

Case Comment

**A SOBERING LESSON FOR COMPANIES WITH
ERRANT EMPLOYEES**

OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd
[2020] SGHC 142

[2021] SAL Prac 4

In *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 (“*OUE*”), the Singapore High Court examined whether a corporate lender can be liable to a corporate borrower when the loan is misused by the latter’s officers. In *OUE*, a lender was found liable in conspiracy, in part due to the mental state of the lender’s errant employee which was attributed to the lender. This article seeks to analyse the practical implications of the High Court’s decision, and to provide suggestions for corporate lenders to avoid being liable for dishonestly assisting a corporate borrower’s fraudulent officers.

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I. Introduction

1 The proliferation of misfeasance amongst employees signals a prevailing need for employers to adhere to more stringent corporate protocol that eradicates such wrongdoings. Many employers, however, struggle to generate a strategy that effectively counters unruly conduct whilst respecting the morale integrity of their employees. The incorporation of a strenuous corporate code of conduct indirectly manifests an employer’s veiled diminution of trust in its employees; an arguably lax regulatory framework merely scraps the tip of the iceberg. Stuck between two polarities, an employer may stumble

towards achieving the most effective method of circumventing unacceptable corporate conduct.

2 Consequently, the lack of a well-balanced regulatory mechanism opens a loophole for dishonest employees. Coupled with insider knowledge of how the corporation functions, crafty employees (especially those who are highly ranked) would be able to undermine the mandatory protocols that protect the integrity of a corporation's financial health.

3 Such unscrupulous conduct on the part of corporate employees formed the basis of the plaintiffs' claim in *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd*¹ ("OUE"). In *OUE*, it was alleged that eight defendants (five corporate lenders, two corporate employees and a substantial shareholder) had engaged in a conspiracy by unlawful means to injure the plaintiffs. This article seeks to unravel the threads of deceit undertaken by the defendants, and to provide adequate solutions to safeguard the future interests of both corporate borrowers and lenders.

II. Background of the parties

4 The first plaintiff, OUE Lippo Healthcare Ltd (formerly known as International Healthway Corp Ltd) ("IHC"), wholly-owns the second plaintiff, IHC Medical Re Pte Ltd ("IHC Medical") (collectively "the Plaintiffs"). It was alleged that eight defendants (collectively "the Defendants") had caused IHC to enter into a Standby Facility granted by the Crest Entities as lenders (as defined below), and the funds were used to indirectly acquire IHC's own shares. In this regard, the Plaintiffs claimed that the Defendants had engaged in a conspiracy by unlawful means to injure IHC by causing IHC to enter into the Standby Facility and cause losses to the Plaintiffs.² For ease of reference, a list of the Defendants is summarised as follows:

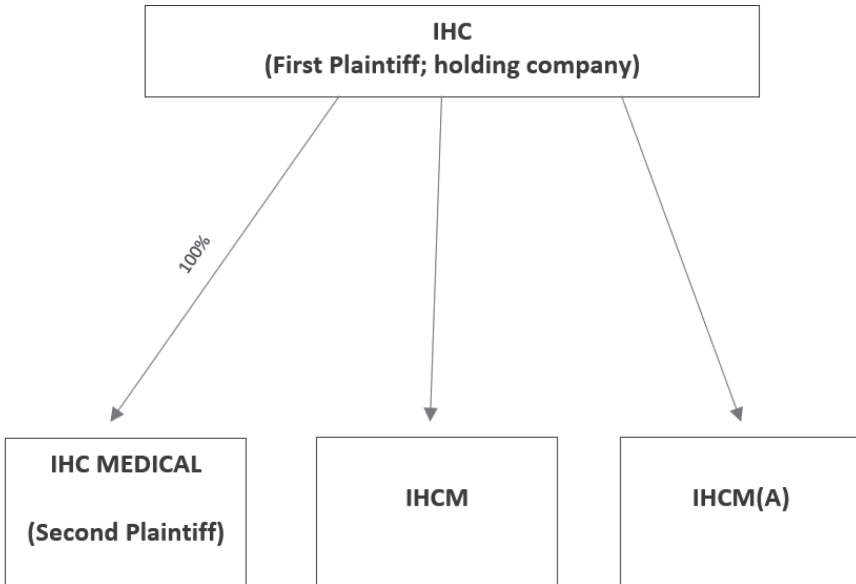
1 [2020] SGHC 142.

2 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [2].

