an escrow sum of HK$170 million with Elite Choice in order to avail itself of "*the exclusivity of the negotiation for completion of the Transaction, for a period of 6 months effective from the date of full receipt of the escrow sums*".

125. Pursuant to the Memorandum of Agreement, Centreline paid the sum of HK$170 million to Elite Choice by way of a cheque drawn on the account of Centreline at Wing Hang Bank dated 12 July 2007. The cheque bore the signatures of Peter Lee and Tony Chik. Peter Lee does not admit that he had or has any knowledge of the Memorandum of Agreement, or that when the relevant cheque was signed by him, he knew or contemplated the purpose for which the cheque was eventually used.

126. The Memorandum of Agreement was approved as evidenced by the minutes of a board meeting of Centreline on 12 July 2007. According to the board minutes, David Wong, Tony Chik and Mr Goetz were present. By this date, the Group had already paid HK$259.7 million in escrow funds to Elite Choice in respect of potential investments, with HK$111.5 million of that sum having been paid by Centreline.

127. Centreline sent a notice dated 8 August 2007 to Elite Choice cancelling the Memorandum of Agreement and requesting the return of the HK$170 million. Pursuant to the terms of the Memorandum of Agreement, Elite Choice was obliged to refund the escrow sum with interest at 3% pa within 5 business days from the date of receipt of the notice. No payment or reply has been received from Elite Choice in response to this notice.

128. No legal adviser was engaged throughout the Group's negotiation and documentation of this proposed investment, despite the nature and quantum of the proposed investment.

129. Despite the Deeds of Debt and the Memorandum of Agreement being entered into, there is no evidence that Elite Choice, Uni-Star or Goloda had any actual operations or business.

130. In his oral evidence, David Wong explained how the resources of the Company would be utilised to finance Peninsula's purchase of Richemont's shares. He described it, with his background as a tax person, as a kind of "defeasance loan" concept which comes from tax planning. He said he proposed to use the defeasance loan concept, which he also called a transferable loan arrangement, so that Peninsula would obtain the money through a third party. Under this concept, A is to give money to B, and then B is to allow some participation by C such that the money will be in hands of C (here Peninsula). This was specifically to avoid the problem that if money was lent by the Company directly to Peninsula that would amount to a connected transaction under the Hong Kong Listing Rules. When Goloda and Uni-Star received the money, they would transfer it to Peninsula

so that Peninsula received the money not from the Company directly but from an independent third-party, and that would not be in breach of the Listing Rules.

131. David Wong emphasised that Peter Lee and Tony Chik had no knowledge of this, and said that he was the one to be blamed, not them.

132. David Wong also explained in evidence that when Peninsula was minded to borrow from the Company, Peninsula was to effect repayment through the sale of its shares in the Company. Essentially, Mr Seeberger wanted to sell the shares, to sell his stake in the Company for whatever reason, but he needed first to purchase back from Richemont, and the proceeds of the sale of shares would be used to repay the Company. What seems to have caused the ultimate problem, which was unforeseen, was that the "music stopped", when David Wong was arrested by the ICAC in late July 2007 in relation to an unconnected matter, arising from an article written by a market watcher.

133. In any event, David Wong's evidence and explanation confirms the improper nature of the transactions. He admits that the Group's money was being used to fund Mr Seeberger's buy-back of his family's block of the Company's shares from Richemont, and he admits that he knew that was the intended use of the money.

C.11 Cheques and Minutes

134. Kerie Fung was asked about her part in making payments to Luen Fung, Global Kent, House of Brands, Goloda, Upbest Asia, Uni-Star, Asia Top and Elite Choice during her interview by Billy Yeung. She said that David Wong instructed her to prepare cheques for all those payments. As far as she could recall, none of them were related to trading business. When David Wong instructed her to prepare the cheques, he always said that the cheques were related to some promissory notes or payments, but he did not specify the reason for the payment or provide any supporting documents. He did specify the subsidiary of the Company by which the cheque had to be issued, the amount of the cheque and the payee. Ms Fung also said that on some occasions it was Tony Chik who instructed her to prepare the cheques, and Tony Chik told her it was David Wong who asked her to prepare the cheques. Tony Chik also did not specify the reason for the cheque or provide any supporting documents, but he would also specify the subsidiary to issue the cheque, the amount and the identity of the payee.

135. After that, Ms Fung said, she would pass the cheques to the authorised signatories of the subsidiaries, including (amongst others) David Wong, Peter Lee and Tony Chik. She would tell the authorised signatories that it was David Wong who requested to issue these cheques, and they had to ask David Wong for information related to the transactions. As

far as she knew, the supporting documents would subsequently be passed to the accounting colleagues responsible for the relevant subsidiaries. She said they were not passed to her, because they were not ordinary trading business.

136. During cross-examination, Ms Fung said that when she was issuing cheques she did not peruse the underlying documents, though she often heard other staff mentioning promissory notes and "CP", which she thought were equivalent to one another or each other. She also said that she did not make any effort or to investigate into the purpose of the funds because her responsibility was merely to make an arrangement for the money, and she was not authorised or entitled to have any knowledge or make any investigation into the nature.

137. Ms Fung said David Wong also instructed her to prepare some blank cheques, albeit only a small proportion. He told her they were for promissory notes and/or payments. On those occasions, he only identified the specific subsidiary to issue the cheque, but did not tell her the payees or the amounts. The reason for the blank cheques was because some of the authorised signatories, including Peter Lee and Tony Chik, might not be in Hong Kong, so that it was necessary to have cheques signed in advance. Those cheques would be passed to them for signing, but she would obtain only one signature, and ask the other authorised signatory to sign after the amount and payee had been put onto the cheque when the time for payment actually came. When Peter Lee and Tony Chik signed the blank cheques, she would tell them it was on the instruction of David Wong, who they had to ask for any information related to the transactions. When it was suggested to Ms Fung in cross-examination that when given a blank cheque Peter Lee would ask what it was for, she said he would not; rather, she would tell him to ask David Wong, as she did not know the purpose of the cheque, and would leave it to Peter Lee to decide whether he was going to sign it or not.

