EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)

CLAIM No: BVIHC (COM) 2018/0222

IN THE MATTER OF GREEN ELITE LTD (IN LIQUIDATION)

BETWEEN:

GREEN ELITE LTD
(IN LIQUIDATION)

Claimant

and

(1) FANG ANKONG
(2) FANG ANLIN
(3) DING LI
(4) GU LIYONG
(5) HWH HOLDINGS LTD

Defendants

Appearances:

Mr. John Machell QC, with him Mr. Peter Ferrer and Ms. Sarah Thompson of Harneys for the Claimant
Mr. Andrew Ayres QC, with him Ms. Eleanor Morgan and Ms. Sophie Christodoulou of Mourant Ozannes for the First, Fourth and Fifth Defendants
The Second and Third Defendants did not appear and were not represented

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2021: October 19-22 and 25-27
November 1, 2
2022: January 17

JUDGMENT

[1] **JACK, J [Ag.]**: This action concerns claims for payment of the sums of HK$150 million (about US$19.3 million), HK$8,733,490.88 and HK$3.45 million and various forms of declaratory relief.

[2] I shall use the following shorthand expressions:

The Agreed Purpose: this is a pleaded expression in the Re-Amended Defence of Mr. Fang and HWH (and adopted in the Re-Amended Defence of Mr. Gu) set out at para [68] below;

Ms. Chan: Emily Chan, Mr. Fang's personal assistant;

Mr. Chow: Paul Chow, the chief financial officer of CT;

CT: Chiho Tiande Group Ltd, a Cayman company now called Chiho Environmental Group Ltd, listed on the HKSE;

CT Metals: Taizou Chiho-Tiande Metals Co Ltd, a company incorporated in the People's Republic of China;

Delco: Delco Participation BV, a Dutch company owned during the relevant period beneficially by Mr. de Leeuw and Mr. van Ooijen;

Delco Asia: Delco Asia Company Ltd, a Hong Kong company whose shares were held 50:50 by HPL and SVO;

Mr. Ding: Ding Guopei, Mr. Fang's brother-in-law and father of Ms. Ding;

Ms. Ding: Ding Li, the third defendant, the daughter of Mr. Ding and niece of Mr. Fang, a director of Green Elite;

Mr. Fang: Fang Ankong, the first defendant, a director of CT, Green Elite, HWH and other companies;

Fang Anlin: the second defendant, Mr. Fang's brother, a director of Green Elite;

Fang Hui: Mr. Fang's son;

The FDG Trust: a discretionary trust settled in Cayman on 28th August 2008 by Mr. Fang for the benefit of Fang Anlin, Ms. Ding and Mr. Gu;

Green Elite: Green Elite Ltd, the claimant, a BVI company, now in liquidation;

Mr. Gu: Gu Liyong, the fourth defendant, a director of CT and Green Elite and other companies;

Mr. Hammerstein: Erik Hammerstein, a Dutch court-appointed director of Delco;

Hefast: Hefast Holding Corp Ltd, a company used from late 2002 for the joint venture between Mr. de Leeuw and Mr. van Ooijen on the one hand and Mr. Fang on the other, Hefast being a shorthand for Herman, Fang and Stephan;

HKM Metal: HKM Metal Ltd, a Hong Kong company beneficially owned by Mr. Fang;

HKSE: the Hong Kong Stock Exchange;

HPL: HPL Metals BV, a Dutch company once beneficially owned by Mr. de Leeuw, now beneficially owned by members of his family;

HWH: HWH Holdings Ltd, the fifth defendant, a BVI company beneficially owned by Mr. Fang;
IPO: Initial Public Offering;
Mr. de Leeuw: Herman de Leeuw, a director of Delco;
Mr. van Lint: Frank van Lint, a Dutch tax lawyer;
New Asset: New Asset Holding Ltd, a BVI company, the shares of which were held on the trusts of the FDG Trust;
Mr. van Ooijen: Stephan van Ooijen, a director of Delco and at material times of CT;
The Share Scheme: this is a pleaded expression in the Re-Amended Defence of Mr. Fang and HWH, set out in para [67] below;
Sims Metal: Sims Metal Management Dragon Holdings Ltd, a purchaser in 2012 of 16 per cent of the shares in CT;
Standard Chartered: Standard Chartered Trust (Cayman) Ltd, the trustee of the FDG Trust;
Stickting HPL: a Dutch foundation established for the benefit of Mr. de Leeuw's family;
SVO: SVO Company BV, a Dutch company beneficially owned by Mr. van Ooijen;
Tai Security: Tai Security Holding Ltd, a BVI company which purchased Green Elite's shares in CT;
The Three Employees: Fang Anlin, Ms. Ding (although it was Mr. Ding who was the employee) and Mr. Gu;
The Understanding: I am using this term as a neutral expression for the intention that the Three Employees be rewarded: see para [10] below;
Mr. Ybema: Ralph Ybema, Delco's Hong Kong adviser.

The undisputed facts

[3] Much of the background to this dispute is common ground.

[4] Mr. de Leeuw's family commenced a scrap metal business in the Netherlands in 1897. Mr. de Leeuw was born in about 1947. He left school at 14 in order to work as the third generation in the family business. He became the manager of the business when aged 21. In the 1990's with the opening up of China to the world, he started selling scrap metal to Chinese recycling firms. Originally this was conducted through intermediaries who had the requisite import licences. The attraction of the business was that China had a great demand for scrap metal and its labour costs were much less than in the West.

[5] In the mid-1990's Mr. de Leeuw met Mr. van Ooijen, who worked for one of the companies to which Mr. de Leeuw's firm sold metal. In 1997 Mr. de Leeuw offered Mr. van Ooijen employment in his company which Mr. van Ooijen accepted. In 2000 they formed a joint venture company, Delco, with each owning a half share.

[6] It was during the mid-1990's too that Mr. de Leeuw met Mr. Fang, who had his own recycling business in the People's Republic. They started to do business direct. As trust in each other grew, so too did the business they transacted. An oddity of the arrangement throughout has been that Mr. de Leeuw speaks only Dutch with at most a smattering of English. Mr. Fang only speaks Mandarin. Mr. van Ooijen speaks Dutch and English. He was the main contact man at Delco for the Chinese counterparties, although he spoke no Mandarin. Communications were conducted in English largely between Mr. van Ooijen and Mr. Fang's personal assistant, Ms. Chan.

[7] Another key individual on the Dutch side was Mr. van Lint. He was an experienced tax lawyer, which in Holland is a separate profession to that of ordinary attorneys-at-law. He gave evidence to me in English, which he spoke to a near-native standard. He advised both Mr. de Leeuw and Mr. van Ooijen throughout on issues of Dutch tax law. In that capacity he was closely involved in the technical legal and international tax aspects of the structuring of the Delco business and, in particular insofar as it might have Dutch tax implications, CT's business structure. Mr. Fang's direct dealings were, however, mostly with Mr. van Ooijen, not with Mr. van Lint.[1] When Mr. de Leeuw and Mr. van Ooijen fell out in 2016, Mr. van Lint moved into the de Leeuw camp. He now lives in the United States and is involved in business with Mr. de Leeuw. Mr. van Lint often wrote emails in English on Mr. de Leeuw's behalf.

[8] By 1999 Mr. de Leeuw and Mr. van Ooijen agreed to enter a joint venture with Mr. Fang. The vehicle for the joint venture was initially CT Metals, which had a factory in Taizhou in the People's Republic. This recycled the scrap metal sourced in

[1] Transcript, day 4, p 31 (Cross-examination of Mr. Fang).

Europe. Initially Mr. Fang held a majority share in CT Metals with the balance held by a Delco company, Delco Recycling BV. (Mr. Gu thinks that another Delco company, Delco Europe BV, may have had shares. Nothing turns on this.) In about 2002 Delco's shares were transferred to Delco Asia, owned beneficially half and half by Mr. de Leeuw and Mr. van Ooijen. The shareholding in CT Metals was also reorganised, so that by December 2002 Delco Asia and Mr. Fang's group had equal interests in CT Metals through a new joint venture company, Hefast.

[9] By 2008, the parties had decided that the business should be floated on the HKSE in an IPO. This would allow more capital to be raised and give an exit route for Mr. de Leeuw, who had medical issues and wanted to retire. A company, CT, was incorporated in Cayman to serve as the vehicle for the floatation. Two shares were issued in CT, held one each by Delco and HWH, a company owned by Mr. Fang. Subsequently 49 more shares were issued to each of Delco and HWH.

[10] As part of the arrangements for the IPO, there was an understanding ("the Understanding") between Mr. de Leeuw and Mr. van Ooijen on the one hand and Mr. Fang on the other that there would be an incentive scheme for certain key employees. Let me emphasise that I use the term "Understanding" as a neutral expression. The central issue in this case is whether there was any legally binding agreement in regard to the incentive scheme and, if so, in what terms. My use of "Understanding" is not intended to pre-empt the decision on these questions.

[11] The employees who were originally intended to benefit from the incentive scheme were: Vincent van Ooijen, Mr. van Ooijen's brother; Fang Anlin, Mr. Fang's brother; Mr. Ding, his brother-in-law; and Mr. Gu, a vice-president and director of CT, who was primarily responsible for CT's operational activities. At an early stage it was decided that it was not tax-efficient for Vincent van Ooijen to be given incentive shares and alternative arrangements were made for him in the Netherlands. Further, Mr. Ding decided that it would be better that any benefits from the incentive scheme went to his daughter, Ms. Ding. Accordingly, the beneficiaries of the Understanding were to be Fang Anlin, Ms. Ding and Mr. Gu.

[12] The 2008 IPO had to be aborted after the Global Financial Emergency struck. However, the paperwork and preliminary steps for the IPO were quite far advanced when this global disaster struck. The draft prospectus gave details of a scheme for giving share options to employees after the floatation. The number of shares was to be 0.1 per cent of the total issue. Beneficiaries were not limited to Fang Anlin, the Dings or Mr. Gu. This proposed post-IPO share option scheme is quite separate to the Understanding reached regarding the Three Employees.

[13] Of significance is a different incentive scheme. New Asset was incorporated on 8th July 2008 in this Territory. On 28th August 2008 Mr. Fang (as settlor) and Standard Chartered (as trustee) created a settlement, the FDG Trust. The shares in New Asset were transferred to Standard Chartered as trustee of the FDG Trust on discretionary trust, the initial beneficiaries being Fang Anlin, Ms. Ding and Mr. Gu. As is usual with such trusts, beneficiaries of the trust could be added or removed. Distributions of income or capital were in the trustee's discretion. The same day board resolutions were passed by HWH, Delco, New Asset and CT, whereby HWH and Delco each sold four ordinary shares of HK$0.01 in CT to New Asset for US$6,275,000, a total consideration of US$12,550,000.

[14] Because New Asset had no assets, New Asset entered into a promissory note for US$12,550,000 in favour of HWH. HWH agreed to fund New Asset's liability to Delco and HWH agreed to lend New Asset the funds to fund its liability to HWH. The US$6,275,000 payable by New Asset to Delco was paid by or on behalf of HWH to Delco Asia by instalments. I shall come back to the issues surrounding the payment of the shares transferred to New Asset.

[15] When he settled the FDG Trust, Mr. Fang signed a memorandum of wishes in English addressed to Standard Chartered. So far as appears in the evidence, the memorandum of wishes was never translated in writing into Mandarin. The operative part of the memorandum states:

> "3. Whilst I appreciate that you have absolute discretion in this matter (subject to my written request), I would wish you to take into account the following when exercising your discretion:
>
> (i) I wish that, upon my written request and subject to paragraph 3(ii) below, you exercise your discretion to procure that [New Asset] distributes the Shares in equal shares per stirpes to each of the Beneficiaries then living.
>
> (ii) Before exercising your discretion under paragraph 3(i) above, I wish that you request satisfactory evidence from each of the Beneficiaries or from [New Asset] that each of the Beneficiaries have paid (such payment to be by way of irrevocable gift) to [New Asset] in money the amount of consideration that [New Asset] paid in money or money's worth to acquire each Beneficiary's proportion of the Shares. If no such satisfactory evidence can be obtained in respect of any one or more Beneficiary, I wish that you do not exercise your discretion to procure that [New Asset] distributes the relevant portion of Shares to that Beneficiary or to those Beneficiaries."

There is no mention in this document of any lock-up periods after an IPO in respect of the beneficiaries. Nor was there any requirement for them (or Mr. Ding) to work in the business for any period after an IPO.

[16] On 11th December 2008 Deloitte's Hong Kong office provided Mr. Fang with a long letter of tax advice. Among many matters discussed, the letter said that beneficiaries of the FDG Trust resident in the PRC were potentially liable to pay 20 per cent tax on distributions from the Trust, but that there was at that time no gift tax to pay on the transfer of assets to the Trust.

[17] By early 2010 the proposals for an IPO were revived. A reorganisation memorandum from January 2010 shows, as part of the preparation for the 2010 IPO, that the FDG Trust was to be unwound. All the relevant documentation was to be backdated to 12th October 2008, ostensibly because the parties had agreed back then to the unwinding. Various issues remained to be resolved following the unwinding, in particular what was to become of the promissory note and the monies paid to Delco on behalf of New Asset. I shall come back to these issues.

[18] Green Elite was incorporated in this Territory on 20th January 2010.

[19] A later version of the reconstruction memorandum from around 28th January 2010[2] has a "step 11" described as "Transferring of the incentive Shares from HWH and DP to [BVI Co]" (square bracketing as in the original). The memorandum, however, merely describes HWH and Delco transferring four shares each to a new company, which in fact was Green Elite. It says nothing about the terms on which Green Elite or its assets would be held for the benefit of any employees. A still later version of the memorandum omitted the word "incentive" from the description of the shares to be transferred. (A feature of the evidence in this case is that there is no evidence as to HKSE market practice. The significance of dropping the word "incentive" was thus not the subject of any expert evidence.)

[20] Around 28th January 2010, the unwinding of the FDG Trust was effected by documents, all backdated to 12th October 2008. These comprised a letter from the Three Employees (as the beneficiaries of the FDG Trust) to Standard Chartered and to New Asset disclaiming their interest in the Trust; a letter from the beneficiaries to HWH and Delco; a transfer of four CT shares from New Asset to HWH; and a transfer of four CT shares from New Asset to Delco. The beneficiaries' letter said:

> "Whereas these Transferred Shares were transferred by you in anticipation of the proposed listing of the Company in Hong Kong and on the Understanding that it is an incentive to us as senior management of the Company, we understand that as a result of the recent market conditions, the Company has decided to terminate the proposed listing. In view of the termination of the proposed listing... we, being all the beneficiaries to and ultimate interest holders of the Transferred Shares held by New Asset, hereby unconditionally and irrevocably: 1. Agree to transfer the Transferred Shares to you in equal proportion..."