Summary of the Defendants			
First Defendant	Crest Capital Asia Pte Ltd	It is a fund administration company and the holding company of the Second Defendant. ³	Collectively known as “the Crest Entities”
Second Defendant	Crest Catalyst Equity	It is a fund management company that manages affiliated private equity funds. ⁴	
Third Defendant	The Enterprise Fund III Ltd	They are funds administered and managed by the First and Second Defendants. ⁵	
Fourth Defendant	VMF3 Ltd		
Fifth Defendant	Value Monetisation III Ltd		
Sixth Defendant	Fan Kow Hin (“Fan”)	CEO of IHC whom the Plaintiffs claimed had breached his duty to IHC. ⁶ Substantial shareholder of IHC. ⁷	-
Seventh Defendant	Andrew Ah Kong Aathar (“Andrew”)	A substantial shareholder of IHC. ⁸	-
Eighth Defendant	Lim Beng Choo (“Lim”)	Officer of IHC whom the Plaintiffs claimed had breached her duty to IHC. ⁹	-

5 Apart from being the parent company of IHC Medical, IHC is also the holding company of two other subsidiaries: (a) IHC Management Pte Ltd (“IHCM”); and (b) IHC Management (Australian) Pty Ltd (“IHCM(A)"). For ease of reference, the chart below illustrates the subsidiaries of IHC:

3 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [11].
 4 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [11].
 5 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [11].
 6 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [2].
 7 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [58].
 8 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [2].
 9 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [2].



III. Background of the Standby Facility

6 The Standby Facility was a *short-term* credit facility granted to IHC amounting to \$20m (“the Loan”). This was used to supersede an initial facility agreement and to extend the facility to five months.¹⁰

7 Both Fan (*ie*, CEO and substantial shareholder of IHC) and Andrew (*ie*, substantial shareholder of IHC) were personal guarantors for the payment of sums due under the Standby Facility.¹¹ Security over the Standby Facility was provided by way of two deeds of share charges, whereupon IHC granted charges to be made over *all* the shares of its subsidiaries, namely IHC Medical, IHMC and IHMC(A).¹²

8 One of the Crest Entities, The Enterprise Fund III Ltd (“EFIII”) (*ie*, the Third Defendant), made 14 drawdowns on the Standby Facility, amounting to \$17,322,081.15, to purchase IHC

10 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [14].

11 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [16].

12 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [16].

shares on the open market (the “Open Market Acquisitions”).¹³ The IHC shares purchased by EFIII were held on trust for IHC¹⁴ (the “Trust Arrangement”). This was a prohibited transaction under s 76 of the Companies Act.¹⁵ Specifically, s 76 prohibits a *public company* (ie, IHC is a public company) from giving financial assistance, whether *directly or indirectly* for the purpose of, or in connection with, the acquisition or proposed acquisition by any person of shares in the company. The Standby Facility thus fell within the ambit of s 76 as it constituted a single transaction comprising the Loan, the Open Market Acquisitions and the Trust Arrangement whose sole purpose was to purchase IHC’s own shares.¹⁶ This thereby contravened s 76 as the purpose of the Standby Facility was to enable IHC to purchase its own shares (albeit held on trust by EFIII).

9 Further, whilst the transaction appeared to have a commercial benefit for IHC, it served to benefit Fan, Andrew and the Crest Entities.

(a) Fan and Andrew were the *substantial shareholders* in IHC, and their collective shareholdings in IHC were worth more than \$166m.¹⁷ In April 2015, IHC had noticed an “unusual sale pattern of its shares”, and an industry specialist had taken the view that there was a “‘high probability’ that there was a ‘stealth plot’ that would lead to an ‘imminent shorting of IHC shares’”.¹⁸ Due to the likelihood of the said short-selling, Andrew contacted the Crest Entities to provide the Standby Facility to be used “against [the] activity [of short-selling]”.¹⁹ It is significant to note that one of the terms that Andrew had proposed was that the Standby Facility was required to “defend IHC’s share price”.²⁰ Sneakily, the Standby Facility seemed to provide an illusion that it was protecting

13 *The Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd* [2019] 2 SLR 524 at 525.

14 *The Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd* [2019] 2 SLR 524 at 525.

15 Cap 50, 2006 Rev Ed.

16 *The Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd* [2019] 2 SLR 524 at [68].

17 *The Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd* [2019] 2 SLR 524 at [10].

18 *The Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd* [2019] 2 SLR 524 at [12].

19 *The Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd* [2019] 2 SLR 524 at [12].

20 *The Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd* [2019] 2 SLR 524 at [12].