138. In her oral evidence, Ms Fung also explained that most bank accounts of the subsidiaries had a threshold below which managers alone might sign cheques, but above which a director or directors had to sign. I accept all of Ms Fung's evidence.

139. Lillian Wong stated in her ROI that she was only responsible for preparing minutes of board meetings convened in relation to transactions between the Company and Luen Fung, Global Kent, House of Brands, Goloda, Upbest Asia, Uni-Star, Asia Top and elite Choice. Her impression was that on most occasions it was David Wong who informed her that meetings had been held and asked her to prepare the board minutes. But on some occasions Tony Chik would also ask her to prepare minutes. David Wong and Tony Chik would verbally inform her of the contents of the board meeting, meeting date, which

subsidiary it was, sometimes with supporting documents like agreements between the parties of the transactions attached. Then she would prepare the board minutes before finally asking the highest-ranking director in the office at that time – usually Peter Lee, or if he was out of Hong Kong she would look for Tony Chik – to sign the board minutes in the capacity of the Chairman of the meeting. Subsequently, she would put the board minutes in the minutes book kept in the Corporate Planning Department. She was unable to say whether board meetings were actually held in respect of the minutes created, or if they were merely paper meetings. She explained that it was just that David Wong and Tony Chik informed that the relevant board meetings had been held. I accept her evidence.

D. Breaches by Directors Triggering Section 214(1)

D.1 Lack of Commercial Rationale

140. I agree with the submission made for the SFC that it is plain even from the KPMG Report that the transactions which led to the Doubtful Receivables were not commercial transactions. Whilst it is correct that the purpose and focus of the KPMG review was on the recoverability of the Doubtful Receivables, I do not think Mr Ko's submission is correct when he suggests that the KPMG analysis did not cover the commercial viability of the transactions. It seems obvious that a good part of the reason why the Doubtful Receivables were highly unlikely to be recoverable was because they were not proper commercial transactions in the first place.

141. It is significant that money was paid or lent (as the case may be) by the Group Companies to some of the debtors who were involved in multiple categories of the Doubtful Receivables. For instance, Uni-Star was a debtor for both the Promissory Notes and the Richemont Transaction; Upbeat Asia was a debtor for both the Promissory Notes and Strategic Investments; and Goloda was a debtor for the Trading Business, the Strategic Investments, and the Richemont Transaction. I agree that the high concentration of risk in such "investments" further highlights the non-commercial nature of the transactions.

142. The lack of commerciality was further evident from the Round Robin Transactions and Partial Round Robin Transactions. Denise Yip was not cross-examined, despite attending the trial for that purpose, and her fund-flow analysis was therefore unchallenged. None of the Directors even attempted to offer a commercial rationale for the Round Robin Transactions and Partial Round Robin Transactions.

143. Nor were any of the Directors really able to challenge the findings made in the KPMG Report. As already stated, it is no answer to suggest that the focus of that report was recoverability rather than commerciality.

144. David Wong did not cross-examine Tiffany Wong or Fergal Power, and did not in submission challenge the analysis contained in the KPMG Report. Whilst he attempted certain explanations for the Trading Business, Promissory Notes, and Strategic Investments, there was really no documentary evidence which supported his attempts. As to the Richemont Transaction, David Wong admitted during cross-examination that this was part of a scheme to use the Company's money (funnelled via various Group Companies and then Uni-Star, Goloda and Elite Choice) in order to fund Peninsula's buy-back of shares from Richemont. This use of the Company's money was ultimately for the benefit of Peninsula and Mr Seeberger.

145. Peter Lee did not challenge the analysis contained in the KPMG Report in his submissions, nor did he attempt to assert the commerciality of the transactions leading to the Doubtful Receivables, nor did his cross-examination of Tiffany Wong and Fergal Power cast doubt on the reliability of the KPMG Report. Peter Lee's main focus was to deny or lessen his involvement in the transactions. Ultimately, he admitted breaches of duty in relation to the Trading Business, Promissory Notes, and Strategic Investments, which admissions at least impliedly accept that the transactions did not have a proper commercial rationale (see below).

146. Tony Chik also did not challenge the analysis contained in the KPMG Report in his submissions, nor did he attempt to assert the commerciality of the transactions leading to the Doubtful Receivables. His cross-examination of Tiffany Wong did not adversely impact the reliability of the KPMG Report. Tony Chik also admitted to breaches of duty in relation to the transactions giving rise to the Doubtful Receivables, which admissions at least impliedly accept that the transactions did not have a proper commercial rationale (see below).

D.2 David Wong

147. I accept that the evidence identifies that, amongst David Wong, Peter Lee and Tony Chik, it was David Wong who was the prime mover in relation to the transactions which led to the Doubtful Receivables, and the payment of HK$622 million out of the Group. Indeed, David Wong did not really dispute that fact, though he suggested that a better description might be as the "initiator of advice/proposal". He did suggest that the definition of "prime mover" might better suit Mr Seeberger, as the chairman and founder of the Company, responsible for the Group's overall strategic planning, objective setting and corporate development.

148. However, David Wong was, and was described by others, as Mr Seeberger's "right-

hand man". As to Peninsula, David Wong was the only other director in addition to Mr Seeberger. Generally, David Wong was regarded as the head of Finance in the Company, and was identified as the person who asked Peter Lee and Tony Chik to sign various cheques (sometimes blank cheques) and other documents in relation to the various transactions. As to the use of the HK$622 million from the Syndicated Loan, David Wong admitted that it was his idea to use that money to fund Peninsula's buy-back of shares from Richemont, and that the other directors had nothing to do with Peninsula. David Wong also accepted the Strategic Investments were arranged by him, and that he was the exclusive organiser of the Trading Business.