[21] On 1st February 2010 Ms. Chan emailed Mr. de Leeuw and Mr. van Ooijen. She wanted them to sign a letter on behalf of Delco subscribing for one US$1 share in Green Elite. The next day Mr. van Lint emailed her referring to that email and said:

[2] Bundle E/6/413/8031.

> "In principle I have no objection that Delco participation BV subscribes for one share of Green Elite Limited (what a name!). However, it is important for us to be informed (earlier) what the function of this company will be. Does it relate to the structure that we discussed in which Delco Participation BV and Fang will become 50/50 shareholder and that this company will acquire the 8 shares of Chiho Tiande Group Ltd?"

[22] Ms. Chan responded the same day indicating that Mr. Chow (the chief financial officer of CT) will "let you know the detail of this alternative arrangement". Mr. Chow then emailed the same day (copying in Mr. de Leeuw and Mr. van Ooijen) to say:

> "First of all, I would like to thank you for helping us in moving forward with our listing exercise. With regard to the transfer of 8 percent from the current shareholders to the new BVI company (Green Elite Limited), your Understanding is correct, the shareholders of the new BVI company are proposed to be Delco participation and Fang (through HWH) on the 50:50 basis. Thsi [sic] exercise is to reflect the arrangement originally agreed back in 2008 when we started the listing exercise."

[23] There is a dispute as to what, if any, oral discussions took place. The same day Mr. van Lint emailed Mr. Chow to say that he would await his call. Mr. Gu pleads[3] that a telephone call did take place between Mr. Chow and Mr. van Lint around 2nd February 2010 "in which Mr. Chow specifically explained to Mr. van Lint that the Company was incorporated for the purpose of implementing the Share Scheme and/or for the Agreed Purpose." I shall return to this issue.

[24] In the next days, formal documentation showing the subscription by HWH and Delco for one share each in Green Elite was executed. Directors of Green Elite were also appointed. These comprised Mr. Fang, Fang Anlin, Ms. Ding and Mr. Gu. There was no representation on the board from the Delco side. Mr. van Lint said in evidence that he had overlooked this point. One point to note is that Mr. Fang was in a minority on the board. I shall return to all the issues surrounding the significance of the make-up of the board and Mr. van Lint's evidence.

[3] Mr. Gu's Re-Amended Defence para 9(d).

[25] On 9th March 2010 Mr. van Lint emailed Mr. van Ooijen and Mr. de Leeuw raising the question of obtaining confirmation from the Fang side that the liability to repay the US$6,275,000 received by Delco in respect of the transfer of the shares to New Asset was transferred to Green Elite, so that Delco ceased to be under an obligation of repayment. It is common ground that that confirmation was never given. The same day Mr. van Lint sent a round-robin email (copied to Stephenson Harwood, the Hong Kong lawyers acting in the IPO) saying that he had advised Mr. de Leeuw and Mr. van Ooijen to sign the transfer of the shares to Green Elite. He asked again for confirmation that Delco was no longer under an obligation to repay the US$6,275,000.

[26] The following day Mr. van Lint emailed Ivan Tan of Stephenson Harwood and Ms. Chan. After referring to various formal matters for Mr. Tan's attention, he wrote:

> "Emily: please ask Mr. Fang to confirm that by [t]ransferring 4 shares of CT Group to Green Elite Delco Participation is also released from its liability to pay US$ 6,275.000 which liability it took up when acquiring the shares a few weeks ago. Regards Frank"

[27] Mr. van Lint's email of 9th March refers to his trying to call Ms. Chan the following morning. It is not clear if the call took place, but even if it did, there is no evidence that Ms. Chan gave Mr. van Lint that confirmation. Ms. Chan's evidence is that the matter was not pursued after the email of 10th March timed at 13.52.

[28] On 10th March 2010 Mr. van Lint arranged for Mr. de Leeuw and Mr. van Ooijen to sign the transfer documents and backdate them to 8th March 2010. Similar documents were signed on the Fang side. The signed documents (which are indeed backdated to 8th March 2010) provided for Delco and HWH each to transfer four shares in CT to Green Elite at their par value of HK$0.04. The board of Green Elite approved the transfers. There is no documentary evidence of any agreement as regards the US$6,275,000 paid to Delco for the shares originally transferred to New Asset.

[29] The same day Jessie Chan of Stephenson Harwood emailed Mr. van Lint the draft IPO prospectus. This draft prospectus, like the 2008 draft prospectus, contained only one single post-IPO share option scheme.

[30] The same day too, the defendants assert that Mr. Gu, Ms. Ding and Fang Anlin gave Mr. Fang a "letter of commitment", which contained lock-up periods after the IPO before which the three were entitled to their shares. Whether they did give such letters and whether the letter signed by Mr. Gu (which was the only letter adduced in evidence) was genuine or was signed on the date it purported to have been signed is in dispute and I shall return to these issues. No notice under CPR 28.28 was given challenging the authenticity of Mr. Gu's letter, but that would not prevent the true date of signing being challenged.

[31] Mr. Gu's letter read:

> "Green Elite Limited
> To: Gu Liyong
>
> After the successful listing of Chiho-Tiande Group Limited (hereinafter referred to as the 'Company') on the [HKSE], its two major shareholders decided to each hand over 4% of their pre-IPO shares (a total of 8% shares, equivalent to 6% of the Company's post-IPO shares) to the three executives who have served the Company from the very beginning since its establishment, for the purposes of rewarding the tremendous contributions made by these executives, and motivating and retaining professionals.
>
> If the Company is successfully listed before December 31, 2010, we will promise to hand over 2% of the Company's post-IPO shares to you, provided that the following conditions are met
>
> 1. 50% of the shares donated to you is subject to a one-year lock-up period; and
> 2. The remaining 50% of the shares is subject to a three-year lock-up period.
>
> If you leave the Company within the aforesaid lock-up periods, the shares donated to you will be withdrawn. This Letter of Commitment shall be void if the Company fails to go public as scheduled.
>
> Starting date of the commitment: March 10, 2010

[Signed on behalf of Green Elite and by Mr. Gu]"

[32] On 31st May 2010 Jessie Chan circulated a draft of a pre-IPO share scheme. On 3rd June 2010, a further draft prospectus was produced which included for the first time the pre-IPO scheme, as circulated in draft, as well as the post-IPO share option scheme. A further draft prospectus was produced in similar terms the following day. The two share option schemes were incorporated in the final prospectus when it was issued. The circumstances in which the pre-IPO share option scheme was adopted are an issue to which I shall return.

[33] On 15th June 2010 Joyce Ma of Stephenson Harwood circulated revised draft statements of interests for the directors of CT. These included Mr. Fang and Mr. Gu. These were to be included in the prospectus for the IPO. Mr. Gu made no statement of interest in relation to the CT shares held by Green Elite. He merely declared his interest under the pre-IPO share option scheme. By contrast, Mr. Fang's statement of interest declares his having a personal interest in 3,500,000 CT shares under the pre-IPO Share Option Scheme and an interest in 375,000,000 CT shares through HWH. The 375,000,000 shares included half the CT shares held by Green Elite. The IPO prospectus was approved by the CT board on 23rd June 2010. The board minutes record Mr. Fang and Mr. Gu confirming the accurate disclosure of their interests in the prospectus.

[34] On 24th June 2010 a Shareholder Loan Assignment and Capitalisation Agreement was entered into between Delco Asia, Mr. Fang and CT. By this, certain loans made by Delco Asia and Mr. Fang were capitalised in exchange for the issue of new shares. CT issued 749,999,900 HK$0.01 shares to HWH, Delco and Green Elite *pro rata* to their existing holdings. By written shareholder resolution passed on the same day, the share capital in CT was increased. Green Elite was subsequently allotted an additional 59,999,992 shares in CT. The effect of this agreement on the $6,275,000 purchase monies for the New Asset shares is in dispute but is not an issue before me.

[35] On 28th June 2010, the prospectus was published. The following passages in the prospectus are relevant to the issues in this case:

> "On 28 August 2008, each of HWH and Delco Participation transferred 4 Shares to New Asset for an aggregate consideration of US$12,550,000, funded by a promissory note in the same amount issued by New Asset to HWH, 50% of which was to satisfy the half share of the consideration payable to HWH and the remaining 50% of which New Asset directed HWH to pay in cash to settle the half share of the consideration payable to Delco Participation. On 12 October 2008 and pursuant to the directions of the beneficiaries of the FDG Trust dated 12 October 2008, New Asset transferred a total of 8 Shares to each of HWH and Delco Participation, in equal proportion, in consideration of the cancellation of the promissory note of US$12,550,000 issued by New Asset to HWH.
>
> On 8 March 2010, each of HWH and Delco Participation transferred 4 Shares, being a total of 8 Shares, to Green Elite for a total consideration of HK$0.08."[4]
>
> …
>
> "Immediately upon completion of the Global Offering and the Capitalisation Issue (but without taking account of the Shares to be Issued pursuant to the exercise of the Over-allotment Option or any options granted or to be granted under the Share Option Schemes and the Shares which may be taken up under the Global Offering), HWH and Delco Participation will each hold 34.5% and Green Elite will hold 6% of our entire issued share capital and, together, will be our Controlling Shareholders with a combined stake of approximately 69% of the Shares eligible to vote at general meetings of our Company… Each of HWH, Delco Participation, Green Elite, SVO, Stichting HPL and HPL is only an investment holding entity and, apart from its shareholding interest in our Company, does not carry on any operating businesses nor has any interests in other metal recycling business."[5]
>
> …
>
> "2. Pursuant to written resolutions of all shareholders of the Company passed on 23 June 20 (I) the authorised share capital of the Company was increased from HK$50,000 to HK$50,000,000 by the creation of an additional new 4,995,000,000 shares, such new shares ranking pari passu In all respects with the existing shares; (II) conditional upon all the conditions in the Hong Kong Undertaking Agreement and the International Underwriting Agreement being fulfiled or waived, 344,999,954, 344,999,954 and 59,999,992 shares are to be issued and alloted to HWH Holding Limited, Delco Participation B.V. and Green Elite Limited, respectively (being a total of 749,999,900 shares), credited as fully paid up

[4] Prospectus, Appendix VI/5.
[5] Prospectus pp 186-187.

> at par out of the reserve created pursuant to the capitalisation of a sum of HK$111,854,000 due to each of Mr. Fang and Delco Asia, such shares ranking pari passu in all respects with the then existing shares..."[6]

[36] On 12th July 2010 CT was listed on the HKSE with shares held 25% by the public, 34.5% by Delco, 34.5% by HWH and 6% by Green Elite. That same day Delco gave notice as a substantial shareholder of its interest in the CT shares. These included the shares held through Green Elite.

[37] CT's annual report for 2010 refers to the pre-IPO and post-IPO share option schemes, but nothing about any employees having an interest in CT through Green Elite. The disclosure of directors' interests section records Mr. Fang through HWH and Mr. van Ooijen through Delco having an interest in the CT shares held by Green Elite. Mr. Gu declares only his interest under the share option schemes, nothing in relation to the shares held by Green Elite.

[38] On 28th September 2011 Mr. van Lint emailed Ms. Chan to ask for Green Elite's 2009 and 2010 annual accounts for 2009 and 2010. Ms. Chan said Green Elite, as a BVI company, had no audit report. She said it was merely "a holding company which hold 6% of CT Group shares, that's all, there is no other operation or business."

[39] Relations between Mr. Fang and Mr. de Leeuw started to deteriorate after the IPO. In an undated letter[7] written by Mr. van Lint in English on Mr. de Leeuw's behalf in late December 2011 or early January 2012, Mr. de Leeuw made various complaints to Mr. Fang. Mr. de Leeuw repeated that he wanted to start selling off the shares held indirectly by him in CT.

[40] In 2012 HWH and Delco agreed to sell 16% of CT to Sims Metal. The stock market listing announcement of the sale said:

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[6] Accountant's report: p I-52.
[7] Bundle E3/199/4036.

> "Upon Completion, HWH and Delco together with their respective associates, will be interested in 312,923,265 Shares and 230,395,981 Shares respectively, representing approximately 30.04% and 22.11% respectively of the issued share capital of [CT] and Green Elite, a 50-50 joint-venture between Delco and HWH, will be interested in 60,000,000 shares representing 5.76% of the issued share capital of the [CT]."

[41] On 20th June 2012 Green Elite transferred HK$2.2 million and on 22nd July 2013 HK$1.25 million to HWH. These monies are part of the dividend payments made to Green Elite by CT.

[42] The view of Mr. van Lint during this period was expressed in an email of 10th December 2012 from him to Mr. de Leeuw and Mr. van Ooijen, which said in translation:

> "Dear Stephan and Herman,
>
> We talked about resolving matters between Delco and Fang et al, and that the time is ripe now to actually do this. I have included an overview in the attachment of the mutual claims and debts. Moreover, I have assumed that the stake in Green Elite Ltd, or a 3% stake in CT, will be sold to Fang et al for, we will say, HKD 4 per share. Finally, I have included what the consequences are if the remainder on balance of the claim on Fang et al is paid by him by means of a transfer of a part of the convertible bond issued by CT that he holds.
>
> If these are the correct starting points, then it would mean it would be possible to create a straightforward contract. If I have to prepare an example contract for it, I'm very happy to do so.
>
> We also spoke about a reorganization, where the CT stake and the investments in the BDR could be structured via an IOM company. I will put this onto paper in more detail so that we have a clear picture together of the benefits and drawbacks. Regards Frank"

[43] On 21st February 2013, Felix Chow asked Mr. van Ooijen to sign the "statement of interest" he needed to give Deloitte, CT's auditor, showing his interest, *inter alia*, in shares in CT. Mr. van Ooijen forwarded the email to Mr. (Paul) Chow and asked:

> "Hi Paul,
>
> Sorry to trouble you, but can you help me re-calculating the amount of shares as declared in the 'statement of interest'? Green elite is full 60.000.000, as we own 50% of it, but we sold some percentage earlier 2012. Is this still the way to calculate as per 31-12-2012?
>
> Thanks
>
> Kind rg
>
> Stephan"

[44] No written reply to that email is in evidence.