IHC's interests (*ie*, defending its share prices). However, the fact that Andrew and Fan were *substantial shareholders* of IHC would inevitably mean that they would *benefit the most* from the Standby Facility. In other words, since the Standby Facility was to be used to defend "IHC's share price", this would in turn protect the value of Fan's and Andrew's collective shareholdings in IHC. Fan and Andrew thus stood to gain from the Standby Facility that was granted to IHC.

(b) Besides benefiting Fan and Andrew, the Standby Facility had also benefited the Crest Entities. In particular, Andrew had proposed that the Crest Entities purchase IHC shares through their own broker, and the Crest Entities had agreed to this proposal because it would provide the Crest Entities with *additional security* for the drawdowns on the Standby Facility.²¹

10 On 9 September 2015, an announcement was made by the SGX to caution shareholders and potential investors that connected parties were trading IHC shares amongst themselves. This led to the plummeting of IHC's share prices, which in turn resulted in IHC defaulting in the Standby Facility.²²

IV. Summary of the Plaintiffs' arguments

11 The Plaintiffs relied on three causes of actions against the Defendants:

(a) First, Fan and Lim (officer of IHC) had acted in breach of their duties to IHC.²³

(b) Second, the Crest Entities alongside Andrew and Lim had provided dishonest assistance to Fan.²⁴

21 *The Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd* [2019] 2 SLR 524 at [75].

22 *The Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd* [2019] 2 SLR 524 at 525.

23 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [2].

24 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [2].

(c) Third, all the Defendants had caused losses to the Plaintiffs by engaging in a conspiracy by unlawful means to injure IHC.²⁵

A. Breach of fiduciary duties

12 Fan was the group CEO of IHC from 17 May 2015 to 30 June 2015 and was subsequently the CEO of IHC from 30 June 2015 to 31 January 2016. The Plaintiffs further claimed that Fan was also, at all material times, the shadow director of IHM and IHM Medical.²⁶ Lim was an officer of IHC during the material period of time.²⁷

13 On this basis, the Plaintiffs claimed that both Fan and Lim owed the following fiduciary duties (with the exception that the duty under s 157(1) of the Companies Act did not apply to Lim):²⁸

- (a) A duty to act *bona fide* in their best interests;
- (b) A duty to exercise his powers for proper purposes;
- (c) A duty of fidelity;
- (d) A duty to avoid any conflict between his duties and his personal and other interests;
- (e) A duty to exercise due skill, care and diligence in the discharge of his duties; and
- (f) A statutory duty under s 157(1) of the Companies Act imposed on directors to act honestly and use reasonable diligence in discharging the duties of office.

14 The Plaintiffs claimed that, in breach of their respective fiduciary duties, Fan and Lim “caused IHC to enter into and draw down on the Standby Facility to purchase IHC shares”.²⁹

15 The premise for the breach stems from the fact that there was *no commercial purpose* for the Standby Facility, and it served

25 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [2].

26 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [56].

27 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [56].

28 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [56]–[57].

29 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [59].

mainly to “benefit the substantial shareholders, namely, [Fan] and [Andrew]”.³⁰

B. Dishonest assistance

16 The Plaintiffs further alleged that the Crest Entities alongside Andrew and Lim had dishonestly assisted Fan in the breaching of Fan’s fiduciary duties to IHC.³¹

17 The basis for forming such an allegation is due to the following factual matrix:³²

(a) The Crest entities agreed to extend the Standby Facility to IHC.

(b) [Andrew] negotiated with the Crest entities on the Standby Facility with the knowledge and authority of [Fan], and extended his personal guarantee to the Crest entities to facilitate the grant of the Standby Facility.

(c) [Lim] prepared and finalised the Standby Facility documents, and prepared and circulated the board paper to recommend IHC’s approval of the Standby Facility.

C. Unlawful means conspiracy

18 In causing IHC to enter into and draw down on the Standby Facility, the Plaintiffs alleged that *all* the Defendants had engaged in an unlawful means conspiracy to injure IHC by way of Fan breaching his fiduciary duties and contravening s 76 of the Companies Act.³³

19 In this regard, the Plaintiffs claimed that all the Defendants were *jointly and severally liable* by way of damages and/or equitable compensation for all the losses suffered by the Plaintiffs.³⁴

30 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [58].

31 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [60].

32 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [60].

33 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [61].

34 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [62].