149. Of course, David Wong also signed numerous cheques and other documents, and took part in various board meetings (sometimes as a person "in attendance") relating to the transactions. As to the minutes of meetings, David Wong said during cross-examination that the meetings may or may not have taken place on the date identified on the minutes, but that normally a meeting was held and then minutes were prepared afterwards. He specifically denied the suggestion put to him that the mere existence of board minutes did not necessarily mean a meeting as recorded had taken place at all. He also said that some board minutes were prepared by himself, meaning that he actually typed them out himself, after which Lillian Wong would them put into the company format and into the corporate department company minutes book.

150. Regarding the ultimate use of the money, David Wong signed the debit authorisation form for Peninsula to transfer the sum of HK$764,322,536 from Peninsula to Richemont, as the consideration for the buy-back of the Company shares.

151. I also accept on the evidence that David Wong was in effective control of seven of the eight Debtors. Various unusual features pointed out in the KPMG Report identify that the Debtors were not genuine trading entities. David Wong accepted that it was his idea for the nominees to become directors of the various Debtors, and that generally the business and money dealings between the Debtors and the Company were handled by himself. Whilst he did not accept that it could be said that the nominees were under his instruction, and he pointed out that there were no trust or nomination agreements, he did accept in evidence: (1) that he would make suggestion, or would make advice, which he always did; (2) that Benny Wong acted under his advice and suggestion; and (3) that Gary Lai would follow his advice, because he respected him and his advice.

152. David Wong admitted that he acted in breach of his duty of care and skill, including such an admission made in his written closing submissions. He admitted that there were significant weaknesses and failings in the Company's internal control and risk management

system, which was his area of responsibility. He has not admitted defalcation.

153. David Wong admitted his breach of his duty to act in the best interest of the Company, in particular by reference to the HK$622 million, but also in relation to the Doubtful Receivables. He admitted that the idea of the "defeasance loan" was his, and that it originated from bad advice by him. As he put it in his closing submissions, it did not come to his mind at the time that the "defeasance loan" concept gave rise to any possible irregularity or insufficiency of the advice of proposal. Nevertheless, with hindsight he accepts that he should have suggested to Mr Seeberger and the board of the Company to seek alternative legal and financial advice about the feasibility of the "defeasance loan" concept for the Richemont Transaction, and the requirement or not of making public disclosure of such an arrangement.

154. David Wong also admitted putting himself in a various position of conflict of interest when acting as a director of the Company, in relation to the transfer of funds to Peninsula used by Peninsula to fund the buy-back, because he was also a director of Peninsula. Indeed, he agreed that was why he resigned as an executive director and company secretary of the Company in August 2007, though he said the purpose was for him to concentrate on looking for a buyer for Peninsula. Possible conflicts of interests between David Wong's roles were referred to in the Company's public announcement of his resignation as director dated 13 August 2007.

D.3 Peter Lee

155. I accept that Peter Lee was involved in the transactions which led to the Doubtful Receivables, and to the payment of the HK$622 million out of the Group.

156. As to the Doubtful Receivables, Peter Lee's name and signature appears on many of the board minutes, transaction documents, and the relevant cheques. As to the payment of the HK$622 million out of the Syndicated Loan to Uni-Star, Goloda and Elite Choice, Peter Lee's signature appears on the cheques for two of the transactions, and he was stated to have been "present" at the board meetings of the Company's subsidiaries during which two of the transactions were approved.

157. As to the cheques and documents where his signature appeared, Peter Lee admitted in his evidence that he had the habit of signing blank cheques and even blank sheets of paper in advance (providing them to Kerie Fung in the accounts department), and on occasions would sign other cheques and documents without checking their contents, on the assumption that they had been checked by David Wong or Tony Chik. He said he did this in the context that he was busy and needed to sign "200 to 300 documents per week".

Therefore, in relation to various cheques which he signed or co-signed, but of which he had no specific recollection, Peter Lee accepted in evidence that they either "could be or probably" were blank cheques previously signed and subsequently filled in. I agree with that probability.

158. I think it significant that there does not seem to have been any procedure by which Peter Lee sought to establish, after his return from any trip, the purpose for which any cheque signed in blank might have been used. He seems to have made no enquiries, and there was no system by which he would have been automatically informed. Even when asked to sign further blank cheques, he made no enquiries as to what had happened to the previous ones signed by him.

159. As to board meetings at which he was recorded as being "present", Peter Lee was able to demonstrate that he was not in Hong Kong on 11 and 13 July 2007. But, for example as regards the minutes dated 11 July 2007, he also accepted that it was possible for him to have had a discussion with Tony Chik before he left Hong Kong – his full answer being, "It was likely, it was possible, I'm not sure. I can't remember." As regards the minutes dated 13 July 2007, Peter Lee accepted that it was possible, but he really could not remember, that he had a discussion with Tony Chik about the material transaction. In any event, it was Peter Lee's own evidence that most board meetings of subsidiaries were held on paper, a practice developed for convenience because some directors were overseas. On balance, I find that Peter Lee did have discussions with the other directors about the transactions dealt with on the board minutes, even if he was not physically present at a board meeting on the exact day the minutes suggest. For the avoidance of doubt, I make that finding as a matter of inference not by merely preferring one guess over another, but as a matter of likelihood from the totality of the evidence. It seems to me that the primary facts proved form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which I may reasonably be satisfied.

160. During an interview with the SFC investigators on 4 February 2008, Peter Lee was asked whether, when he signed the cheques and documents relating to the doubtful transactions mentioned in the KPMG Report, he did anything to verify the procedures involved in the transactions, such as checking whether there was proper board approval, whether due diligence had been conducted for the transactions and so forth. His answer was that he did not. But he went on to say, amongst other things, that there was a division of labour within the Group. The director who oversaw the corporate planning department was in charge of the transactions and matters handled by the corporate planning department, that is David Wong was in charge of that. He said he all along believed that David Wong would handle the necessary work procedures.

161. It may be that Peter Lee's denial of involvement in certain transactions was really a denial of "conscious" or "knowing" involvement. But I accept Mr Fung's submission that any such distinction would not matter to the analysis as to whether or not there was misfeasance or other misconduct for the purpose of section 214(1)(b). Indeed, at least in part, Peter Lee made admissions on the basis that he ought to have known things which he says he did not know.