[45] On 9th November 2013, Mr. de Leeuw sent a long email to Mr. van Ooijen. It is clear from this that there were tensions in the relationship between the two men which were starting to manifest themselves. For current purposes, what is significant is this passage, which says in translation:

> "5. Green Elite Ltd. You indicated that you are not a director of Green Elite Ltd. That begs the question of who is, then? In my view DP should play its role as a shareholder of Green Elite Ltd more actively. I propose making contact via CT with the board of Green Elite Ltd. Subsequently we can request information such as annual accounts, minutes of AGMs etc. I think DP has to get a grip on Green Elite Ltd and the money that will be made by it. There also needs to be some grip on the share interest in CT. Will I suggest a draft to CT or will you do this?"

[46] Mr. van Ooijen replied on 11th November 2013, with further exchanges as follows (again in translation):

> Van Ooijen, 11th November: 5) These shares should go to staff members; at the end of this week I will probably be in HK and I'll ask Fang what we do with the shares. Depending on that, we can take action.
>
> De Leeuw, 14th November: 5(d) The CT shares held by Green Elite were intended for the staff. For certain reasons, that was not possible and this is back before IPO turned. It has been replaced by the pre- and post-IPO

options. That makes that DP BV is legally and economically responsible for the 50% interest in Green Elite.[8]

Van Ooijen, 14th November: 5) I do not think that one thing replaced the other. But I would be glad share your position, of course.

Van Ooijen, 24th November: d. As far as I know, the options have not replaced this. We shall discuss what our definitive standpoint is and will be. Earlier it was 5%, with the aim of distributing 2% to employees. The shares were intended for a limited number of managers. That too was an agreement. We need to discuss whether there are possibilities, arguments and joint wishes that change our standpoint.

De Leeuw, 25th November: 3d) A lot has been said about this, but let's simply be guided by the facts and the situation as it is: Yes, at one point a maximum 3% was intended for the employees. At CT/Fang's request that was reversed prior to the stock market listing. That plan didn't work in fact. This is why advisors came up with the pre- and post-IPO options. I don't see why we should have to adopt a position other than that this 3% is DP BV's.[9]

Van Ooijen, 26th November: 3d) 5% was promised at one stage, and we brought it back down to 3% for China employees, 2% for our own employees. I don't remember either of these decisions being reversed before the flotation. That's also logical, since in that case we wouldn't have needed to set up GE. That the advisors came up with the options for that reason is not something I'm aware of. The options are also for a much larger number of staff members, and have to be paid. Do you have documents that show that this ever worked in the way you're claiming? Otherwise we need to discuss this and adopt a position.

[47] On 27th February 2014 Ms. Chan emailed Mr. van Ooijen the management accounts of Green Elite for 1st April 2010 to 31st December 2013. The profit and loss account shows dividend income from CT of HK$8,892,000. The balance sheet shows an "Amount due from Director" of HK$8,733,492.88.

[48] By an agreement of 2nd April 2014 Green Elite agreed to sell its CT shares to Tai Security for HK$150,000,000 (about US$19,350,000). The sale price was to be

[8] The translation at bundle E3/236/4972 was highlighted, which made it illegible in the electronic copy. I have used Google translate to translate afresh from the original at E3/236/4975.
[9] I have corrected the obvious mistranslation of the last few words of this quote from E3/238/4981.

paid on completion. However, by a supplemental agreement of the same date, it was provided:

> "2.1. Subject to Clause 2.2 of this Supplemental Agreement, the Vendor hereby agrees to waive the obligation of the Purchaser to pay the Consideration at Completion in accordance with clause 4.3 of, and paragraph 1 of Part 3 of Schedule 3 to, the Share Sale and Purchase Agreement.
>
> 2.2. The Purchaser shall pay the Consideration to the Vendor's bank account as set out in paragraph 1 of Part 3 of Schedule 3 to the Share Sale and Purchase Agreement within 14 calendar days from the Completion Date, or such later date as the Parties shall agree."

[49] No mention of this supplemental agreement was made in the board minutes approving the sale the day before. Nor were Mr. de Leeuw or Mr. van Ooijen informed.

[50] On 4th April 2014 the CT shares were transferred to Tai Security. On 18th April 2014 Mr. van Lint emailed Mr. de Leeuw the accounts for Green Elite and said that the dividend from CT had been lent to Mr. Fang. He referred to the sale of the CT shares and included a calculation of the sum due to Delco. On 1st May 2014 Mr. de Leeuw sent an email to Mr. Fang and Ms. Chan. This was in English and was written by Mr. van Lint on Mr. de Leeuw's instructions. It was copied to Mr. van Ooijen. It read:

> "Dear Mr. Fang, dear Emily,
>
> It was pleasure talking to Emily again. I am very pleased that the recent sales transaction has been completed and would like to thank you for that! As regards the position of Green Elite Ltd.
>
> I would like to summarize in this email what I mentioned over the phone. It is true that prior to the listing of CT we had set up the Green Elite Ltd structure to make available a portion of the CT shares to several key staff CT/Delco. However, prior to the IPO the advisers recommended not to do that and to return the Green Elite Ltd shares to Delco Participation BV/HWH. We agreed to that. Instead, for key employees a pre-IPO option

scheme and a post-IPO option scheme were adopted (on June 23, 2010) and we agreed to that as well.

Delco Participation BV has followed this from a legal perspective in its frequent reporting to the Hong Kong Stock Exchange and in many other instances. In addition, Delco Participation BV has accordingly reported to the tax authorities its (indirect) shareholding in CT via Green Elite Ltd year after year.

Only Delco Participation BV is the legal and beneficial owner (on pro rata basis) of the CT shares held via Green Elite Ltd. As such we kindly request Green Elite Ltd to transfer to Delco Participation BV its share of the the [*sic*] dividends and sales proceeds received by Green Elite Ltd re the CT shares as soon as possible. If this does not take place we expect questions and major issues with the Dutch tax authorities and eventual Hong Kong Stock Exchange. That is something we must avoid.

We acknowledge the contributions made by many people to the success of CT. Therefore we are very well prepared to discuss if and how we can express our gratitude for that in addition to the existing arrangements for those people after we have received the funds from Green Elite Ltd.

Best regards,

Herman de Leeuw"

[51] Ms. Chan translated the email for Mr. Fang. Thenceforth, Green Elite says that the Green Elite directors were on notice of Delco's position in relation to the sale proceeds and dividends. Mr. Fang did not respond in writing. The defendants' case is that there was subsequently a discussion between Ms. Chan and Mr. van Ooijen. What Ms. Chan said in evidence is this:[10]

> "A. I have good recollection of this email, not because of this particular litigation. First of all, because Herman seldom sends emails, and, number 2, the content of this email had surprised me or even shocked me, because it says that the options would replace the incentive shares. So I am really shocked to see that.
> Q. Do you remember translating this email for Mr. Fang?
> A. I had told him about the content of this email.
> Q. Can you remember where you were when you told him?

[10] Transcript, day 5 pp 63-65.

A. …At that time, I was really very shocked, after reading this email. So I immediately told Mr. Fang about this matter.
…
Q. Is it fair to say that both you and Mr. Fang regarded this as an important email?
A. We were pretty shocked.
Q. And you and Mr. Fang understood the email was requesting payment to Delco of half the proceeds of sale; is that right?
A. Yes. We read from the email there was that request.
Q. Do you actually remember Mr. Fang asking you to speak to Stephan about the email?
A. Yes, he asked me to give Stephan a phone call.
Q. Do you have an actual recollection of speaking to Stephan, or do you just assume that you must have done?
A. I believe I had called Stephan and talked to him. Because, first of all, the email said the option would replace the incentive share scheme, and then, secondly, that Delco should receive 50 per cent of the proceeds. Then, number 3, this email was written by Herman, so we were somewhat shocked. So as a result we asked Stephan about the matter, and Stephan said that he would handle it.
…
Q. Can you remember precisely what Stephan said to you?
A. He said he would handle it and he asked Mr. Fang not worry about it.

[52] There is no pleading averring that Mr. van Ooijen said "he would handle it." Nor is any pleaded legal consequence alleged to result from Mr. van Ooijen's statement. Mr. Gu says he was not told about the email and the subsequent telephone call. I shall have to consider whether I accept that evidence.

[53] Contrary to the terms of the sale agreement and the supplemental agreement, Tai Security in fact paid the purchase price for Green Elite's CT shares in three tranches on 31st March, 2nd April and 9th April 2015. The payments were made to Mr. Fang's personal bank account. Mr. Fang did not tell Mr. de Leeuw or Mr. van Ooijen that he had received the payments and that he had kept the proceeds. There was never a board meeting of Green Elite to authorize this mode of payment. Mr. Gu accepted in evidence that he knew of the payments and that he was happy for Mr. Fang to retain them.

[54] On 7th December 2015, a firm of Hong Kong solicitors, F Zimmern & Co, sent a letter before action to Green Elite for payment of Delco's share of the dividends and the sale proceeds received from Tai Security. The letter was received by Ms. Chan and forwarded to Mr. Fang's legal advisors.

[55] By this time relations between Mr. de Leeuw and Mr. van Ooijen had broken down completely. As the only two directors of Delco, the board was deadlocked. In particular there was a question as to whether certain proceedings commenced in Hong Kong by Delco had been properly authorised. Proceedings were commenced in the Amsterdam Enterprise Court to resolve these issues of Dutch company law. On 1st February 2016, that Court appointed Mr. Hammerstein, an experienced Dutch lawyer, to be a third director of Delco. Another lawyer, Mr. Willem Jan van Andel, was appointed to investigate the affairs of Delco.

[56] Despite the letter before action, on 15th February 2016 Mr. Fang paid Mr. Gu HK$50,000,007.60, this being what Mr. Fang considered to be Mr. Gu's share of the sale proceeds. By this time, Mr. Gu had retired from his employment with CT. The payment was made from the bank account of Fang Hui, Mr. Fang's son. So far as payments to Fang Anlin and Ms. Ding are concerned, there were small instalments in April 2015. The balance was paid between 1st February 2016 and 29th December 2017. Again the payments were made through various members of Mr. Fang's family. Neither Mr. de Leeuw nor Mr. van Ooijen were told about the payments.

[57] On 31st August 2016, Delco sought to requisition a meeting of the shareholders of Green Elite to enable the shareholders to be provided with information about the sale proceeds and the dividends. The directors of Green Elite failed to comply with the requisition. On 12th October 2016 Delco applied to this Court for an order that a meeting be held. Despite Green Elite's objections, on 30th November 2016 Wallbank J ordered that a meeting be held. An appeal against that order was dismissed on 15th January 2018.[11] A meeting was held on 1st February 2018 with

[11] Green Elite Ltd v Delco Participation BV [2018] ECSCJ No 4.

Mr. Gu as the chairman, but no information was given as to the whereabouts of the dividend monies and the sale proceeds.

[58] In the meantime, Mr. Fang had sought legal advice from Stephenson Harwood. They on 16th October 2016 instructed Richard Millett QC to advise on a number of points. Of significance is the following in the instructions to Mr. Millett QC:

> "21. The above transactions were described in the Prospectus for the eventual listing of CT In 2010 as follows:
>
> > 'On 28 August 2008, each of HWH and Delco Participation transferred 4 Shares to New Asset for an aggregate consideration of US$12,550,000, funded by a promissory note in the same amount issued by New Asset to HWH, 50% of which was to satisfy the half share of the consideration payable to HWH and the remaining 50% of which New Asset directed HWH to pay in cash to settle the half share of the consideration payable to Delco Participation. On 12 October 2008 and pursuant to the directions of the beneficiaries of the FDG Trust dated 12 October 2008, New Asset transferred a total of 8 Shares to each of HWH and Delco Participation, in equal proportion, in consideration of the cancellation of the promissory note of US$12,550,000 issued by New Asset to HWH.'
>
> According to clients' instructions, as the consideration of US$12,550,000 was never actually paid to HWH and Delco Participation, there was no repayment by Delco Participation for the transfer back of the 4 CT shares.
>
> …
>
> 28. According to clients' instructions, Green Elite was set up to reward senior management of CT who were not beneficial owners of HWH or Delco Participation. The trust structure as previously adopted in respect of the FDG Trust was not used. Our instructions are that the purpose of setting up Green Elite was known to all concerned including the Beneficiaries; Stephan, Herman and Frank of the Delco group; and Mr. Fang, Paul Chow and Emily Chan of HWH. Green Elite, as a company compared to a trust, was used because of the short period of time between the incorporation of Green Elite in January 2010 and the listing application in March 2010. The thinking at that time was that there was insufficient time to set up a trust structure in that period of time. The intention was to set up a company entity (Green Elite) first and then dealt [*sic*] with how to reward the senior management later.
>
> 29. Although we have so far not been able to identify any document which clearly stipulates the purpose of setting up Green Elite, it was stated in a draft memorandum dated January 2010 which set out the steps taken or to be taken for the restructuring of the CT for the purpose of its listing entitled

> 'Reorganisation Memorandum' that the CT shares transferred from HWH and Delco Participation were 'incentive Shares' [see Step 11 of the draft Reorganisation Memorandum…]. In the same document, the CT shares transferred to and later back from New Asset were also described as 'incentive Shares' (see Steps 6 and 7 of the draft Reorganisation Memorandum). It Is noted, however, that in a subsequent version of the draft Reorganisation Memorandum sent out in March 2010 as part of the attachments to the Al listing application documentation, the reference to 'Incentive' was removed in the description of Step 11… It was unclear why the reference to 'incentive' was removed in the March 2010 version. However, client's instructions are that the intention of setting up Green Elite, as known to DP, remained the same throughout the IPO process, which is to reward the senior management.
>
> 30. The Reorganisation Memorandum was circulated to the parties' involved in the preparation work of the IPO, including Stephan, Frank van Lint and Ralph Ybema of Delco... We have not yet identified documentary evidence showing that the Reorganisation Memorandum was circulated to the legal adviser of Delco, Reed Smith Richards Butler… Nonetheless, the fact remains that Delco had knowledge of the Reorganisation Memorandum." (Square brackets as in the original.)

[59] On 8th March 2017, Delco applied for the appointment of liquidators over Green Elite on the basis that its substratum had disappeared. This was opposed by Green Elite and HWH, who claimed it had a continuing purpose of dealing with the proceeds of sale. Wallbank J dismissed the application to appoint liquidators on 26th July 2017, but on 15th June 2018 the Court of Appeal allowed an appeal against his determination.[12] It held that the substratum of the company had disappeared on the sale of the CT shares. It upheld Wallbank J's conclusion that Green Elite was not a trust company. Liquidators were appointed on 3rd July 2018 and it is these liquidators who bring the current proceedings.