V. Summary of the Defendants' arguments

20 Countering the Plaintiffs' arguments, the following were pleaded within the Defendants' defence and counterclaim:

(a) First, the Standby Facility was *widely worded* to allow IHC to use the funds for any purpose (including the purchase of IHC's own shares).³⁵ As such, the Crest Entities denied that they had "intended" to use the Standby Facility for the specific purpose of IHC acquiring its own shares.³⁶

(b) Second, when the Standby Facility was entered into, the Crest Entities claimed that they were not aware of any contravention of s 76 of the Companies Act by IHC.³⁷

(c) Third, in the Defendants' counterclaim, the Crest Entities sought to recover the sums drawn down from the Standby Facility by attempting to set-off and/or obtain an indemnity from IHC under cl 10.1 of the Standby Facility. However, the Court of Appeal in *The Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd*³⁸ determined that the Standby Facility, which funded indirect acquisition by IHC of its own shares, was void under s 76A(1)(a) of the Companies Act for contravention of s 76(1A)(a)(i) of the same.³⁹ As such, there was no basis for the Crest Entities to claim for losses under the specified clause. In this regard, the Defendants alternatively claimed to recover the drawdowns through the ground of unjust enrichment.⁴⁰

35 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [63].

36 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [63].

37 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [66].

38 [2019] 2 SLR 524.

39 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [5].

40 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [71].

VI. The Court of Appeal's decision

A. Fan's breach of fiduciary duties

21 The Court of Appeal found that Fan was liable for breach of his fiduciary duties to IHC for paying the sum of \$4,538,800 to the Standby Facility, and for causing the loss of use of payments amounting to \$4,440,780.77 under the Standby Facility.⁴¹

B. Crest Entities' and Andrew's accessory liability for dishonest assistance

22 The court held that the Crest Entities and Andrew were dishonest accessories to Fan's breach of his fiduciary duties, and they were jointly and severally liable for the losses that would not have been suffered by the Plaintiffs but for Fan's breach.⁴²

C. Liability for unlawful means conspiracy

23 The court had to determine whether the Crest Entities alongside Fan and Andrew had conspired to cause IHC to enter into and incur substantial liabilities under the Standby Facility.⁴³ It was held that the Plaintiffs had failed to prove that the losses were the result of the unlawful means conspiracy.⁴⁴

D. Lim's breach of her duty of skill and care

24 Lim was held to be jointly and severally liable with the Crest Entities, Fan and Andrew for payments made towards the Standby Facility based on two premises:⁴⁵

- (a) The losses caused by the said payment were *entirely* foreseeable and not remote. By entering into the Standby

41 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [297].

42 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [299].

43 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [300].

44 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [300].

45 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [302].

Facility, it was foreseeable that IHC *would make* payments towards the Standby Facility.⁴⁶

(b) IHC would not have been liable for sums under the Standby Facility if Lim had exercised skill and care. She had prepared a board paper, on Fan’s instructions, for the approval of the Standby Facility.⁴⁷ She did not make inquiries on the true purpose of the Standby Facility.⁴⁸ In particular, if Lim had made further inquiries, she would have known about the risk that the Standby Facility was drawn down in an irregular manner.⁴⁹ In this regard, she would have reported this to IHC’s board of directors (“BOD”), who would not have given a mandate for IHC to enter into the Standby Facility.⁵⁰

E. Crest Entities’ counterclaim: unjust enrichment

25 The Crest Entities argued that IHC was unjustly enriched when IHC had drawn down a sum of \$17,332,081.15 from the Standby Facility.⁵¹ However, the Court of Appeal dismissed the Crest Entities’ counterclaim in unjust enrichment.⁵²

26 First, the Standby Facility was *illegally* entered into. In particular, the Standby Facility which funded the indirect acquisition by IHC of its own shares was void under s 76A(1)(a) of the Companies Act for contravention of s 76(1A)(a)(i) of the same.⁵³

27 If the Court of Appeal had allowed the Crest Entities’ claim for the full sum of \$17,332,081.15, this would have created a lever for future parties (to a transaction illegal by virtue of s 76 of the Companies Act) to enforce the illegal agreement.⁵⁴

46 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [300].

47 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [75].

48 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [312].

49 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [312].

50 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [301].

51 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [314].

52 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [326].

53 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [5].

54 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [323].