162. In his admitted facts, Peter Lee admits that he breached the duty of care and skill in relation to Trading Business, Promissory Notes and Strategic Investments.

163. Insofar as the Doubtful Receivables arising from Trading Business are concerned, Peter Lee admits that he failed to exercise reasonable care, skill and diligence to protect the Group Companies' best interests because:

> (1) there was an absence of proper procedures, or due inquires and due diligence carried out by him, who relied upon the judgment, information and advice of David Wong and Tony Chik (who were responsible for corporate planning and treasury matters of the Group Companies respectively) and believed that the Trading Business were in the Group Companies' best interests;
>
> (2) he failed to independently consider whether it was in the Group Companies' best interest to enter into the Trading Business and failed to take any or any reasonable steps to protect the interests of the Group Companies; and
>
> (3) he has allowed or permitted the Group Companies to part with their funds in circumstances where the Group Companies were exposed to unnecessary and/or unreasonable risks of losses caused by the Trading Business.

164. However, Peter Lee does not admit that he approved and/or procured the Group Companies to enter into the substantial transactions and make substantial payments to third parties which gave rise to the Doubtful Receivables arising from Trading Business.

165. Insofar as the Doubtful Receivables arising from Promissory Notes and Strategic Investments are concerned, Peter Lee admits that he failed to exercise reasonable care, skill and diligence to protect the Group Companies' best interests because:

> (1) there was an absence of proper procedures, or due inquires and due diligence carried out by him, who relied upon the judgment, information and advice of David Wong and Tony Chik (who were responsible for corporate planning and treasury matters of the Group Companies respectively) and believed that the

Promissory Notes and the Strategic Investments were in the Group Companies' best interests;

(2) he failed to independently consider whether it was in the Group Companies' best interest to enter into the transactions relating to Promissory Notes and the Strategic Investments and failed to take any or any reasonable steps to protect the interests of Group Companies;

(3) he has allowed or permitted the Group Companies to part with their funds in circumstances where the Group Companies were exposed to unnecessary and/or unreasonable risks of losses caused by the Promissory Notes and the Strategic Investments; and

(4) he failed to protect the Group Companies' best interests before approving the transactions and/or causing, procuring or permitting the Group Companies to enter into the substantial transactions and make substantial payments to third parties which gave rise to the Doubtful Receivables arising from Promissory Notes and the Strategic Investments.

166. Peter Lee does not make an any express admission of breach of duty of care and skill in relation to the Doubtful Receivables arising from Richemont Transaction, and the payment of the HK$622 million. He expressly does not admit that:

(1) he was aware of the intention of Peninsula to acquire the interest held by Richemont in Joint Asset Limited from Richemont or the entering into the said acquisition by Peninsula before it was made known to the Company by Peninsula on 11 July 2007;

(2) he was aware that the Company was involved in financing the said transaction before the KPMG report;

(3) he was involved in approving the Deeds of Debt and Memorandum of Agreement, or causing, procuring or permitting the Group Companies to enter into those transactions and make substantial payments to third parties which caused or gave rise to the Doubtful Receivables arising from the Richemont Transaction;

(4) failed to take any or any reasonable steps to protect the interests of the Group Companies insofar as it concerns the Richemont Transaction; and

(5) allowed or permitted the Group Companies to part with their funds in circumstances where the Group Companies were exposed to unnecessary and/or

unreasonable risks of losses caused by the Richemont Transaction.

167. On the other hand, supposedly without prejudice to those non-admissions, Peter Lee does admit that:

(1) he might have signed the relevant cheques and documents in relation to the transactions giving rise to the Doubtful Receivables arising from Trading Business, Promissory Notes and Strategic Investments, without paying attention to or knowing the details of the transactions and sometimes without having seen the supporting documents;

(2) signed some blank cheques and blank papers handed to him by Kerie Fung (Assistant Accounting Manager of the Compnay) when he was about to leave Hong Kong;

(3) although he had not participated in the relevant transactions, he signed cheques because he was an authorized bank signatory of the relevant subsidiaries in Hong Kong.

168. Nevertheless, I find that he was in breach of duty also in relation to the Richemont Transaction.

169. Whilst merely signing blank cheques or documents might not, of itself, always amount to a breach of duty, whether or not there is a breach will depend upon the overall circumstances. In these particular circumstances, and against the size of the amounts involved, and the failure to have taken any steps after returning from trips to have found out what happened to individual pre-signed blank cheques or other documents, I think there was a breach of the duty of care and skill. Further, Peter Lee also admitted signing (non-blank) documents without checking their contents, simply assuming they had been checked by David Wong and/or Tony Chik.

170. As to the duty to act in the best interests of the Company, I accept that Peter Lee's admissions mean that he simply did not apply his mind to whether the transactions involved in the Trading Business, Promissory Notes, and Strategic Investments were in the best interests of the Company. Nor did he assert that he actually applied his mind to whether the transactions forming the Richemont Transaction were in the best interests of the Company. Mere reliance on or trust of other directors is insufficient. In the absence of any actual application of his mind to the relevant question, an objective test is applied, and I agree with the submission made by Mr Fung for the SFC that there is no basis upon which an honest and intelligent man in the position of a director of the Company could have

reasonably believed that the transactions which led to the Doubtful Receivables were for the benefit of the Company.

171. I note that in any event, though apparently intended to exclude anything arising from the Richemont Transaction, Peter Lee admits that the business or affairs of the Company have been conducted in a manner involving misfeasance or other misconduct towards the Company, its member or part of its members and/or unfairly prejudicial to its members or any part of its members. He denies defalcation.

D.4 Tony Chik

172. Tony Chik was, and he has accepted he was, involved in the transactions leading to the Doubtful Receivables, and to the payment of the HK$622 million out of the Group.

173. In respect of all of the matters, Tony Chik's name and signature appears on many of the board minutes, transaction documents, and cheques. There was also unchallenged evidence from Kerie Fung that Tony Chik also signed blank cheques.