[60] Neither Wallbank J nor the Court of Appeal were told that Mr. Fang had already received the proceeds directly from Tai Security and distributed the proceeds to Fang Anlin, Ms. Ding and Mr. Gu. This fact was first revealed to the liquidators in a letter from Appleby, acting on behalf of HWH and Mr. Fang, dated 13th September

[12] Delco Participation BV v Green Elite Ltd [2018] ECSCJ No 163.

2018. It is convenient to quote from it, because it delineates what the major issues for determination by me are.

> "7. The sale of Green Elite's 60 million shares in CT came about as a result of Delco's decision to sell some of its own CT shares, which it had acquired on 12 July 2010. Delco had been eager to reduce its shareholding in CT since at least 2011, and Tai Security… was identified as a potential purchaser in around late 2013 or early 2014. In the course of the sale negotiations it became clear that Tai Security wished to acquire more than the 115,197,990 shares Delco intended to sell (which represented half the shares Delco then held), but did not have sufficient funds to do so. Mr Fang therefore proposed that Green Elite should also take the opportunity to sell its CT shares to Tai Security. He considered that it would be a good time to pass the benefit of Green Elite's only asset to the Beneficiaries.
>
> 8. Knowing that Delco would not be prepared to accept any deferral of payment, Mr. Fang suggested that Green Elite do so instead. Mr. Fang relayed this proposal to the Beneficiaries, and agreed with them that:
>
> (a) Green Elite would allow Tai Security to extend the settlement date to about one year after the share transfer;
> (b) the sale proceeds, when paid, would be paid to Mr Fang directly; and
> (c) Mr Fang would distribute the proceeds to the Beneficiaries.
>
> 9. To place this in context, one of the reasons Mr. Fang had been appointed as a director of Green Elite was so that he could supervise, handle and/or determine the appropriate timing of the sale of its CT shares. When they established Green Elite, Delco and HWH were concerned to ensure that the key employees they were rewarding — and who they wanted to retain — would not simply sell the shares and leave the business (i.e. that they would be incentivised to stay by being locked in for a period of time before they could receive the reward). An early sale of Green Elite's CT shares would also have reduced the interests in CT held by Delco, HWH and their affiliates to below 51%, an event which they were then contractually bound to prevent.
>
> 10. Mr. Fang conveyed this proposal to Stephan van Ooijen, who confirmed orally that Delco was content with it. It is likely that Mr. van Ooijen was referring to this discussion when he noted at the start of his email to Herman de Leeuw on 3 September 2014… that 'It was Fang who told me of the deferred payment of the GE shares. The position is still that these shares are to go to key managers and that we would be seeing to it that they would.'
>
> 11. On 2 April 2014 Delco and Green Elite each executed a sale and purchase agreement with Tai Security for the sale of their CT shares at the price of HK$2.50 per share. Delco agreed to sell its shares for

HK$287,994,975 and Green Elite for HK$150 million. The agreement for the sale of Green Elite's shares was signed by Mr. Fang on behalf of Green Elite. Although it provided for payment into Green Elite's bank account, we are instructed that for the reasons stated in paragraph 8 above the payment was ultimately made to Mr Fang for onward distribution to the Beneficiaries. On 4 April 2014 CT, of which Mr. van Ooijen was then a director, published an announcement regarding both sales on the Hong Kong Stock Exchange website.

12. In short, Delco knew that the shares had been sold, that the Beneficiaries were entitled to the proceeds and that they would receive them from Mr. Fang and not Green Elite.

13. In or around March or April 2015, Tai Security paid HK$150 million to Mr. Fang, who distributed that sum amongst the Beneficiaries in the following manner:

(a) HK$50 million to Mr. Gu in or around February or March 2016; and

(b) the equivalent in Chinese Yuan of HK$50 million to each of Mr. Fang Anlin and Ms. Ding Li, by instalments.

14. Mr. Fang did not retain any part of the HK$150 million.

15. The distribution of the sale proceeds to the Beneficiaries was entirely faithful to and in accordance with Green Elite's purpose. As a shareholder without any beneficial interest in the shares, it was not for Delco (or indeed HWH) to direct how the proceeds should be distributed. That was a matter for the board of directors."

[61] On 13th December 2018 Wallbank J granted a freezing order against HWH, Mr. Fang, Fang Anlin, Ms. Ding and Mr. Gu in the current proceedings, which were issued the following day. Subsequently, there was an application to discharge the freezing order and to stay the action on *forum non conveniens* grounds. Those applications came before me on 19th and 20th November 2019. I discharged the freezing order but refused to stay the action on *forum* grounds. An appeal by Green Elite against the discharge of the freezing order failed.[13]

The Business Companies Act and the Articles of Association

[13] [2021] ECSCJ No 589 (determined 11th June 2021).

[62] Before turning to the case put forward by each party, it is convenient to set out the relevant sections of the **Business Companies Act 2004** ("BCA"):[14]

> "120. Duties of directors
> (1) Subject to this section, a director of a company, in exercising his powers or performing his duties, shall act honestly and in good faith and in what the director believes to be in the best interests of the company.
> ...
> 121. Powers to be exercised for proper purpose
> A director shall exercise his powers as a director for a proper purpose and shall not act, or agree to the company acting, in a manner that contravenes this Act or the memorandum or articles of the company.
> …
> 175. Disposition of assets
> Subject to the memorandum or articles of a company, any sale, transfer, lease, exchange or other disposition, other than a mortgage, charge or other encumbrance or the enforcement thereof, of more than 50 per cent in value of the assets of the company, other than a transfer pursuant to the power described in section 28(3), if not made in the usual or regular course of the business carried on by the company, shall be made as follows:
>
> (a) the sale, transfer, lease, exchange or other disposition shall be approved by the directors;
>
> (b) upon approval of the sale, transfer, lease, exchange or other disposition, the directors shall submit details of the disposition to the members for it to be authorised by a resolution of members;
>
> (c) if a meeting of members is to be held, notice of the meeting, accompanied by an outline of the disposition, shall be given to each member, whether or not he is entitled to vote on the sale, transfer, lease, exchange or other disposition; and
>
> (d) if it is proposed to obtain the written consent of members, an outline of the disposition shall be given to each member, whether or not he is entitled to consent to the sale, transfer, lease, exchange or other disposition.
>
> …
> 179. Rights of dissenters
> (1) A member of a company is entitled to payment of the fair value of his shares upon dissenting from
>
> (a) a merger, if the company is a constituent company, unless the company is the surviving company and the member continues to hold the same or similar shares;
>
> (b) a consolidation, if the company is a constituent company;
>
> (c) any sale, transfer, lease, exchange or other disposition of more than 50 per cent in value of the assets or business of the company,

[14] No 16 of 2004, Laws of the Territory of the Virgin Islands.

if not made in the usual or regular course of the business carried on by the company, but not including

(i) a disposition pursuant to an order of the Court having jurisdiction in the matter,

(ii) a disposition for money on terms requiring all or substantially all net proceeds to be distributed to the members in accordance with their respective interests within one year after the date of disposition, or

(iii) a transfer pursuant to the power described in section 28(2);

(d) a redemption of his shares by the company pursuant to section 176; and

(e) an arrangement, if permitted by the Court.

(2) A member who desires to exercise his entitlement under subsection (1) shall give to the company, before the meeting of members at which the action is submitted to a vote, or at the meeting but before the vote, written objection to the action; but an objection is not required from a member to whom the company did not give notice of the meeting in accordance with this Act or where the proposed action is authorised by written consent of members without a meeting.

(3) An objection under subsection (2) shall include a statement that the member proposes to demand payment for his shares if the action is taken."

[63] Article. 9.8 of Green Elite's Articles of Association provides:

> "For the purposes of Section 175 (Disposition of assets) of the Act, the directors may by Resolution of Directors determine that any sale, transfer, lease, exchange or other disposition is in the usual or regular course of the business carried on by the Company and such determination is, in the absence of fraud, conclusive."

Green Elite's case

[64] Green Elite puts its case in its closing submissions as follows (omitting citations). The claims originally pleaded under section 255 of the **Insolvency Act 2003**[15] and conspiracy were not pursued.

[15] No 5 of 2003, Laws of the Territory of the Virgin Islands.

"134. Green Elite seeks an order that the First to Fourth Defendants account to it for the HK$150,000,000 sale proceeds plus interest or pay damages or compensation in that amount. The claim is put on two alternative principal bases.

135. First, that the payment of the proceeds to Mr. Fang and then to Fang Anlin, Ms. Ding and Mr. Gu was a breach by them of their fiduciary duties and, as a result, that they are jointly and severally personally liable to account to Green Elite for the sale proceeds plus interest. Their fiduciary duties included a duty to exercise their powers for a proper purpose (BCA section 121) and to do so honestly, in good faith and in what they considered to be the best interests of Green Elite (BCA section 120(1)). They are also all liable to account on the basis of knowing receipt and, to the extent that the proceeds remain traceable, Green Elite has a proprietary right to the proceeds or their traceable product.

136. Secondly, there was a failure to comply with section 175 of the BCA with the consequence that:

a. the payment away of the proceeds was undertaken without authority and is void or voidable;
b. the first to fourth defendants are jointly and severally liable to account to Green Elite for the proceeds plus interest; and
c. to the extent that the proceeds remain traceable, Green Elite has a proprietary right to the proceeds or their traceable product.

137. The starting point is clearly that the payment of the proceeds of sale and the dividends to Mr. Fang and then Fang Anlin, Ms. Ding and Mr. Gu was wrongful.

138. Without more, it is obviously a breach of fiduciary [duty] for directors to transfer the whole of the assets of a company to themselves. *Prima facie*, directors do not have authority to pay the assets of a company to themselves and to do so involves a breach of fiduciary duty. Where a director receives company property, the burden is on the director to show that the transaction is proper…

139. A director is treated as a trustee of company property which comes into their hands or which is under their control. They are liable to make good monies that they have misapplied upon the same footing as if they were trustees. For this purpose, misapplication means any disposition of the company's property which:

a. by virtue of any provision of the company's constitution or any statutory provision or any rule of general law the company or the board is forbidden or incompetent or unauthorised to make; or
b. is carried out by the directors in breach of their fiduciary duties...

140. There is, of course, as the sub-paras in para 139 above identify, a distinction between: a. [the] scope of power or authority and b. the proper exercise of that power. [Footnote: The attempt by the Defendants in opening… to suggest that this principle only applies where there is *prima facie* no good explanation for the company director having the property in his hands seeks to turn the principle on its head. The whole purpose of the principle is to require a director/trustee to account for his/her possession of the company/trust property. And, in the present case, the good explanation — the alleged agreement — is the very thing that the Defendants must prove.]

141. The present case concerns not just a contention that the directors improperly exercised a power by exercising it in breach of fiduciary duty, but also a contention that the directors exceeded the scope of their powers. A director — like any agent — is under a duty to act in accordance with his or her power or authority and is liable to restore the value of any asset disposed of by an act in excess of that authority.

142. Where a director causes a company to make unauthorised payments for which the company receives no value, the director is liable to the company to pay compensation equal in amount to the payments...

143. Limits on a director's authority can be imposed by the constitution of the company, by statute or by the general law. A director's duty to act in accordance with his or her authority is reflected in BCA section 121.

144. The classic manifestation of a director's duty to comply with statutory limits on authority concerns the payment of dividends. A payment of a dividend in contravention of the statutory limitations is void; and a director is accountable to the company for unlawful dividends paid in contravention of the statutory provisions…

145. In the present case, the directors had no authority to pay the company's assets to themselves unless they can establish that there was an agreement between the shareholders that gave them that authority and that section 175 was satisfied.

146. The Defendants seek to avoid what would otherwise be a breach of duty by alleging the existence of an agreement that makes lawful what would otherwise be unlawful (namely, the payment to the directors of the dividends and proceeds of sale). They say that the payments were permitted by an agreement between the two shareholders; and they say that that agreement prevented the directors from acting in breach of fiduciary duty and gave them the requisite authority because it satisfied the requirements of section 175 (if section 175 applies, which they deny).

147. Green Elite's case with regard to the alleged agreement is twofold: first, no such agreement was reached; and, secondly, in any event, it was agreed that, rather than use Green Elite as an employee share scheme, the IPO terms would be amended to add a Pre-IPO Share Option Scheme.

148. There are four fundamental points that the Court ought to have in mind when embarking upon its analysis.

149. The first is that the relevant agreement must be an agreement in relation to Green Elite. The agreement must be one made between Delco and HWH in their capacity as shareholders of Green Elite: the very purpose of the alleged agreement is to negate what would otherwise be the unlawful act of the directors of Green Elite. That being the case, the agreement must be one that was formed at or after the time that Green Elite was incorporated and the CT shares transferred to it. The suggestion that one can simply carry across what was agreed in 2008 is wholly misconceived, not just conceptually, but in substance: the Green Elite arrangements were (on any basis) just not the same as the terms of the 2008 Share Scheme.

150. The second is the distinction between binding/operative agreement or purpose and inchoate/nascent agreement or purpose. The distinction is binary: an agreement is either legally binding or it is not. This applies as much to a company's purpose as it does to any other agreement. For example, assume two shareholders agree to incorporate a company and each subscribes for shares. They discuss a proposal to use the company to acquire and operate a restaurant (the proposed purpose), but the discussions envisage further discussions and agreement before the purpose is to be implemented. In that case, the purpose would be inchoate/nascent and it would obviously be a breach of duty for the directors to proceed to use the company's funds in the acquisition of a restaurant prior to such further discussions and agreement between the shareholders taking place.

151. The third is that, whilst informality is not, by itself, fatal, the Court must be satisfied that there was an intention to create legal relations and a sufficient certainty of terms, and that there is evidence from which the Court can conclude, objectively, that there was a meeting of minds on those terms."

[65] Green Elite cite for this proposition passages of **Taylor Goodchild Ltd v Scott Taylor**, where Snowden J (as he then was) says:[16]

[16] [2020] EWHC 2000 (Ch) at [70] and [71].