28 Second, the Crest Entities had effected the drawdowns on the Standby Facility based on Andrew's instructions to purchase IHC's shares directly.⁵⁵ This had in turn circumvented the contractual safeguards in the Standby Facility Agreement which would have prevented such unauthorised drawdowns. Consequently, if the court were to allow the unjust enrichment claim, this would have absolved the Crest Entities of the consequences that had arisen out of their risky conduct (*ie*, the lack of due diligence before drawing down on the Standby Facilities).⁵⁶ The Crest Entities should have undertaken requisite due diligence in entering as well as executing any transactions that involve a company's direct or indirect acquisition of its own shares.⁵⁷

VII. How did Fan breach his fiduciary duties to IHC?

29 It is trite law that a director of a company owes fiduciary duties to the company.⁵⁸ In this regard, the Court of Appeal had to assess whether Fan, who was IHC's CEO, was a shadow director of the IHC. The court held that Fan was not a shadow director of the Plaintiffs.⁵⁹ Even so, the court held that Fan's appointment as group CEO, and subsequently as CEO of IHC, meant that Fan owed fiduciary duties to IHC (*ie*, duty to avoid conflict; and duty to exercise due skill, care and diligence).⁶⁰

30 The court found that Fan had breached his fiduciary duties to IHC due to the following reasons:

(a) First, Fan and Andrew were the two key persons involved in negotiating the terms of the Standby Facility with the Crest Entities.⁶¹

(b) Second, the court found that Fan *knew* that the drawdowns of funds from the Standby Facility were to

55 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [325].

56 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [325].

57 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [325].

58 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [99].

59 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [105].

60 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [116].

61 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [118].

acquire IHC shares (*ie*, he admitted that he was aware of the prohibition against a company buying its own shares without a proper share buyback mandate).⁶²

(c) Third, based on evidence given, the court found that Fan *knew* that the drawdowns of funds from the Standby Facility were illegal and detrimental to IHC's interests.⁶³

(d) Fourth, despite the knowledge of the arrangement being illegal and detrimental, Fan *vetted, approved and submitted* a board paper to the IHC BOD for their consideration. The board paper *did not* stipulate that the drawdowns on the Standby Facility would be used to purchase IHC shares. Instead, Fan *mischaracterised* the Standby Facility as a loan facility "for general working capital purposes".⁶⁴

(e) Fifth, if Fan thought that the purchasing of shares using funds from the Standby Facility was legal, he would not have omitted to mention the purchase of shares to the BOD.⁶⁵

(f) Sixth, Fan and Andrew were substantial shareholders who potentially stood to gain from the shares being bought as that would potentially prop up IHC's share value.⁶⁶

31 Collectively, the above illustrates how Fan had breached his fiduciary duties to IHC to act *bona fide* in IHC's interests. The failure to truthfully disclose the main purpose of the Standby Facility, coupled with the fact that Fan could benefit substantially from the prop up in share prices, ultimately placed Fan in a position of conflict with that of IHC's interests.⁶⁷

62 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [118].

63 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [119].

64 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [120].

65 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [120].

66 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [122].

67 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [123].

VIII. How can corporate borrowers protect themselves from unscrupulous employees' acts against corporate interests?

A. Actual scenario: analysing the acts of the borrower IHC

32 The breach of Fan's fiduciary duties to IHC sends a rather troubling message. Ostensibly, Fan was able to *conceal* the truth behind the purpose of the Standby Facility simply because the BOD had trusted Fan. In other words, there was no mention of any *check-and-balance mechanism* within the organisational framework that required Fan to present *concrete evidence* as to the purpose of the Standby Facility. By omitting the need to adequately justify for IHC to enter into the Standby Facility, this arguably created a loophole for unscrupulous high-ranking employees such as Fan to act contrary to the interests of IHC.

33 Further, the BOD had allowed IHC to enter into Standby Facility *on the basis* of a board paper alone presented by Fan. This enabled Fan to manipulate the BOD into thinking that the Standby Facility *would benefit* IHC, when in actual fact the Standby Facility benefited *both Fan and Andrew* (who were substantial shareholders of IHC). In particular, the funds from the Standby Facility were used to *stop short-selling*, and this in turn helped preserve the value of Fan's and Andrew's collective shareholdings in IHC.

B. Safeguard scenario: how IHC, as a corporate borrower, could have protected itself

34 First, IHC should have implemented a *mandatory system* which required Fan to *state the purpose of the loan* not just to the BOD, but also to two other departments, namely: (a) the legal department; and (b) the audit department. In this regard, the legal department would be responsible for checking the *legality* of the proposed loan, and the *internal* audit department could *carry out checks* on whether the loans were used for legitimate purposes. This would have prevented Fan from obtaining BOD mandate by manipulating the BOD into thinking that the loans were beneficial to IHC when in fact, Fan and Andrew were the ones who stood to gain from the Standby Facility.