174. In relation to the relevant transactions giving rise to the Doubtful Receivables, Tony Chik accepts that had not set up any separate or adequate procedures or undertaken any independent due inquiries and due diligence when carrying out actions and/or transactions to implement these instructions from senior management, believing that these decisions were in the Group Companies' best interests. Tony Chik also accepts that he thus failed to exercise reasonable care, skill and diligence to protect such interests, before approving the transactions and/or causing, procuring or permitting the Group Companies to enter into the substantial transactions and make substantial payments to third parties which gave rise to the Doubtful Receivables.

175. Tony Chik admits his breach of the duty of care and skill in relation to the Doubtful Receivables and the payment of the HK$622 million. Further, where he admits that he did not apply his mind as to whether the transactions involved were in the best interests of the Company, the objective test again applies. I accept that there is no basis upon which an honest and intelligent man in the position of a director of the Company could have reasonably believed that the transactions which led to the Doubtful Receivables were for the benefit of the Company.

176. Though there remained some confusion as to whether Tony Chik accepted or recognized that the transactions in respect of the Promissory Notes were not made in the Group Companies' best interests, Tony Chik accepts that he failed to exercise sufficient reasonable care, skill and diligence before approving the transactions and/or permitting the

Group Companies to enter into the transactions and make payments to Upbest Asia, Asia Top and/or Uni-Star. He also accepts he failed to ensure that proper procedures, due inquiries and due diligence were carried out to protect the interests of the Group Companies.

177. As to the Strategic Investments, Tony Chik accepts that he failed to exercise sufficient reasonable care, skill and diligence before approving the transactions and/or causing, procuring or permitting the Group Companies to enter into the transactions and make payments to Goloda, Upbest Asia, and/or Elite Choice. He also failed to ensure that proper procedures, due inquiries and due diligence were carried out to protect the interests of the Group Companies.

178. Without recognizing that the transactions in respect of the Richemont Transaction were not made in the Group Companies' best interests and relying solely on the instructions of David Wong, Tony Chik accepts that he failed to exercise adequate reasonable care, skill and diligence before approving the transactions and/or causing, procuring or permitting the Group Companies to enter into the transactions and make payments to Goloda, Uni-Star, and/or Elite Choice. He also failed to ensure that proper procedures, due inquiries and due diligence were carried out to protect the interests of the Group Companies.

179. More broadly, Tony Chik admits that in respect of the transactions giving rise to the Doubtful Receivables, David Wong had asked or arranged for him and Peter Lee to sign the relevant cheques, documents and board minutes of the Group's subsidiaries to approve the transactions. However, the board minutes were prepared only after the payments had already been made and they were only paper meetings. When David Wong told him or arranged for him to sign such board minutes, cheques and documents, David Wong did not give any explanation or supporting documents to Tony Chik, and Tony Chik just signed them without making any enquiry about the underlying transactions. David Wong had also asked him to sign blank cheques and blank papers whenever he was about to leave Hong Kong, and Tony Chik would act in accordance with David Wong's requests because he was an authorised bank signatory of the Group's subsidiaries in Hong Kong and he trusted David Wong. Tony Chik admits that, as far as he was aware, there was no procedure, and no due diligence was performed, to verify the authenticity or the recoverability of the loans and investment transactions giving rise to the Doubtful Receivables handled by David Wong.

180. Further, Tony Chik agrees he was present at some of the meetings held between David Wong and Kerie Fung when David Wong explained what he wanted Ms Fung to do

as regards the billing and payment arrangements for the transactions in relation to the Trading Business.

181. Tony Chik therefore admits that:

(1) he failed to ensure that proper procedures, or due inquiries and due diligence were carried out before the Group Companies entered into substantial transactions and made substantial payments to third parties and he therefore failed to exercise reasonable care, skill and diligence to protect the Group Companies' interests before approving the transactions and/or causing, allowing or permitting them to enter into such substantial transactions;

(2) he failed to independently consider whether it was in the Group Companies' best interests to enter into the relevant transactions giving rising to the Doubtful Receivables, and failed to take any or any reasonable steps to protect the interests of the Group Companies;

(3) he acted in serious dereliction of his duties as an executive director of the Company in failing to exercise independent judgment when acceding to the requests or carrying out the instructions of David Wong which gave rise to the Doubtful Receivables;

(4) he allowed or permitted the Group Companies to part with their funds in circumstances where the Group Companies were exposed to unnecessary and/or unreasonable risks of losses. Further, he allowed or permitted the Group Companies to be exposed to the same Debtors in respect of different categories of the Doubtful Receivables, including to (a) Goloda in respect of the Trading Business (to the extent as stated in paragraph 94 hereinabove), Strategic Investments and the Richemont Transaction, (b) Upbest Asia in respect of the Promissory Notes and Strategic Investments and (c) Uni-Star in respect of the Promissory Notes and Richemont Transaction; and

(5) without recognizing the impropriety and/or the possibility of improper purpose, he allowed and/or permitted a substantial part of the Syndicated Loan to be used for purposes contrary to the purpose of the Syndicated Loan as stated in the Company's announcement dated 15 June 2007 (in that the funds were used to fund Peninsula's purchase of the Company's shares from Richemont instead of being used "*for refinancing existing bank loans of approximately HK$300 million and for general working capital requirements*").

182. Tony Chik acknowledges and accepts that the business or affairs of the Company was conducted in a manner involving misfeasance or other misconduct towards the Company, its members or part of its members, and/or unfairly prejudicial to its members or any part of its members. However, he also denies defalcation.

D.5 Overall

183. I am satisfied that each of David Wong, Peter Lee and Tony Chik have acted in a way which triggers section 214(1).

184. Each of the Directors has admitted to misfeasance or other misconduct under sub-section 214(1)(b), but has at the same time denied defalcation. But it seems to me that the misapplications of the Company's monies through the activities leading to the Doubtful Receivables plainly fall within the broad meaning of that term (see above). I find that each has acted in defalcation, misfeasance or other misconduct (sub-section 214(1)(b)), and in a manner unfairly prejudicial to the members of the Company (sub-section 214(1)(d)).