> "70. I accept, depending on the facts, a company could be bound by an informal agreement between its two shareholders. Agreements can be legally binding even though not in writing (see e.g. **Paul v Constance**[17]); in many small private companies, business is frequently conducted on an informal basis; and agreements between shareholders can be binding both upon themselves and the company, even if undocumented: see e.g. **Re Duomatic Ltd**.[18]
>
> 71. However, for a binding legal agreement there does need to be sufficient certainty of terms and some evidence from which the court can conclude, objectively, that there was a meeting of minds on those terms. The evidence that I have seen to date certainly does not satisfy me that the Company has no realistic prospect of disputing the existence and terms of such a contract. In particular, I am far from convinced that the suggested implied terms as to declaration of a dividend satisfy the strict tests of necessity or that they are so obvious as to go without saying. In particular, any implied terms binding the Company as a matter of contract to declare a dividend in the 'necessary amount' seems imprecise, and would have to deal specifically with the fact that as a matter of law the directors are responsible for recommending declaration of a dividend, and they have overriding fiduciary duties to the company in making any such decision: see e.g. **BAT Industries v Sequana**.[19]"

[66] The closing submissions continued:

> "152. An agreement or purpose may be inchoate/nascent either because the parties actually agreed that further steps were required for a binding agreement to be formed, or because, objectively:
>
> a. the parties have not evinced an intention to create legal relations;
> b. there is insufficient certainty of terms; or
> c. there was no meeting of minds in relation to those terms.
>
> 153. The fourth is the distinction between agreement of a company's general purpose and agreement to an actual disposition. Even if they could establish it was binding/operative (rather than inchoate/nascent), merely identifying the 'purpose' of Green Elite is not enough for Defendants.
>
> 154. The Claimant accepts that, if (contrary to the Claimant's case) Delco and HWH agreed a binding/operative general purpose, namely, to benefit employees, it would not have been a breach of duty by the directors to apply Green Elite's assets in accordance with that purpose.

[17] [1977] 1 WLR 527.
[18] [1969] 2 Ch 365.
[19] *Sub. nom.* BTI 2014 LLC v Sequana SA [2019] EWCA Civ 112, [2019] Bus LR 2178.

155. But — and this is absolutely central — agreement of a general purpose would not constitute agreement to or approval of the actual disposition (the payment to the employees) for the purposes of section 175 BCA. In the absence of an actual resolution passed by the shareholders, compliance with section 175 requires the unanimous approval by the shareholders of the actual transaction. The Claimant accepts that that approval can be given in advance, but it has to be approval of the actual terms of the disposition. An earlier agreement of a corporate purpose does not constitute an agreement to or approval of a later disposition for the purposes of section 175.

156. For example, assume two shareholders agree that a company they are incorporating will be used to buy and sell financial investments and assume that that purpose is binding/operative. In that situation, it cannot *per se* be a breach of fiduciary [duty] for the directors to use the company's assets in furtherance of that purpose; but a transaction in furtherance of that purpose involving the disposal of more than 50% of the company's assets will require shareholder approval if section 175 is otherwise engaged. The fact that a purpose has been agreed is no answer to the obligation to comply with section 175: section 175 requires shareholder approval of the actual disposition. If the relevant disposition is the use of, say, 75% of the company's cash to acquire one investment and section 175 is otherwise engaged, then, unless shareholder approval is given (formally by resolution or on a **Duomatic** basis), the directors will have no authority to proceed with the acquisition."

The defendants' case

[67] The Re-Amended Defence of Mr. Fang and HWH pleads as follows:

"11. In 2008 and as a result of the success of the JV Business, a decision was taken by the board of CT to list its shares (**the 2008 Listing Plan**) on the Main Board of the [HKSE].

12. As part of the 2008 Listing Plan, the board of CT, Delco, [Mr. Fang] and [HWH] agreed that certain shares in CT be transferred by Delco and [HWH] and new shares be allotted by CT upon its listing for the benefit of and/or allocated to three (3) senior employees, being [Fang Anlin], Ding Guopei (who requested that his daughter, [Ms. Ding], receive the shares on his behalf) and [Mr. Gu] (together **the Employees**). The purpose of the proposed share transfers, allotment and allocation was to reward the Employees for their substantial contribution to the JV Business over many years and to incentivise them to remain with the business after CT listed (**the Share Scheme**)."

[68] The pleading then deals with the setting up of New Asset and the FDG Trust and its unwinding prior to the 2010 listing. It then pleads the incorporation of Green Elite and the transfer of CT share to it and continues:

> "21. In 2010, the board of CT revisited a listing of its shares on the HKSE (**the 2010 Listing**).
>
> 22. In implementation of the 2010 Listing and to give effect to the Share Scheme:
>
> (a) to comply with HKSE Listing Rules, the FDG Trust structure was superseded by the incorporation of the Company;
> (b) the Employees and [Mr. Fang] were appointed directors of [Green Elite] to provide the Employees with control of the Incentive Shares post-2010 Listing and [Mr. Fang] with oversight of the same to ensure the Employees would not immediately sell the Incentive Shares and leave the business on CT being listed;
> (c) on or about 8 March 2010, HWH transferred four (4) Incentive Shares to the Company; and
> (d) at about the same time, Delco transferred four (4) Incentive Shares to the Company in extinguishment of the Delco Debt; and
> (e) following the 2010 Listing, 34,999,946 new shares in CT were allotted to the Company.
>
> 23. …(b) [Mr. Fang and HWH] say further that the agreed purpose for which [Green Elite] was incorporated was to act as the corporate vehicle through which the Share Scheme would be given effect for the benefit of the Employees (**the Agreed Purpose**)…
>
> 24. …(a) [B]etween 2008 and 2010, meetings were held between HWH, Delco, CT and its professional advisers to discuss the listing of CT, including the Incentive Shares, the Share Scheme and how to give effect to the Share Scheme;
> (b) the meetings were attended by [Mr. Fang] as representative of the Fang Group and chairman/director of CT, [Mr. Gu] as representative director of CT and later of [Green Elite] and Mr. van Ooijen as representative of the Delco Group as well as Mr. Frank van Lint, the Delco Group's tax adviser; and
> (c) it was during those meetings that the Share Scheme and the Agreed Purpose were discussed and eventually agreed by the parties, which agreements also constituted both approval by the board of directors (albeit without formality) and approval by or on behalf of the members of [Green

> Elite] (albeit without formality) for the purposes of section 175 of the [BCA]; and
> (d) at all material times, the Agreed Purpose remained unchanged and the First and Fifth Defendants acted in accordance with the Agreed Purpose and pursuant to the Share Scheme (as agreed and understood between the parties).

[69] Further Information was provided by Mr. Fang and HWH about the meetings alleged in para 24. This said:

> "During the Listing Meetings which followed, which were attended by duly appointed directors, professional advisors and other representatives of Delco, HWH and CT (including but not limited to [Mr. Fang], [HWH], Stephan van Ooijen and Frank van Lint), various matters pertaining to the CT listing were discussed. From time to time, the Share Scheme and Agreed Purpose were considered (including the need to change how the Share Scheme was to be implemented due to the requirements of the [HKSE] Rules…). The directors and representatives of Delco, HWH and CT discussed, and ultimately agreed, how to give effect to the Share Scheme and the Agreed Purpose, as pleaded in paras 24(c) and (d) of the Re-Amended Defence. The terms of the Share Scheme and the Agreed Purpose were agreed and approved verbally. No meeting minutes were prepared in respect of the Share Scheme and Agreed Purpose.

[70] Mr. Gu served a separate (now Re-Amended) Defence. It in large measure simply adopted the Re-Amended Defence of Mr. Fang and HWH and in particular the definition of the Share Scheme and the Agreed Purpose. The main addition was that Mr Gu asserted that Green Elite was estopped from making its claims against him. Mr. Ayers QC, however, in opening abandoned any reliance on estoppel.

[71] At para 9(c) Mr. Gu asserted that:

> "he attended the meetings held between 2008 and 2010 as representative of CT and later of the Company and at which the Share Scheme and the Agreed Purpose were discussed and agreed by the parties, as pleaded in para 24 of the Re-Amended Defence [of Mr. Fang and HWH]…"

[72] In relation to the restitution claim he pleaded: "Restitution is impossible on the basis of innocent change of position."

Demeanour and the assessment of witness evidence

[73] In assessing the oral evidence, I remind myself of what I said in **IsZo Capital LP v Nam Tai Property Inc and another**.[20] Baptiste JA recently echoed this approach in **Lamond Barker v Mary Almanda O'Garro and another**.[21] What I said was:

> "[75] …I first remind myself of the limitations of the assessment of the demeanour of witnesses. As Leggatt LJ (as he then was) said in **R (SS (Sri Lanka)) v Secretary of State for the Home Department**:[22]
>
> > '36. …[I]t has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth. The reasons for this were explained by MacKenna J in words which Lord Devlin later adopted in their entirety and Lord Bingham quoted with approval:[23]
> >
> > > "I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help."
> >
> > 37. The reasons for distrusting reliance on demeanour are magnified where the witness is of a different nationality from the judge and is either speaking English as a foreign language or is

[20] [2021] ECSCJ No 478 (3rd March 2021), appeal dismissed [2021] ECSCJ No 714 (4th October 2021), stay pending an appeal to the Privy Council refused [2021] ECSCJ No 754 (8th November 2021).
[21] [2021] ECSCJ No 723 (determined 18th October 2021) at [25]ff.
[22] [2018] EWCA Civ 1391.
[23] "Discretion" (1973) 9 Irish Jurist (New Series) 1 at p 10, quoted in Devlin, The Judge (Oxford, 1979) at p 63 and Bingham, "The Judge as Juror: The Judicial Determination of Factual Issues" (1985) 38 Current Legal Problems 1 (reprinted in Bingham, The Business of Judging (Oxford, 2000) at p 9).

giving evidence through an interpreter. Scrutton LJ once said that he had "never yet seen a witness giving evidence through an interpreter as to whom I could decide whether he was telling the truth or not."[24] In his seminal essay on 'The Judge as Juror' Lord Bingham observed:

> "If a Turk shows signs of anger when accused of lying, is that to be interpreted as the bluster of a man caught out in deceit or the reaction of an honest man to an insult? If a Greek, similarly challenged, becomes rhetorical and voluble and offers to swear the truth of what he has said on the lives of his children, what (if any) significance should be attached to that? If a Japanese witness, accused of forging a document, becomes sullen, resentful and hostile, does this suggest that he has done so or that he has not? I can only ask these questions. I cannot answer them. And if the answer is given that it all depends on the impression made by the particular witness in the particular case that is in my view no answer. The enigma usually remains. *To rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm*." (Leggatt J's emphasis)

[76] This warning echoes the earlier observation of the judge, sitting at first instance, in **Gestmin SGPS SA v Crédit Suisse (UK) Ltd**,[25] where he said:

> '[T]he best approach for a judge to adopt in the trial of a commercial case is… to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose — though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.'

[24] Compania Naviera Martiartu v Royal Exchange Assurance Corp (1922) 13 Ll L Rep 83 at p 97.
[25] [2013] EWHC 3560 (Comm) at para [22].

[77] Now this is not a binding rule. On the contrary, as the English Court of Appeal held in **Kogan v Martin**:[26]

> 'We start by recalling that the judge read Leggatt J's statements in **Gestmin v Credit Suisse** and **Blue v Ashley**[27] as an "admonition" against placing any reliance at all on the recollections of witnesses. We consider that to have been a serious error in the present case for a number of reasons… **Gestmin** is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed… But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon *all* of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence.'

[78] An oft-cited summary of the appropriate approach (albeit in the context of fraud rather than improper motive) is that of Robert Goff LJ in **Armagas Ltd v Mundogas SA (The Ocean Frost)**:[28]

> 'Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.'

[79] I shall thus take a holistic view of the case when I reach a final view of the facts."

The witnesses

[26] [2019] EWCA Civ 1645, [2020] FSR 3 at para [88].
[27] [2017] EWHC 1928 (Comm) at paras [65]-[69].
[28] [1985] 1 Lloyd's Rep 1 at p 57.

[74] On Green Elite's side I heard live evidence from Mr. Hammerstein, Mr. de Leeuw and Mr. van Lint. Mr. van Ooijen's witness statement was put in pursuant to a hearsay notice. I shall consider what approach I take to his evidence below. On Mr. Fang's and HWH's behalf I heard from Mr. Fang himself and Ms. Chan. Mr. Gu gave evidence on his own behalf.

Mr. Hammerstein

[75] Mr. Hammerstein was a patently honest witness, however, his involvement in matters commenced many years after the events giving rise to the current claim. He could thus give very little relevant evidence.

Mr. de Leeuw

[76] Mr. de Leeuw I found to be a witness endeavouring to assist the Court. However, he had only limited involvement in the negotiations which lead up to the creation of Green Elite. He had a firm belief that the pre- and post-IPO share schemes in the 2010 prospectus replaced the New Asset 2008 scheme. That, I find, is an interpretation he put on events. It is not a belief founded on direct evidence that the parties had agreed that. As such I can put little weight on his assertion that the 2008 scheme was replaced by the two schemes in the prospectus. The correspondence between him and Mr. van Ooijen in November 2013, which I have set out above, shows that Mr. van Ooijen (who had had direct involvement in the negotiations of both the 2008 and 2010 schemes) did not agree with him. Although I am jumping ahead, I can indicate that looking at the evidence overall, on balance of probabilities I can reject Mr. de Leeuw's evidence that Delco and HWH agreed that the pre- and post-IPO share schemes were intended entirely to satisfy the Understanding (as I have defined it above) to which effect was given by the New Asset scheme. It is, for example, belied by the correspondence in November 2013 between him and Mr. van Ooijen.

Mr. van Lint

[77] Mr. van Lint I found to be an impressive witness. He was a senior tax specialist and was meticulous and professional in his contemporaneous dealings with CT and the

Fang side of the business. However, he was not centrally involved in the key negotiations, which occurred largely between Mr. Fang and Mr. van Ooijen (with Ms. Chan as the medium of communication). Although he was aware of the cancellation of the New Asset scheme, he was not privy to the reasons for it.[29] He said that the purpose of the emails he sent in 2010 about how Delco should treat the $6,275,000:[30]

> "was to clarify with Mr. Fang (*via* Mr. Chow or Ms. Chan) the position in relation to Green Elite. If Green Elite was a substitution of the [New Asset] Scheme, I wanted confirmation that I did not have to reflect the Consideration as a debt in the accounts of Delco. I did not receive that confirmation from Ms Chan or from Mr Fang himself, and, as a result, the sum of US$6,275,000 continued to be included in the original amounts recorded in the financial statements for Delco Asia as 'Other Payables'."

[78] Mr. Ayers QC criticised Mr. van Lint for his assertion that he did not know the composition of the board of Green Elite. In my judgment, there is nothing surprising in Mr. van Lint believing that there was Delco representation on the board. He knew that Delco held half the shares (beneficially, as he believed), so board representation was a reasonable assumption. His failure to check was at most an oversight. The other matters raised in para 99.3 of Mr. Ayers' closing by way of criticism are all minor.