35 Second, in relation to the drawdown of the standby facility, IHC *should not* have permitted Fan to have the *sole discretion* to decide *when and how* the drawdowns should be made. Instead, there should have been a *separate system* which required Fan to submit a request for funding to be drawn from the Standby Facility, and thereafter, *another employee* in the finance department could counter-check the request and verify the purpose(s) stipulated by Fan.

36 Third, as a corporate borrower, IHC *should not* have allowed funding from the Standby Facility into the accounts of third parties, such as EFIII. Instead, the audit or finance department of IHC should have been involved to ensure that funds from the Standby Facility *entered into IHC's own bank account* so as to make sure that, whenever funds are being drawn from IHC's bank account, the finance and/or audit department would be involved in ensuring the legitimacy of the drawdowns.

37 Consequently, corporate borrowers such as IHC should incorporate a coherent framework that not only requires the mandate of the board, but also the prior approvals of the audit, finance, and the legal departments to ensure that the transaction at hand *is legal and within the financial interests of the corporate borrower*.

IX. Why were the Crest Entities liable for dishonest assistance?

A. Ascertain whether mental state of an employee can be attributed to a corporation

38 Unlike natural persons, corporations (such as the Crest Entities) do not possess a mental state.⁶⁸ The question that arises is: under what circumstances can the mental state of an employee be attributed to the Crest Entities for them to be liable for dishonest assistance?

68 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [139].

39 The Court of Appeal held that the mental state of Tan Yang Hwee (“Tan”), who was a senior employee (the investment director of Crest Capital), could be attributed to the Crest Entities.⁶⁹ This is because Tan was the main representative handling Crest Capital’s business deals with IHC, including the deals that resulted in the Standby Facility.⁷⁰

40 Tan was also the authorised representative of each of the Crest Entities (*ie*, the Crest Entities relied entirely on Tan’s acts and did not dispute that he had acted with authority).⁷¹ In particular, Tan had acted on behalf of the Crest Entities throughout the negotiations, during entry into the Standby Facility, and in respect of the subsequent drawdowns on the Standby Facility.⁷² Henceforth, the mental state of Tan could be attributed to the Crest Entities.

B. *If the mental state of an employee can be attributed to his employer, consider whether the employer in question can be liable for dishonest assistance*

41 The next issue to consider is whether, based on Tan’s mental state as the relevant employee, the Crest Entities can be liable for dishonestly assisting the Defendants in extending the Standby Facility to IHC, and carrying out drawdowns on the Standby Facility to purchase IHC’s shares.

42 The Crest Entities put forth the following arguments against their liability for dishonest assistance:

(a) First, the Crest Entities *did not know* that it was illegal to allow IHC to drawdown funds from the Standby Facility to purchase its own shares.⁷³

(b) Second, Tan was not aware of the prohibition against public companies purchasing their own shares

69 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [142].

70 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [12].

71 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [142].

72 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [145].

73 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [157].

(and hence, Tan’s personal lack of knowledge should be attributed to the Crest Entities (his employers)).⁷⁴

(c) Third, Tan had claimed that the Crest Entities would not have participated in the arrangement if he had known that the arrangement was illegal.⁷⁵

(d) Last, given the contractual warranties that IHC had presented to the Crest Entities, the Crest Entities did not know that IHC was unable to lawfully enter into the Standby Facility.⁷⁶

43 Despite the Crest Entities’ arguments, the Court of Appeal held that the Crest Entities were liable for dishonest assistance. The premises for the court’s decision are as follows:

(a) First, Tan personally *knew* about the prohibition under s 76 of the Companies Act (*ie*, public companies cannot give financial assistance to purchase their own shares) because Tan was an investment director of Crest Capital, and is a licence holder under the regime by the Monetary Authority of Singapore.⁷⁷

(b) Second, Tan had *omitted* to include in legal documents for the Standby Facility the security in the form of the IHC shares held by the Crest Entities. This was regarded as a “glaring omission” which pointed to Tan being aware of something amiss regarding the share purchases.⁷⁸

(c) Third, Tan was unable to give any explanation for the Crest Entities’ failure to send any confirmation of the principal drawn down from the Standby Facility.⁷⁹ The failure by Tan to update IHC on the purchase of the shares is telling.⁸⁰

74 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [157(a)].

75 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [157(a)].

76 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [157(b)].

77 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [160(a)].

78 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [160(b)].

79 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [160(c)].

80 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [160].