185. As to the failure to have given all information to the members (sub-section 214(1)(c)), as the authorities suggest this perhaps almost necessarily flows from the other breaches. But in particular, whilst I do not accept that the public announcement dated 15 June 2007 relating to the Syndicated Loan was materially inaccurate at the time that it was issued, it clearly subsequently became so, at the very latest after the directors had received the KPMG Report in October 2007.

186. I accept that, as David Wong submitted, at the time of the making of the Syndicated Loan, and the relevant public announcement, the statement that the Syndicated Loan was partly for bank loan repayment and the balance for working capital was proper and true. The Richemont put option and the "defeasance loan" concept were not yet in place, and a significant jump in the amount of the Syndicated Loan from the originally planned HK$400 million to HK$1 billion was because the syndicated banks were offering to fund a larger sum.

187. But in his closing submissions, David Wong accepted that an announcement on the change of use of the process of the Syndicated Loan became a requirement in the circumstances as they changed from mid-July 2007 to the end of July or early August 2007. At least David Wong knew of the changed circumstances as he was instrumental in making those changes. He should have but failed to cause the Company to issue a further public announcement. Also, by the time of the KPMG Report in October 2007, though David Wong had ceased to be a director of the Company with effect from 13 August 2007, Peter Lee and Tony Chik remained directors and should have but

failed to cause the Company to issue a further public announcement. I find each of the Directors to have acted in breach of sub-section 214(1)(c), though that perhaps adds little to those breaches already established under the other sub-sections, on my other findings.

E. Disqualification Orders

188. In closing submissions, Mr Fung for the SFC first addressed the periods of disqualification which it sought against Peter Lee and Tony Chik. He described their breaches as "extremely serious", emphasising that both were executive directors of the Company, and that Peter Lee was the Deputy Chairman of the Group and responsible for the operational and general management of the Group's Hong Kong and Mainland China operations whilst Tony Chik was the Group Treasurer and responsible for the financial and treasury operations of the Group.

189. Further, both Peter Lee and Tony Chik were clearly involved in the transactions giving rise to the four categories of the Doubtful Receivables, in which large numbers of blatantly uncommercial transactions were conducted not in the best interests of the Group Companies. They occurred in circumstances where both Peter Lee and Tony Chik were content to sign documents without independent consideration, simply assuming that David Wong had done the appropriate due diligence. There was no attempt to resist or question the directions given to them by David Wong. The transactions caused enormous losses to be suffered by the Company.

190. Through Mr Fung, and including by reference to previous cases, the SFC therefore suggests that the appropriate period of disqualification for Peter Lee and Tony Chik should be 7 years. Mr Fung submits such a period would be entirely in line with the disqualification period suggested by Peter Lee and Tony Chik themselves.

191. As to the position of David Wong, Mr Fung submits that his breaches were even more serious than those of Peter Lee and Tony Chik. Mr Fung emphasised that David Wong was an executive director of the Company, the Director of Corporate Planning and Control of the Group and responsible for overseeing corporate planning and strategic partnership projects as well as internal control and risk management functions. It was David Wong who initiated the transactions giving rise to each of the four categories of the Doubtful Receivables, in which large numbers of blatantly uncommercial transactions were conducted not in the best interests of the Group Companies. David Wong drafted documents involved in some of the transactions, as well as signing cheques and other documents. The transactions caused enormous losses to be suffered by the Company.

192. Mr Fung also relied on the fact that David Wong contested the proceedings and

sought to defend the legitimacy of the transactions throughout the trial, and did not agree that there had been any defalcation. However, I think that may be putting it a little too high, where it seemed to me that David Wong was no longer in general seeking to justify his failures looking back with the benefit of hindsight, albeit that at the time he regarded himself to have acted appropriately.

193. Mr Fung therefore submitted that David Wong should be subject to a disqualification period of 10 years, which it was said was also entirely in line with the period suggested by David Wong himself.

194. David Wong has pointed out that he has been suffering the "disqualification effect" for the past 8 years or so. This is because since the Petition in these proceedings was issued in 2011, he has been in practice disqualified from accepting any offer for directorship of a listed company or management position, given that the relevant Form B requires all directors of a listed company to make declarations and disclosure of any existing investigation by the authorities. Therefore, if the 7 or 8 years of official disqualification order which he proposes were to be accepted, he would effectively take an aggregate disqualification period of some 16 years, which would be even beyond the highest period for most the serious cases of around 15 years.

195. David Wong also suggested that his proposed period of disqualification might be arrived at by adding a "30% loading" onto Tony Chik's agreement to a 6-year period, on the basis that Tony Chik's income was approximately 30% lower than that of himself.

196. On behalf of Peter Lee, Mr Mak submitted that in the absence of illicit gain and dishonesty on the part of Peter Lee, his case should be kept out of the middle bracket. Further, in considering the appropriateness of the period of disqualification to be made in respect of Peter Lee, Mr Mak submitted that it is relevant, albeit not decisive, to have regard to the periods of disqualification also imposed on David Wong and Tony Chik in respect of the same transactions, where their roles were clearly different.

197. Mr Mak submitted that Peter Lee's involvement was understandably less in the Company's finance and treasury matters, as compared to Tony Chik. Further, Peter Lee was cooperative with the SFC, and reasonably admitted part of the complaints against him when he served the Notice of Agreed Facts on 6 November 2019 on his own volition. As to that last point, I do not think it is as strong as Mr Mak suggested. The proceedings were commenced in 2011, and there was no agreement or admission even in the opening submissions at trial in late 2019. Even the admissions made during trial were to matters and breaches more limited than I have found proved.