[79] Mr. van Lint's evidence is important in relation to tax. Delco had been the subject of a long-running investigation by the Dutch tax authority, which had been initially resolved in 2005, but was then revived. This revived investigation resulted in a settlement following a mediation held in 2008. The settlement was quite favourable to Delco, but Mr. van Lint was concerned that Delco's tax affairs going forward were dealt with completely transparently. This is relevant to the six documents to which I shall come which deal with the CT shares held by Green Elite. Mr. van Lint also appears to have been the originator, when the New Asset scheme was set up, of

[29] Witness statement, para 23.
[30] Witness statement, para 26.

the idea that the Three Employees should pay for the incentive shares, on the basis that they might otherwise have an immediate obligation to pay PRC tax on the benefit without having any funds with which to pay the tax.

Mr. van Ooijen's evidence and adverse inferences

[80] As regards Mr. van Ooijen, Mr. Ayers QC invites me to draw inferences from his failure to give evidence. The leading authority on drawing inferences is **Wisniewski v Central Manchester Health Authority**, where Brooke LJ giving the judgment of the English Court of Appeal held:[31]

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

[81] Mr. Ayers QC submits at para 99.4 of his written closing:

> "With respect to Mr. van Ooijen: this is the plainest ever case for the drawing of an adverse inference from the absence of a witness at trial. No explanation has been offered for his absence. Clearly, he could have appeared by Zoom if he had wanted to. The permissible and indeed only inference is that Mr. van Ooijen clearly does not believe in this claim. The Company procured a tepid and punch-pulling witness statement from Mr.

[31] [1998] PIQR P324 at p P340.

> van Ooijen in July 2021. He was clearly prepared to hold his nose and sign that witness statement but he was and is unprepared to come to court and look the Judge in the eye and tell lies. Tellingly, Mr. de Leeuw accepted in evidence[32] that Mr. van Ooijen's view of this case is that it is a 'waste of time'. Mr. van Ooijen's witness statement also shows up the evidential chaos in the Company's case: he is simply unwilling to include in his statement evidence to the effect that the Green Elite scheme was reversed or superseded by the IPO, in particular the IPO prospectus (the position taken by Mr. de Leeuw). Mr. van Ooijen's position, described cryptically by Mr. Hammerstein as 'nuanced', is that it was and is still open for Green Elite to operate as an employee share reward scheme. The [defendants] of course challenge that but the point is that the Company's witnesses do not sing with one voice, which must be fatal to the Company's case in any true and objective assessment of whether Delco Participation is to be taken as having assented to the use of the 4 CT shares which it originally held for the benefit of the Key Employees."

[82] The key passage in Mr. van Ooijen's witness statement is this:

> "11. Delco and HWH's plan to reward certain key members of staff in the listed business was revisited in anticipation of the 2010 listing. There was an informal Understanding between Delco and HWH whereby they could (at their discretion) reward certain key members of staff with their respective shares in CT held though Green Elite. That Understanding was never (and was never intended to be) formally or legally documented. It was different from the formal [2008 New Asset] Scheme, which was formally documented as a trust."

[83] Looking at Mr. Ayers' points, I have already rejected Mr. de Leeuw's belief that the pre- and post-IPO shares schemes were intended to replace the scheme for the Three Employees, so that point goes. The difficulty with his other points is that Mr. van Ooijen shows in the passage cited that he believed the employees had a moral claim to the money, even if the Understanding between Delco and HMH did not (or was not intended to) have legal effect. It has to be remembered that Mr. van Ooijen was the major contact with the Chinese side of the operation. Mr. Gu said that he, using his (Mr. Gu's) limited English, had socialised with Mr. van Ooijen. It would be

[32] Transcript, day 2, p 82.

unsurprising if Mr. van Ooijen considered that the joint venture owed the Three Employees a more substantial reward than Mr. de Leeuw considered appropriate.

[84] In my judgment it is not appropriate to draw an inference that, had Mr. van Ooijen given live evidence, he would have admitted that Delco and HMH had made a legally binding agreement that the CT shares held by Green Elite were held for the Three Employees. The fact that he considered there was a moral obligation to them sufficiently explains his reluctance to give evidence. That said, it does not seem to me that I can attach any substantial weight to the evidence in Mr. van Ooijen's witness statement. It is hearsay. Moreover, it is hearsay in a case where the oral testimony of witnesses is of central importance. I shall need to see to what extent Mr. van Ooijen's evidence is corroborated as part of my overall assessment of the evidence.

Ms. Chan

[85] Ms. Chan gave her evidence in Mandarin, although she spoke English and indeed was the main conduit between Mr. van Ooijen and Mr. Fang in that language. That is not something which I consider can properly be held against her: see what I said in similar circumstances in **Zhao Long and another v Endushantum Investments Co Ltd and another**.[33]

[86] I found her an honest witness, but as can be seen from the passages of her witness statement cited below that she made various assumptions. These were not based on direct knowledge. The significance of what she said is in my judgment more in what she did not say.

[87] Mr. Fang's evidence, as set out below, was that there was "no discussion [about the details of the new Green Elite share scheme] because I spent money to buy the share to be rewarded to the shareholders". There would have been nothing for Ms. Chan to interpret. Ms. Chan's witness statement confirms, by its silence, that there was indeed no discussion:

[33] [2021] ECSCJ No 639 (20th July 2021) at [122].

"42. On 1 February 2010, I sent Stephan and Herman an email about the incorporation of Green Elite… The following day, Frank sent me an email to seek clarification about the function of Green Elite. He suspected, correctly, that it related to the arrangement whereby Green Elite was to replace New Asset and the FDG Trust. As stated in his email, Frank was again concerned about Dutch tax consequences and wanted to review the documents from that perspective before arranging for Stephan and Herman to sign. I replied to his email and told him that Paul Chow would let him know the details of the arrangements. Paul Chow then offered to discuss by phone to clarify whatever issue Frank had…

43. Frank apparently was satisfied with Paul Chow's explanation, as he immediately arranged for Stephan and Herman to sign the relevant documents, copies of which were sent to me by Stephan on 2 February 2010…

44. Green Elite was set up in such a way that Delco Participation did not have any representative appointed to its board. I understand that this was consistent with the common intention between Mr. Fang and Delco Participation.

45. Whilst New Asset transferred 4 CT shares back to Delco Participation, neither Delco Participation nor Delco Asia repaid the sum of USD 6,275,000 to HKM Metal (or Mr. Fang / HWH).

46. A sum of USD 6,275,000 was thus due from Delco Participation to HKM Metal.

47. On or about 9 March 2010, Frank emailed me and others concerning Delco Participation's subscription of 1 share in Green Elite (thus becoming equal shareholders of Green Elite together with HWH) and the transfer of 4 CT shares to Green Elite as part of the Share Scheme… On Frank's confirmation that the documents were 'OK' and that he would advise Herman and Stephan to sign the same, my impression was that Delco Participation was released from its obligation to repay USD 6,275,000 to HKM Metal as it had no real beneficial interest in those 4 CT shares in Green Elite, given that Agreed Purpose.

48. On 10 March 2010, Frank emailed Ivan Tan of Stephenson Harwood and me to discuss various matters relating to the listing of CT. Among other things, he asked me to confirm with Mr Fang that by '[t]ransferring 4 shares of CT to Green Elite Delco Participation is also released from its liability to pay US$6,275,000 which liability it took up when acquiring the shares a few weeks ago.' …

> 49. I have not been able to locate any written reply I may have sent, but Frank did not pursue this matter with me thereafter. My impression was that Delco received full consideration for the 4 CT shares which it transferred to Green Elite by virtue of the fact that it never returned its share of the 8 CT Share Consideration when its 4 CT shares were re-transferred back to it from New Asset after the 2008 Listing plan fell through."

Mr. Gu

[88] Mr. Gu was an unsatisfactory witness for reasons which I shall set out. However, his evidence is useful in what it says about Mr. Fang's approach to New Asset and Green Elite and, like Ms. Chan, for what it does not say. Mr. Gu had no direct knowledge of the agreement between Delco and HWH in relation to Green Elite, instead he was reliant on Mr. Fang. At para 68.1 of his witness statement, he says:

> "I was told by Mr. Fang and understood that Delco had agreed that a new offshore company would be incorporated to replace New Asset and the FDG Trust to give effect to the Share Scheme. The new company would be a holding company… The Company's sole purpose was to act as the corporate vehicle through which the Share Scheme would be implemented for the benefit of the Key Employees (the Agreed Purpose)."

[89] The reliance on information coming solely from Mr. Fang is a feature of Mr. Gu's evidence in relation to the setting up of the 2008 structure for the FDG Trust as well: see paras 43.3 to 45 and 50 of his witness statement. His assertion in para 9(c) of his Re-Amended Defence that he was present at the meetings between 2008 and 2010 where the key agreement or agreements as to the Green Elite shares were made is not borne out by his evidence, nor indeed the evidence of Mr. Fang.

[90] Indeed, his evidence is that insofar as Mr. Fang had agreed something with Delco, for example, the requirement that beneficiaries under the FDG Trust had to pay for their shares, Mr. Fang thought he could vary the terms unilaterally. Mr. Gu was taken to Step 6.3 of the Reconstruction Memorandum for the 2008 listing, which provided:

> "New Asset shall not be allowed to transfer the Shares it held to any object of the FDG Trust until that person has paid to New Asset an amount equivalent to such portion of the debt under the promissory note attributable to the acquisition of those Shares. New Asset will apply such amount to pay off all or part of the promissory note issued by New Asset to HWH. There is no time fixed to effect the transfer — this is purely in the discretion of the trustee of the FDG Trust."

He was cross-examined on this as follows:[34]

> "Q. Mr. Gu, do you remember one of the listing professionals translating that paragraph for you, or explaining that paragraph to you?
> A. They have spoken about that. I have also heard the message that for the trust we had to make payment, but definitely we had no money to pay. So at that time, we said to Mr Fang that we had no money to pay, so what should be done? Mr. Fang said that we did not need to worry about it, he would take care of it.
> Q. But you knew it was a term that had been agreed between Delco and Mr. Fang, that you would have to make payment for the shares, didn't you?
> A. Yes, as I said just now, after we communicated with Mr. Fang he asked us not to worry about it, he would take care of it."

[91] Later in cross-examination there was this exchange:[35]

> "Q. Can you explain to his Lordship what you remember about the reason why the share scheme had to be reversed?
> A. Because we got in this intensive share scheme from 2008 all the way to the completion of listing, it has not been changed at all. It was an agreement reached by Mr. Fang and Delco.
> Q. Let us be clear, Mr. Gu, the trust and the holding of shares through New Asset, that was unwound, wasn't it?
> A. Because listing was suspended.
> Q. Is your evidence that the trust was unwound because the listing was suspended?
> JUSTICE JACK: Sorry, I am not sure that Mr. Gu has accepted that the trust was unwound. Mr. Gu, what was your Understanding of the shares which had been put into New Asset? Was there a time when the shares were moved out of New Asset?
> A. I don't really have an idea, because there are other people responsible for that work. So I am not sure when exactly the shares were moved out.

[34] Transcript, day 6, pp 35-36.
[35] Transcript, day 6, pp 41-42.

> JUSTICE JACK: But you did know that the shares were moved from New Asset and eventually came into the ownership of Green Elite?
> A. Yes, because originally the shares were held by New Asset. Then, after that, there was a new listing plan. Then the professional listing team came up with a proposal to unwind the trust, and then the shares were transferred to Green Elite.
> JUSTICE JACK: Why were they translated[36] to Green Elite? Why couldn't they just carry on with the trust plan you had with New Asset?
> A. I don't know too much about the incentive share scheme, and also New Asset, because I am one of the beneficiaries, so I did not take much part in the whole thing. But based on what I know from different sources, well, the new listing team was of the view that if Green Elite was established then, first of all, it would satisfy the original purpose of having the trust. At the same time, it made things convenient for Mr. Fang. It would make it convenient for Mr. Fang to control everything, and it can also save money."

[92] As to my overall assessment of Mr. Gu's evidence, Mr. Ayers QC submitted that I should accept him as a witness of truth. In para 192 of his written closing in relation to the restitution claim he said that:

> "Mr. Gu was forced to repeat in the public forum of this court that he had gambled a large amount of money in Macau and lost. Whilst HK$50m is a significant sum, it is not incredible that Mr. Gu has dissipated it. He also repaid loans although he could not recall the details. He has high living expenses. He has plainly and innocently changed his position."

[93] At para 165.2 of his witness statement, Mr. Gu says:

> "I spent the Funds during the same approximate period [2014-2016]. I have very high day-to-day living expenses due to my lifestyle and the cost of maintaining my family (my **Expenses**). I had previously obtained significant loans to fund my Expenses and I made loan repayments as soon as I received any portion of the Funds meaning that I spent the Funds almost immediately after receipt. After I had settled those loans in full, I used the reminder of the Funds to pay for further Expenses and I spent some on gambling. At all times when I was spending the Funds I believed that I was entitled to receive the money and to spend it as I saw it because it was my money."

[36] *Sic* in the transcript: presumably "transferred" was meant or said.

[94] His assertion at para 167 of his witness statement that he cannot "recall, exactly, when he spent the last of the Funds", with the implication that he had spent all the HK$50 million, was contradicted by himself in cross-examination:[37]

> "Q. Is it fair to say that working for Mr. Fang has made you a wealthy man?
> A. Yes.
> Q. And do you still work for a living?
> A. No.
> Q. So do you live on the money that you made working for Mr. Fang?
> A. Not entirely.
> Q. So some of the money you spend is money you earned working for Mr. Fang; is that right?
> A. Yes.
> Q. What other sources of income do you have?
> A. I have my own income, which I don't think I need to tell you."

[95] There is no documentary evidence, or indeed any oral evidence other than his own, that he lost money gambling. The suggestion that much of the money went on the repayment of loans is also uncorroborated. HK$50 million is a very large sum of money. It is difficult to see how Mr. Gu, whilst merely earning a salary at CT, could have borrowed sums in that order of magnitude. The "high living expenses" are unparticularised and are not supported by documentary evidence.

[96] Mr. Gu's assertion that he was not told about the 1st May 2014 email is implausible. He was Mr. Fang's right-hand man. He was still working in the business. It is not in my judgment credible that Mr. Fang did not discuss this important communication from Mr. de Leeuw with him and indeed with Fang Anlin, Mr. Fang's brother, and Ms. Ding, his niece.

[97] I would not accept Mr. Gu's evidence save on matters contrary to his interest, undisputed matters, or where there is corroboration.

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[37] Transcript, day 6, p 21.

Mr. Fang's evidence

[98] Great circumspection needs in my judgment to be taken with Mr. Fang's evidence. He has a very great personal financial stake in the current litigation. His secrecy in relation to the proceeds of sale of the Green Elite shares to Tai Security is difficult to understand, if he thought there was nothing untoward occurred in his dealings with those monies.