(d) Lastly, Tan did not follow the mandatory procedural safeguard that was laid down in the Standby Facility Agreement for drawdowns to be made; this was drafted by the Crest Entities.⁸¹ Specifically, cl 7 of the Standby Facility Agreement stated that the drawdowns funds should have been disbursed by way of bank transfers to IHC's bank account.⁸² This mandatory procedure would have prevented the funds from being directly used by the Crest Entities to purchase IHC shares. *In particular, the failure to follow the mandatory procedure enabled EFIII to make 14 drawdowns on the Standby Facility to purchase IHC shares in the open market whereupon such shares were held by EFIII on trust for IHC.* In court, Tan had failed to follow the mandatory procedure without a satisfactory explanation.⁸³

44 Based on points (a) to (d) above, the Court of Appeal was of the view that Tan *ought* to have known of the prohibition under the Companies Act as there was *no conceivable reason* for Tan to disregard the procedural safeguards in the Standby Facility Agreement. As such, the court held that Tan had *actual knowledge* of the illegality of the Standby Facility Arrangement.⁸⁴

45 Next, the Court of Appeal held that since Tan had *actual knowledge* of the various irregularities of the Standby Facility, this could be attributed to the Crest Entities.⁸⁵ In this regard, despite the Crest Entities having actual knowledge of the irregularities (which included mandatory procedural safeguards laid down by the Crest Entities), they did not query these irregularities.⁸⁶ Instead, they allowed the arrangement to continue and even formalised the Standby Facility with IHC.⁸⁷ Consequently, their participation involved a breach of the standards of honest conduct,⁸⁸ which in turn meant that the Crest Entities were liable for dishonestly assisting in the illegal Standby Facility arrangements.

81 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [160(e)].

82 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [160(e)].

83 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [160].

84 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [161].

85 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [162].

86 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [162].

87 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [162].

88 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [162].

X. How can corporate lenders protect themselves from being liable for dishonestly assisting a wrongdoing employee?

46 An apparent flaw of the organisational structure of the Crest Entities is how they *solely relied on a single employee* (ie, Tan) to arrange the Standby Facility. In other words, despite the implementation of a *mandatory procedure* via the Standby Facility Agreement, this was easily circumvented as Tan *had the sole authority* to decide whether to undertake or omit such a procedure. In this regard, it becomes essential to consider the actual scenarios (including the acts of Tan which were attributed to the Crest Entities) as well as various *safeguard* scenarios that illustrate how the Crest Entities *should* have acted to have prevented the misfeasance of Tan.

A. Actual scenario: analysing the acts of Crest Entities as lender

47 To recap, Tan, as the main authorised representative of each of the Crest Entities,⁸⁹ was the *sole senior employee* who had acted on behalf of the Crest Entities throughout the negotiations, during entry into the Standby Facility and in respect of the subsequent drawdowns on the Standby Facility.⁹⁰ As an add-on to the above discussion about Tan's conduct, the following can be said:

48 First, Tan was *fully aware* that at all times, the Standby Facility was being used to purchase IHC shares, and this knowledge was attributed to the Crest Entities.⁹¹ In particular, Tan was of the view that:⁹²

71 ... *from a lender's perspective, IHC was a listed company, had a good borrowing track record with the Crest Funds and was a creditworthy client.* There were therefore no 'red flags' that would have alerted the Crest Funds or prompted them to inquire

89 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [12].

90 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [145].

91 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [162].

92 *The Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd* [2019] 2 SLR 524 at [71]–[72].

further whether there was any non-compliance with the [Companies Act].

Although one of the proposed securities offered to the Crest Funds in the Term Sheet for the Standby Facility was a '[p]ledge of IHC shares purchased through Fund' ... *Mr Tan indicated that the Crest Funds 'would have been willing to grant the Standby Facility in any event, even without the additional security in the form of the IHC shares'. Mr Tan emphasised that there was nothing in the Standby Facility Agreement that expressly required or obliged the Crest Funds to acquire IHC shares on behalf of IHC, and thus, the Standby Facility was an arrangement between the parties that was quite separate from the share acquisitions.*

[emphasis added]

49 Second, when Andrew had proposed that the Crest Entities should purchase IHC shares through the Crest Entities' own broker, the Crest Entities agreed to this proposal because, in Tan's own words, this would avoid a "circuitous arrangement".⁹³ Such an arrangement would also provide the Crest Entities with *additional security* for the drawdowns on the Standby Facility which were made for the purpose of purchasing IHC's shares.⁹⁴

50 Third, Tan did not follow the mandatory protocol safeguard that was laid down in the Standby Facility Agreement for drawdowns to be made. In particular, the protocol required that the drawdown funds be disbursed by way of *bank transfers to IHC's bank account*.⁹⁵ By giving Tan the sole prerogative in circumventing this mandatory protocol, this allowed EFIII (a third party) to drawdown on the Standby Facility to purchase IHC's shares in contravention of s 76 of the Companies Act.