198. For Tony Chik, Mr Ko submitted that Tony Chik was the "most junior and least influential of all of the executive directors all along" and the Statement of Agreed Facts proceeded on the basis that Tony Chik acted in the belief that the decisions were made in the Group Companies' best interests, hence his various admissions that he had failed to exercise sufficient reasonable care, skill and diligence were made on the basis that he had not recognised that the transactions were not made in the Group Company's best interests. In particular, and based on David Wong's evidence, Mr Ko submitted that there was no reason why Tony Chik should have suspected that the Company's funds would be used for improper purposes under the Richemont Transaction. Mr Ko submitted that Tony Chik would not have foreseen that Goloda, Uni-Star and Elite Choice were not genuine third parties but David Wong's nominees, and he went so far as to submit that even had there been proper procedures in place it is unlikely that Tony Chik would have discovered the nominee arrangement. I reject the latter part of that submission. As to the former part, focusing on foreseeability is something of a misdirection; the point is that there ought to have been due diligence and proper care exercised, but there was not.

199. It is also no answer for any of the Directors to say that if everything had gone swimmingly and the money had come back into the Company or the Group, then no one would complain and no one would worry about shoddy paperwork. The point is that the money left the Group and did not come back, giving rise to the enquiries as to why the money did not come back and whether that could have been properly guarded against by any or all of the Directors.

200. I have considered all the points made by each of the parties, against the twofold purpose of imposing a qualification order. I do not propose to rehearse them all. As required, I necessarily adopt a broad-brush approach, where it seems to me that earlier decided cases will be of limited assistance to the exercise of the Court's discretion. I do not think it necessary or particularly helpful to go through other cases by way of comparison. The period of disqualification must reflect the gravity of the offence. I take as a starting point of assessment the gravity of the conduct, with a discount given for the mitigating factors.

201. In this case, I have in mind the long period of time since the events occurred which give rise to these proceedings, and the practical effect on the ability of the Directors to have acted as directors of any listed vehicle since 2011. I take into account what seems to me to be the Directors' respective and relative responsibilities, and the degree to which, and the timing when, each has been cooperative or made admissions. I accept that David Wong should serve a longer period of disqualification than Peter Lee and Tony Chik. The starting point of assessment for all three would be well into at least the middle category of 6 to

10 years, with David Wong at the higher end.

202. But in light of all the circumstances and mitigating factors, it seems to me in the exercise of my discretion that the following periods of qualification should apply from the date of this Judgment:

(1) David Wong: 9 years;

(2) Peter Lee: 6 years;

(3) Tony Chik: 6 years.

F. Compensation Order

203. For the SFC, Mr Fung submitted that a compensation order can be made irrespective of whether a respondent has received any financial benefits. As stated above, this recognises that there may be a distinction between a "compensation order" and a "restitution order".

204. Mr Fung submitted that there can be no doubt that but for the involvement of the Directors in the Richemont Transaction, the Company would not have lost the US$622 million from the Syndicated Loan which was paid to Elite Choice, Goloda and Uni-Star. Therefore, he submitted, there is no difficulty with causation. Mr Fung also submitted that there is no difficulty in ascertaining the amount of compensation which is due to be paid to the Company, where the unchallenged evidence identifies HK$622 million of the Company's money being funnelled through a series of intra-Group transfers until the eventual transfer out of the Group, to fund Peninsula's buy-back from Richemont.

205. Mr Fung also submitted that the SFC's case on compensation does not depend on Peninsula's receipt of the money from the three Debtors, and does not depend on Peninsula's further payment to Richemont. The SFC's case is complete when the HK$622 million which belonged to the Company was collectively received by the three Debtors, for that was when the Company had lost that sum of money.

206. Each of the Directors opposed the making of any compensation order against him.

207. David Wong referred to the recent Ng J decision in *SFC v Chin* (see above), and submitted that the agreed compensation order seems to have come from the Court's primary reference to three factors, being: (1) a family relationship with the sellers in the acquisition; (2) significant control of the companies in acquisition; and (3) the bulk of the total consideration for the acquisition having ended up in bank accounts controlled by

Mr Chin or persons related to him. David Wong compared that to his own position where he said: (1) he had no family relationship with Peninsula, or its owner Mr Seeberger and his family; (2) he had no significant control, indeed no control at all, over Peninsula because (a) he did not have any shareholding interest in Peninsula, nor one in the Company, and (b) he was nominated to be a director of Peninsula pursuant to a Joint Asset shareholder agreement, at no salary or remuneration or any share option benefit, so he was effectively a nominee director; and (3) he did not receive any benefit or reward out of the HK$622 million sum, whether directly or indirectly.

208. However, I do not think the question of any family relationship is likely to be determinative. I do accept that matters of control and of direct or indirect benefit may be of greater weight in the overall consideration as to whether or not to make a compensation order. But those matters are also distinct from other aspects of the consideration.

209. As has been pointed out by Mr Ko, the Company has been in the control of the Provisional Liquidators since 6 March 2009, and they were appointed Liquidators on 9 September 2011. There was no impediment to prevent the Liquidators bringing proceedings in the Company's name against any alleged wrongdoers, in order to recover damages. However, no action has been commenced in the Company's name in this regard.

210. Mr Mak has denied that there was causation between any breach by Peter Lee and the Company's loss of HK$622 million. More directly, Mr Mak submitted that the SFC had sidestepped its burden to prove the exact extent of the loss suffered by the Company that was caused by the Directors. He said that the SFC's seemingly straightforward submissions are built on the false premise that the loss suffered by the relevant subsidiaries necessarily equates to the loss of the Company, ignoring David Wong's testimony that the intra-group transfers were legitimate and for good business reason. Peter Lee has also not made an admission that the intra-group transfers were made without commercial reason.

211. However, I have found that to be so – albeit by reference to the 'big picture' or endpoint, and not necessarily by reference to each and every intermediate transfer through the various Group Companies which were the conduits of the funds. Mr Power's evidence, which I accept, was that he had not been provided with any documentation which evidence a legitimate reason to have funnelled money through the companies. No one could explain to him any genuine reason to have transferred monies from one company to another, to the next and to the next, before it left the Group. It must be thought surprising and inherently odd that (as just one example) one tranche of money, in the sum of HK$89.8 million, bounces through various companies in that sum before it leaves the Group. If there were general commercial reasons for various transfers between Group Companies, it is unlikely

that they would be all in precisely the same sum. In any event, David Wong accepted in evidence that the point of transferring the various sums through the conduit companies was to get those sums to an end point where they might be provided through the third party Debtors to Peninsula, irrespective of any individual internal justification which might have been put forward for any one transfer along the line of conduit.