[99] He had been party to a very successful joint venture with Mr. de Leeuw and Mr. van Ooijen for many years. The relationship had been built on trust. Even if there was a major disagreement between him and in particular Mr. de Leeuw about the employee share scheme, there was money available for an amicable settlement to be reached. The price of the CT shares placed with New Asset and later with Green Elite was put at just over US$12.5 million in 2008. By the time of the sale of those shares to Tai Security in 2014 they were worth US$19.3 million. Mr. van Ooijen was sympathetic to the claims of the Three Employees.

[100] Mr. Fang gave no good explanation for the stonewalling in relation to the proceeds of sale until the disclosure in Appleby's letter of 13th September 2018. There was no need for a cover-up if there was nothing to hide. Likewise, the means of paying the Three Employees was far from straightforward on his part. There is no adequate explanation for why the payment of the HK$50 million to Mr. Gu was made through Fang Hui's bank account. Again, if there was nothing untoward, there was no need for concealment of the payments.

[101] However, before making any conclusions about the reliability of Mr. Fang's evidence, I need to examine what he says about key issues.

[102] Mr. Fang's understanding of the FDG Trust was explored in cross-examination. There was the following exchange.[38]

"Q. Well, the CT shares were put into a trust structure, weren't they?

[38] Transcript, day 4, pp 36-38.

A. Yes.
Q. And you understood it was a discretionary trust; is that right?
A. Yes. So everything — the trustee has to listen to me.
Q. You understood that the trustee had the ultimate discretion to make decisions; you understood that, didn't you?
A. Because I have the letter of guarantee in the amount of USD12 million, because that arose because I bought half of the shares and the employees had to work for my company for a number of years before they are entitled to that reward.
Q. You are not quite answering my question, Mr Fang. You understood the trustee of the trust had the ultimate power to make decisions about what happened to the shares.
A. No, that is not correct.
Q. Sorry, what is not correct?
A. There must be my agreement, my consent.
Q. But also the trustee's consent?
A. I have the absolute control, the absolute right. So there must be my consent.
Q. I am going to resist trying to argue the case with you, Mr Fang. That's your understanding, is it?
A. Yes, it is my understanding that I have the absolute right and control, and allocation right.
Q. And it must follow, Mr Fang, that you accept and you understood at the time that the employees couldn't force you to give them the shares; is that right?
A. Yes.
Q. So if, for example, Mr Gu, you discovered, was guilty of some misconduct, you and the trustee could decide to remove him from the scheme; is that right?
A. Yes, it is to be decided by me.
Q. Also, you and the trustee could decide to change the proportions between the employees; is that right, in your understanding?
A. I can change, but not the trustee.
Q. So change the proportions; is that what you are saying, Mr Fang?
A. It is up to me to decide on the proportions as well as whether or not the shares are to be given to an employee based on his performance and his service.
Q. Thank you. Did you understand that you and the trustee could add a new beneficiary to the scheme if you chose to?
A. It is for me to decide.
Q. And do you remember signing a memorandum of wishes in relation to the trust?
A. I can't remember."

[103] From a practical perspective, what Mr. Fang says here may be correct. In practice, Standard Chartered would probably follow Mr. Fang's wishes. On this basis, Mr. Fang could change his letter of wishes, for example to disentitle an employee who has been dismissed for misconduct or to waive the requirement for a beneficiary to pay for his or her shares or to impose a lock-up period. This might be in practical terms an absolute power, as he said in evidence. From a legal perspective, however, Mr. Fang is completely wrong. This was a standard form discretionary trust, where it was Standard Chartered who made the decisions. All Standard Chartered were required to do was consider Mr. Fang's wishes; they could ignore his wishes if they thought it was appropriate to do so.

[104] I find as a fact that Mr. Fang held a genuine, albeit erroneous, belief that he had an absolute right to direct what should happen to the assets of the FDG Trust. It has to be remembered that Delco was paid US$6,275,000 for the shares it contributed to New Asset, so Mr. Fang considered, whether rightly or wrongly, that Mr. de Leeuw and Mr. van Ooijen were not concerned in the management of the FDG Trust. I shall need to examine the extent to which this belief on Mr. Fang's part carried over when the trust was unwound.

[105] Mr. Fang's cross-examination continued as follows:[39]

> "Q. Can you remember when it was decided the trust structure would be unwound?
> A. Around the end of 2008 or early 2009, but I can't remember the exact time. Because there was no longer the IPO and trust had to incur expenses and costs, so that's why the structure was unwound.
> Q. Was it your understanding that the employees would only benefit from the shares if the IPO went ahead?
> A. Yes. Yes, they could only receive the reward if the company could be listed. Then after listing they must serve the company for a certain period of time before they can get the reward.
> Q. But the period of time they should serve wasn't something that you agreed with Stephan or Herman, was it?
> A. When I discussed the scheme with Stephan and Herman, we did not raise that point. But then when our documents were prepared there was

[39] Transcript, day 4, pp 39-41.

> the agreement, or maybe oral agreement, that the employees must have served the company for at least three years after listing. Later I bought 4 per cent shares of Delco, so I did not see any need to tell them.
> Q. When do you say that documents were prepared that included requirements for three years of service? When did that take place?
> A. At the time when the trust was set up, I have the absolute decision-making power to say that the employees have to serve the company for at least three years. I don't know whether this point is in the document or not, but at least when the trust was set up I have this discretion.
> Q. So you had that question in your mind, you say. But it is not something you discussed with Stephan or Herman in 2008, was it?
> A. I can't remember whether I have discussed this with them. Later on I spent money to buy the shares, so I really could not remember whether or not this was discussed with them.

[106] The 10th March 2010 letters of commitment allegedly signed by Fang Anlin, Ms. Ding and Mr. Gu need to be seen in this context. As can be seen from the above, Mr. Fang was keen to ensure that the Three Employees stayed with the business for a reasonable period after any floatation. He did not want them just to take their money and go. Mr. Machell QC attacked the letters as forgeries, or at least as having been backdated. I do not need to determine this issue. The letters are not pleaded and are not relied on as having any legal effect. They are, however, consistent with Mr. Fang's view that he could determine the terms on which the Three Employees would be rewarded. The letters, only one of which was adduced in evidence, are effectively home-made documents. The purpose seems to have been to give comfort, both to Mr. Fang that the employees would remain with CT after the floatation, and to the Three Employees, that they would receive the emoluments promised by Mr. Fang. It has never been suggested that the bifurcated lock-up period of one year for half the shares and three years for the balance was ever agreed with, or known by, anyone on the Delco side. Insofar as it is necessary to make a finding of fact about the letters, I find that they were signed on the dates put on them. There is nothing to gainsay the date.

[107] As to the developments in 2010, what Mr. Fang said in his witness statement is this:

"84. In early 2010, the attempt to list CT was revisited and CT was listed on the Main Board of the HKSE on 12 July 2010… For the 2010 Listing, CT appointed a different sponsor, CCB International Capital Ltd and retained Stephenson Harwood as its lawyers.

85. The intention to reward the Key Employees with shares in CT remained unchanged.

86. As the FDG Trust had been dismantled, I was advised that it was necessary to recreate a similar structure to give effect to the Share Scheme and fulfil my intention.

87. The mechanism for how the 8 CT Shares (and such new shares in CT to be allotted to what would have been the FDG Trust after CT's listing, collectively the **Incentive Shares**) were to be held was not something that I was overly concerned with — I deferred to the better judgment of the listing professionals on how this could be achieved now that a trust structure was not being used. My intention (and what I understood to be Stephan's, on behalf of Delco Participation) remained unchanged: to reward the Key Employees with the Incentive Shares. This was the very same purpose as contemplated during the 2008 Listing. It mattered not to me how or what structure would be deployed so long as this intention could be achieved."

[108] The cross-examination on this went as follows:[40]

"A. I understand at that time the trust was cancelled, and then Green Elite was established, because the team gave me the advice that this arrangement is better and can save money.
Q. When you refer, in paragraph 85, to 'intention'; that's your intention, isn't it?
A. Yes. The intention is that I will give reward to the employees.
Q. You didn't discuss that with Stephan, Herman or Frank, in 2010, did you?
A. I asked Emily to tell them.
Q. You asked Emily to tell them what?
A. I asked Emily to tell them that Green Elite should be set up, and then the trust should be abolished with the share scheme.
Q. Why don't — sorry, go on, Mr Fang.
A. They very quickly agreed because this is just a normal way to deal with the matter.
Q. What do you say they agreed?
A. They agreed that Green Elite should be established and four directors should be appointed.
Q. But you didn't personally discuss that with any of them, did you?

[40] Transcript, day 4, pp 46-49.

A. I asked Emily to discuss with them. If they came to Hong Kong, then Emily was the one who did the translation in the discussion, or if they are in Netherlands then, again, Emily would serve as translator for the discussion.
Q. But there wasn't a discussion, was there? Sorry, let me ask that question again. There wasn't a discussion between you and them, was there?
A. There was no discussion because I spent money to buy the shares to be rewarded to the shareholders, and I could do this. But he could not because of Netherlands tax issues.
Q. You — please finish.
A. The money was not repaid to me. So the money was just put in Green Elite. This is very normal.
Q. You left the details of all this, didn't you, to the lawyers, to prepare the necessary documents.
A. Yes, I instructed Emily to give instructions to the financial controller and the lawyers to work accordingly. Our CFO was Paul. He took part in this matter.
Q. You understood, didn't you, Mr Fang, that the setting up of Green Elite was a preliminary arrangement, and you were going to discuss the matter of the detail again with Stephan and Herman later?
A. The team told me there should be a share scheme for the employees, and the way to handle that is to cancel the trust and to set up Green Elite. Then I told Stephan about that, and Stephan agreed to establish Green Elite and shares should be transferred into Green Elite and then our four directors should be appointed.
Q. Let me just make one point clear again, Mr Fang: you didn't discuss the setting up of Green Elite with Stephan, did you?
A. I have already answered this question, just now. To say again, the listing team said that Green Elite needs to be established, and then for this purpose I instructed Emily to tell Stephan about that, and shares have to be transferred into Green Elite, 4 per cent from me, 4 per cent from him. So definitely Stephan is in the know. So definitely Stephan must have agreed to the whole thing because there was the appointment of directors. Altogether there were four directors, three beneficiaries, plus me. I, myself. And from Delco there was no director, so they did not have any right. Stephen[41] and Herman knew everything."

[109] Mr. Fang was taken to the passage at para 28 of Stephenson Harwood's instructions to Mr. Millett QC of 16th October 2016, where the solicitors said that the "intention was to set up a company entity (Green Elite) first and then dealt [*sic*] with how to reward senior management later":[42]

[41] *Sic* in the transcript; presumably "Stephan" was intended or said.
[42] Transcript, day 4, pp 50-52.

"Q. …Do you remember giving an instruction to Stephenson Harwood to that effect, Mr Fang?
A. Participants should be in the know, but the details are not well remembered by me. All those names mentioned in this paragraph, I believe they knew about it.
Q. But it is correct, isn't it, Mr Fang, the intention was to set up Green Elite first, and then discuss and agree detailed arrangements for the employees later? That's correct, isn't it?
A. That is my business. Because I have the right of control and allocation.
Q. No, Mr Fang, it was for you to discuss with Stephan and Herman later what the detailed arrangements would be; that was your understanding at the time, wasn't it?
A. There is not a need to discuss with them. They should be in the know because they are also the beneficiaries. There would be shares from HWH and also Delco to be put into Green Elite company. I have the absolute power to decide whether shares would be given to employees and how to allocate the shares to the employees.
Q. You were advised by Stephenson Harwood, Mr Fang, that it would be necessary, after Green Elite was set up, to put in place more detailed arrangements; that's right, isn't it?
A. I can't remember all these details. These details are to be determined by me.
Q. Let me try that again, Mr Fang. You knew that there would have to be a proper new scheme drafted and agreed after Green Elite was set up.
A. I can't remember that."

[110] Again, what Mr. Fang says he believed, may indeed reflect the practical position, that he was able to direct what should happen to Green Elite's assets. Indeed, we know that he did deal with the CT dividends and the proceeds of the sale of the CT shares as a man with absolute power over them. As a matter of law, however, he was quite wrong. As a single director on a board of four, he could be outvoted by the other three directors. Further he was potentially liable for the claims of the company which are being pursued in the current action.

[111] What did Mr. Fang in fact believe about Green Elite? Here the best evidence is in my judgment the documentary evidence. The following are especially important. First, the draft statements of interest circulated on 15th June 2010 are only consistent with Mr. Fang/HWH and Delco being the ultimate beneficial owners of the CT shares

held by Green Elite. Mr. Gu disavows any assertion of a beneficial interest in those shares. Second, the prospectus repeats that position. Third, the CT annual report for 2010 does not disclose any interest in those shares held by employees or by Mr. Gu.

[112] Fourth, the management accounts of Green Elite from 1st April 2010 to 31st December 2013 are inconsistent with the assets being held for the Three Employees. I do not accept that Mr. Fang knew nothing of these management accounts.

[113] Fifth, the public announcement on the sale of CT shares to Sims Metal says expressly that Green Elite is a 50-50 venture between HWH and Delco.

[114] Sixth, the 16th October 2016 instructions to counsel are important indications of Mr. Fang's state of mind at that time. Moreover, Stephenson Harwood acted in 2010 on the IPO, so they knew what was done at that time and on whose instructions. Although the instructions are expressed to be based on the "clients' instructions" (plural), the only identified client was Mr. Fang. I find that he did give the instructions. There is no other plausible candidate. I reject his evidence in answer to the question: "You knew that there would have to be a proper new scheme drafted and agreed after Green Elite was set up" that he could not remember that.

[115] Putting these considerations together and taking an overall view of the evidence in this case, I find as a fact that Mr. Fang knew and agreed with the Delco side that Green Elite would be set up first. The decision on how to reward the Three Employees would be taken later. Whether this second issue was a decision he could take on his own, or whether it was a decision which required the agreement of Delco is a matter to which I shall come.

The defendants' legal submissions

[116] Mr. Ayers QC in closing submits as to the legal conclusions I should draw:

"83. Many but not all legal conclusions turn on the question of fact as to whether the Share Scheme and Agreed Purpose, which undoubtedly subsisted in 2008, carried over to 2010. There is absolutely no material (other than witness say-so) to suggest that it did not carry over and a large amount of material to support it doing so…

83.1. Mr. Fang is not a dishonest businessman. Anything unsatisfactory which was said to the Court by counsel in the liquidation proceedings is irrelevant to the question of fact in this trial about what was or was not agreed in 2008 and 2010.