51 Collectively, the failure on part of Tan to be alert to potential "red flags" was therefore due to Tan's one-dimensional perspective of what the *proposed* arrangement entailed; he failed to take into consideration the legal implications of entering into such an arrangement, and had agreed for the Crest Entities to enter into the proposed arrangement merely because the Standby

93 *The Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd* [2019] 2 SLR 524 at [75].

94 *The Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd* [2019] 2 SLR 524 at [75].

95 *OUE Lippo Healthcare Ltd v Crest Capital Asia Pte Ltd* [2020] SGHC 142 at [160].

Facility Agreement did not “expressly [require] or [oblige] the Crest Entities to acquire IHC shares on behalf of IHC”.

52 This resulted in Tan *unilaterally* entering into the illegal arrangement with Andrew *despite* the knowledge that the arrangement involved IHC purchasing its own shares. Had there been *adequate* checks and balances as well as interception from *other departments* (such as the legal department) *within the Crest Entities*, this would have intercepted the proposed arrangement between the Crest Entities and IHC, which in turn would have eliminated the dire consequence suffered by the Crest Entities.

B. *Safeguard scenario: analysing what could have been done by Crest Entities as corporate lender*

53 First, the implementation of a countervailing framework, such as the requirement of supervisory mandates of employees from the finance or auditing department, *could have* prevented Tan from circumventing the mandatory procedure. By giving sole authority to a single employee (*eg*, Tan), corporate lenders such as the Crest Entities undertake the risk of an employee gaming the system and undermining various safeguards to the detriment of the corporate lender.

54 As such, when substantial sums are being loaned to a corporate borrower (or any other individuals), the implementation of a two-tier system could potentially decrease the likelihood of a *single individual* acting unscrupulously. For example, under the first tier of the system, the Crest Entities could have protected the integrity of the mandatory procedure under the Standby Facility Agreement by requiring the audit department to certify that Tan had indeed undertaken such a procedure. Once the audit department has certified that Tan had undertaken the mandatory procedure, the second-tier of the system can then require Tan to seek the advice of the legal department to ensure that all legal requirements are being met before releasing the loan to IHC. This would have alerted Tan as well as *other employees* of the Crest Entities to the *illegal nature* of the transaction. Collectively, the incorporation of a two-tier system would *potentially lessen the likelihood* of mandatory

protocols being circumvented by unscrupulous employees whilst ensuring the *legality* of the proposed transaction.

55 Second, the Crest Entities *should not* have given Tan *sole discretion* in allowing third parties, such as EFIII, to make drawdowns on the Standby Facility. Instead, the funds should have been paid into *IHC's own bank account*. This would have prevented Tan from allowing EFIII (based on Andrew's instructions on behalf of IHC) to make 14 drawdowns on the Standby Facility,⁹⁶ and to purchase IHC's shares in contravention of s 76 of the Companies Act.

56 In other words, had there been a mandatory protocol which *involved the legal, audit and finance departments* to intercept the *illegal* arrangement entered between the Crest Entities and IHC, the Crest Entities could have escaped being liable for dishonestly assisting IHC in breaching s 76 of the Companies Act.

XI. Conclusion

57 The judgement in *OUE* serves as a timely reminder for both corporate borrowers and corporate lenders to be cautious about entering into loan agreements. In particular, the fact that a corporate lender can be liable for *dishonest assistance* goes to show that *ignorance is not bliss*. In other words, a corporate lender cannot argue that it did not have the knowledge that the loan transaction is *illegal* in nature.

58 In this regard, corporate lenders should not solely rely on a single employee to enter into loan transactions; the incorporation of a two-tier system (as discussed above) could eliminate the possibility of an employee circumventing any mandatory protocols whilst protecting the legality of the loan.

59 As for corporate borrowers, they should ensure that loans are not entered into on the sole basis of a *board paper*. Instead, due diligence should be conducted on the legality and purpose of the loan. Moreover, the implementation of a multi-tier mandate

96 *The Enterprise Fund III Ltd v OUE Lippo Healthcare Ltd* [2019] 2 SLR 524 at [18].

system would ensure that a high-ranking employee would not be able to conceal salient facts that are essential to determining the financial worthiness of a specific loan.