212. As to whether the relevant compensation sum is readily ascertainable, clearly this case is not one of those where there is an agreement between the parties which agreement constitutes the ascertainment of the sum of compensation. Mr Mak submits that the SFC has failed to prove that loss necessarily suffered by the Company in the exact amounts when and where Centreline, Egana Investment and Egana.com received transfers from the other Group Companies. The fact that the SFC elected not to ask for an order that the Court direct the Company or the relevant subsidiaries to bring proper proceedings does not elevate the SFC case into one for which no further enquiries are necessary for a proper compensation order to be made. On causation generally, he says it remains open to the Directors to contend that not all of the losses suffered by the Company as a result of the transactions were attributable to their breaches of duty. Questions might arise as to principles of recovery, foreseeability, mitigation and contributory negligence (where other executive directors were involved, and their knowledge might be imputed to the Company).

213. Mr Ko also submits that the potential defences available in a civil action have to be brought into consideration. In this case, he says, Tony Chik has defences available to him which cannot be resolved in these proceedings. He says that time bar is obviously an issue. Further, the issue of causation is also pertinent. In opening submissions, Mr Ko suggested that the issue of causation has not been pleaded in the Petition. But it has, at §137 of the Re-Amended Petition, where the SFC in terms "contends that the losses arising from the Doubtful Receivables suffered by the Group Companies were caused by the Directors' breaches of [various duties] and the Directors are liable to compensate or make good the losses suffered by the Group Companies".

214. In his closing submissions, Mr Ko identified that in the *Styland* case Barma J drew a distinction between (1) misappropriation of group funds and (2) losses arising out of the impeached transactions entered into without proper authorisation and in breach of the Listing Rules. Barma J made a compensation order in relation to the former, but not the latter. Mr Ko also relied on some doubt as to what the amount of the loss allegedly was. He said, for example, there was no evidence to explain the contradiction between Tiffany Wong's KPMG Report, and the situation depicted by the bank statement, a possible discrepancy pointed out by the Court during the trial (though I think that discrepancy was explained away by Mr Fung in his closing submissions).

215. I accept that the power to make a compensation order arises to enable the Court to do the widest possible things to achieve justice on the facts of any particular case. I also accept that there may be certain breaches where principles of foreseeability and remoteness do not come into play. I do not instinctively warm to the submission made for Peter Lee and Tony Chik that the "but for" test might not be satisfied because David Wong would have ensured that the Company's money reached Peninsula, irrespective of their own actions or inaction. Nevertheless, I do not think that issues relating to time bar, remoteness, causation and mitigation are necessarily entirely straightforward, and I do not think that they have been sufficiently addressed in these proceedings for me to resolve them. That is not to criticise the way in which the proceedings have been brought by the SFC. Rather, it simply identifies that proceedings brought by the SFC, exercising its public or regulatory functions by reference to section 214(1), may not always be the appropriate proceedings within which to resolve matters relating to "damages" or "compensation", irrespective of the obvious desire to achieve the widest possible justice within one set of proceedings where appropriate.

216. I accept, therefore, that it should remain with the Liquidators to assess the efficacy as to whether it would be beneficial to bring proceedings in the name of the Company against any party.

217. On balance, and in the exercise of my discretion, I decline to make any compensation order against the Directors in these proceedings. Therefore, questions of interest do not arise.

G. Orders

218. In the circumstances, I make the following orders:

219. Pursuant to section 214(2)(d) of the SFO, David Wong shall not, for a period of 9 years from the date of this order, without leave of the Court:

> (a) be, or continue to be, a director, liquidator, or receiver or manager of the property or business, of any listed or unlisted company in Hong Kong including the Company or any of its subsidiaries and affiliates; and
>
> (b) in any way, whether directly or indirectly, be concerned, or take part in the management of any listed or unlisted company in Hong Kong including the Company or any of its subsidiaries and affiliates.

220. Pursuant to section 214(2)(d) of the SFO, Peter Lee shall not, for a period of 6 years

from the date of this order, without leave of the Court:

(a) be, or continue to be, a director, liquidator, or receiver or manager of the property or business, of any listed or unlisted company in Hong Kong including the Company or any of its subsidiaries and affiliates; and

(b) in any way, whether directly or indirectly, be concerned, or take part in the management of any listed or unlisted company in Hong Kong including the Company or any of its subsidiaries and affiliates.

221. Pursuant to section 214(2)(d) of the SFO, Tony Chik shall not, for a period of 6 years from the date of this order, without leave of the Court:

(a) be, or continue to be, a director, liquidator, or receiver or manager of the property or business, of any listed or unlisted company in Hong Kong including the Company or any of its subsidiaries and affiliates; and

(b) in any way, whether directly or indirectly, be concerned, or take part in the management of any listed or unlisted company in Hong Kong including the Company or any of its subsidiaries and affiliates.

222. The SFC's costs in these proceedings (including all reserved costs) shall be paid by the Directors, to be taxed if not agreed with certificate for two Counsel.

223. For the avoidance of doubt, in light of the nature of the proceedings and the way in which the allegations were broadly similar against each of the Directors (albeit with different areas of emphasis), in the exercise of my discretion I direct that the Directors shall be liable for costs jointly and severally.

(Russell Coleman)
Judge of the Court of First Instance
High Court

Mr Eugene Fung SC and Mr Wilson Leung, instructed by Securities and Futures Commission, for the petitioner

The 1st respondent acting in person

Mr Bernard Mak and Mr Lok Ho, instructed by Leung, Tam & Wong, for the 2nd respondent

Mr Tony Ko and Ms Anna M. W. Chow, instructed by C.O. Yu & Co, for the 3rd respondent

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[1] Interest receivable is not included

[2] Equivalent to US$11,751,629.77