83.2. The Company was plainly set up for some Key Employee benefit scheme or purpose — that has to be accepted. But the Company has no evidence to prove that the scheme and intention moved from a 'definite' one in 2008 to only a 'potential' one in 2010 (which appears to be one of the ways it now puts its case).

83.3. In 2010, the FDG Trust structure was dismantled and the CT shares formally retransferred to their original owners. The shares were then transferred to the Company on 8 March 2010. The Company was the replacement corporate vehicle designed to take the place of the prior structure for holding shares for the Key Employees; but there was no time to set up another trust. So, the 'beneficiaries' were made directors of the Company, together with Mr. Fang. There was no secrecy about the appointments — it was all set out clearly in the Reorganisation Memorandum. There was no point in appointing the three Key Employees as directors unless they were to exercise full control over the assets of the Company, subject to the supervision of Mr. Fang, to whom they deferred.

83.4. Whilst Delco Participation was a 50% shareholder in the Company (for reasons relating to compliance with the HK listing rules) [I interpolate to say that no expert evidence was given as to the HKSE rules], there was no Delco Participation involvement on the board or in the management generally. This was not an accident: it was consistent with the handing of full control to the three Key Employees and Mr. Fang.

83.5. Delco Participation never asked the Company for CT dividend income when it knew it had been paid in 2011, 2012 and 2013. This is consistent with Delco Participation consciously having no further interest in the CT shares.

83.6. Delco Participation never enquired in 2014 about the sale proceeds when it knew about the joint sale because it was itself a vendor of its own shares to Tai Security. This is consistent with Delco Participation consciously having no further interest in the CT shares.

83.7. By reason of the payment of US$6,275,000, which had and has not been repaid, Mr. Fang had and still has effectively paid Delco Participation for the CT shares.

83.8. The witness statements put forward by the Company, even taken at face value and without testing, are not coherent or consistent, and do not amount to sufficient evidence to prove the Company's case. There appear to be at least three different bases being put forward by the Claimant Company as to how the Company was to operate after the IPO; this incoherence makes [the defendants'] case much more likely to be correct.

83.9. It is tolerably clear in any event that Mr. van Ooijen, who does not want to participate in this trial, agrees with the [the defendants].

83.10. Mr. Fang as the principal on the Fang side has behaved entirely consistently with respect to the Share Scheme and the Agreed Purpose. The Company's complaints about activity 'in secret' need to be seen in this context. If the CT shares were in reality — or reasonably believed by Mr. Fang to be — none of Delco Participation's business, it is no wonder that he did not tell Delco Participation about what he was doing.

83.11. It was not until May 2014 that Delco Participation (via Mr. de Leeuw) began to assert the position being promoted by the Company in these proceedings, and even then Mr. Van Ooijen reassured Mr. Fang not to be concerned about the assertions being made. Such lateness is not consistent with the Company's case being correct.

84. Serious allegations, including of fraud and dishonesty, are made in this case. The Company is under an obligation to make clear how, in respect of each individual [defendant] alleged to be dishonest, that is so. Dishonesty and fraud must be pleaded and proved clearly and distinctly. The Court is invited to treat every defendant separately and not with a broad brush; and not to assume dishonest conduct readily and without it being proven with cogent evidence of the requisite quality and value. The [defendants] are entitled to this treatment.

Directors' Duties

85. In acting pursuant to the Agreed Purpose or what Mr. Fang or Mr. Gu reasonably and *bona fide* believed to be the Agreed Purpose, there can be no question of breach of section 120.

86. In acting pursuant to the Agreed Purpose, there can be no question of breach of section 121.

[The submissions on section 175 of the BCA I set out separately below.]

Restitution

90. No basis for a restitutionary claim has been set out by the Company.

91. No claim in restitution can lie where there was nothing unlawful or improper in the payments made.

92. Mr. Fang has not received any monies from the CT shares for himself beneficially. If he has, he has paid them away in HK$ or in RMB. No restitutionary claim can lie against him.

93. Mr. Gu received monies, comprising his share of dividends and the final bank account balance of the DBS account and the HK$50,000,000 paid to him after Mr. Fang received the sale proceeds. As he has explained in evidence, he has spent it all (although he accepts that there may be a small amount he spent after notice of the claims in this case). He has done so entirely innocently and thus changed his position; and there can be no basis for asserting any restitutionary liability in those circumstances.

Alleged Loans

94. There were no loans.

95. Even if there were loans, care needs to be taken to ensure there is no double counting."

Section 175 of the BCA

[117] I turn first to the applicability of section 175 of the BCA. Mr. Ayers QC in his opening submits:

"87. Section 175 is simply inapplicable or of no effect in this case:

87.1. The pleaded claim complains about the distribution and transfer of the 'Sales Proceeds' and avers that [Fang Anlin, Ms. Ding and Mr. Gu, but not Mr. Fang] hold 'the shares of the Sales Proceeds that they each received (or their traceable proceeds) on resulting or constructive trust for the Company'. This is an insufficient basis for complaint because it fails to (and cannot) identify, as it must, any transfer or other disposition of more than fifty per cent in value of the assets of the company. It is not permissible, where there are three separate recipients each receiving one-third of the Company's asset basis, to aggregate three different dispositions and thereby assert a breach of section 175. The position would be different if there were three separate dispositions to the same person (perhaps

deliberately designed to defeat the application of section 175) but such is not the case here.

87.2. Given the Company's sole purpose, distributions to the Key Employees plainly fall within the meaning of the usual or regular course of the business carried on by the Company. The phrase usual or regular course is sufficiently elastic to apply to companies with thousands of business transactions and those with only tens.

87.3. As Mr. Gu sets out in his evidence, these transactions were informally approved at board level by the directors/recipients. As a matter of law, unanimity at board level suffices even where there is informality: see **Runciman v Walter Runciman Plc**[43] and **Base Metal Trading Ltd v Shamurin**;[44] and (by reason of the Agreed Purpose) they were approved at shareholder level (see… **Re Duomatic**). For all relevant purposes relating to section 175, any required board and general meeting approvals were in place.

87.4. Given the absence of any claim under section 179, any breach of 175 has no relevant impact on this claim. There is no basis for asserting a resulting or constructive trust and Court of Appeal authority… does not support such a submission.

[118] Para 87.1 makes two points, the first about remedy and the second about the nature of the transaction. I shall deal with remedy later. As to the nature of the transfer, Mr. Ayers QC argues that the transfer of one third of the sale proceeds and other monies to each of the Three Employees cannot be a "transfer… of more than 50 per cent in value of the assets of the company". There are three transfers, each of less than 50 per cent.

[119] I do not accept this. In my judgment, there is one composite transaction. The whole purpose of section 175 would be undermined, if all a company had to do to avoid

[43] [1992] BCLC 1084 at p 192, [1993] BCC 223 at p 230 *per* Simon Brown J: "The articles say nothing as to how or when the directors are to arrive at their determination. In my judgment, therefore, provided only and always that by that time the term relied upon is sought to be enforced all the other directors can be shown to have concurred in the agreement of that term, it can then fairly and properly be said that they have indeed determined it as the article requires. That directors, provided they act unanimously, can act informally appears clearly established…"

[44] [2004] EWCA Civ 1316, [2005] 1 WLR 1157. Mr. Ayers QC cites p 1179 of the Weekly Law Reports without identifying a paragraph number. However, the page equates to para [77] of the judgment of Arden LJ (as she then was). That paragraph does not appear to be in point.

the effect of the section was to divvy a sale or transfer etc into three parts. On the defendants' case the distribution to the Three Employees was the carrying out of the "Agreed Purpose". The Agreed Purpose is a unitary purpose. There were not three separate Agreed Purposes. I see no principled basis on which three separate payments to one person pursuant to one purpose can be distinguished from three payments to three persons pursuant to one purpose. Each can have the effect of defeating the restrictions in section 175.

[120] Mr. Ayers then argues in para 87.2 that the transfers to the Three Employees was in the "usual course of business". He relies on the Court of Appeal judgment in **Ma v Fong**,[45] where Webster JA said:

> "133. It is correct, as the Appellant contends, that the section 175 does not provide for the consequences of a breach of the section. However, that contention fails to recognise that the purpose of the section is to confer certain rights on shareholders who dissent from a proposed disposition of more than 50% value of the assets of the company. Such a shareholder is entitled to exercise his or her rights pursuant to section 179(1)(c) to obtain the fair value of his shares.
>
> 134. However, the critical issue is whether section 175 applies to a transaction involving the conversion of shares as in this case. The Appellant contended that the only question was whether the rights attached to the ordinary shares represented a different set of rights attaching to different property. STIC had purchased preference shares which carried a built-in right to be converted into ordinary shares. In our view, the Judge rightly concluded that, 'all that the Company had done is to exercise its contractual right to "convert".' It was the exercise of the right inherent in the preference shares. Accordingly, the exercise of that right did not come within section 175.
>
> 135. The Appellant further submitted that STIC held the CPS as its only asset with the result that the Conversion was neither usual nor in the ordinary course of business. We are unable to accept the proposition that the sale or other disposition of a holding company of its only asset renders

[45] In the matter of Successful Trend Investments Corporation; Kathryn Ma Wai Fong (as the personal representative, executrix and trustee, and in her personal capacity as a beneficiary of the estate of the late Wong Kie Nai) v Wong Kie Yik and others [2019] ECSCJ No 107 (27th March 2019). An appeal is pending to the Privy Council.

such sale or other disposition outside the usual or regular course of business. In **Ciban Management Corporation v Citco (BVI) Ltd et al**,[46] at para [67], Bannister J said in relation to the forerunner of section 175:

> 'Its purpose is to ensure that directors do not use their powers in order to dispose of assets of a company on ventures to which its members have not signed up. I cannot see how it can be said that a sale of the property was not in the usual or regular course of Spectacular's business. Spectacular's business was that of a property holding company. In the nature of things property holding companies dispose of, as well as acquire property.'

The *dicta* of Bannister J apply to the section 175 point in this case, *mutatis mutandis*.

136. In conclusion, the Court rejects the Appellant's submissions that the Conversion contravened section 175 and that the contravention constituted a separate ground for relief under section 175. The Court is not persuaded that the exercise of a contractual right attaching to the preference shares to convert them to ordinary shares is a sale or other disposition of more than 50 per cent in value of the assets of STIC. The Conversion was not made outside the usual or regular course of its business, although STIC effected no other transaction during the period under reference."

In his written closing, Mr. Ayers QC added:

> "191.4. Whatever the Company may say about the decision in **Fong**, the only remedy for any dissenter in relation to the transaction sought to be impugned is under section 179. That applies whether authorisation has been properly given or not. Part IX of the 2004 Act is entitled 'Merger, Consolidation, Sale of Assets, Forced Redemptions, Arrangements and Dissenters'. It is a clear and complete code and section 179 draws the threads together as to the remedies available to dissenters, including a dissenter from 'any sale, transfer, lease, exchange or other disposition of more than fifty per cent in value of the assets or business of the company, if not made in the usual or regular course of the business carried on by the company [subject to irrelevant exceptions]'. This clearly relates to non-compliance with section 175. So, if the transactions were both over the 50% threshold and not made in the usual or regular course of the business carried on by the company, only Delco Participation has a potential remedy."

[46] [2012] ECSCJ No 339 (27th November 2012).

[121] Mr. Machell QC submits that what the Court of Appeal said in **Fong** was all *obiter* and should not be followed:

> "223. First, the claimant's claim was for relief under section 184I of the BCA on the basis that the affairs of a company were being or had been conducted by the respondents in a manner that was oppressive, unfairly discriminatory and/or unfairly prejudicial. That claim was dismissed at first instance. At first instance, the claimant had made an application to amend to make independent claims, inter alia, for breach of section 175. That application was dismissed.
>
> 224. The Court of Appeal dismissed an appeal from the dismissal of the amendment application and so no issue arose on the appeal as to the remedial consequences of a breach of section 175:
>
> 225. Secondly, in any event, the Court of Appeal held that the critical issue was whether section 175 applied to the relevant transaction. It held that it did not and so the question of consequence and remedy did not arise.
>
> 226. It is unclear whether the Court of Appeal was addressed to any real extent on the section 175 remedy issue, but, with respect, Webster JA clearly fell into error in what he said at [133].
>
> 227. First, section 175 is a statutory fetter on the power or authority of directors. It is not unusual for the consequences of non-compliance not to be set out in the relevant statute. Rather, if a director acts outside his/her authority or power as a result of the noncompliance with the statutory provision, then, in the absence of a statutory remedial provision, the act purportedly undertaken is void or voidable and the remedial consequences are left to the common law/equity. See para [144] [reproduced at para [64] above of this judgment] in relation to unlawful dividends.
>
> 228. Secondly, section 179 is not a statutory remedial provision applicable in the event of non-compliance with section 175. To the contrary, section 179 makes provision for the consequences in the event that section 175 is complied with. It makes provision for a member to have a buy out right upon that member 'dissenting from' various matters including sale within section 175: section 175 is not referred to expressly, but section 179(1)(c) is clearly a reference to a transaction within section 175. That section 179 is concerned with vesting a buy out right in a member in circumstances where the relevant matter is approved (rather than being a remedy in the event of non-compliance) is obvious from section 179(2) which refers to a member who wishes to exercise his buyout entitlement giving notice to the company before the meeting of the members at which the action is submitted to a vote and section 179(4) which refers to the taking of action

within 20 days immediately following the date of the vote of the members authorising the relevant action."

[122] There are two matters on which the Court of Appeal gave its views. The first was that the disposal of all the assets of a company could be within the "usual or regular course of business". Mr. Machell QC is technically correct that what the Court of Appeal are saying in the passages I have cited is *obiter*, because it was not determinative of the issue in the case and therefore not part of the *ratio decidendi*. However, the Court of Appeal approved what Bannister J said in **Ciban v Citco**. In my judgment, whether I am formally bound by the Court of Appeal's view or not, I should follow it, just as I would normally follow Bannister J's holding unless I was convinced it was wrong (and I am not). If the Understanding (as I have defined it) was legally effective, then section 175 would not in my judgment prevent the distribution to the Three Employees. Making the distribution would have been the sole purpose of Green Elite, and thus part of its proper course of business.

[123] The second matter is the Court of Appeal's statement that "the purpose of [section 175] is to confer certain rights on shareholders who dissent from a proposed disposition of more than 50% value of the assets of the company." The Court was of course directing itself to the facts of that particular case. It was not in this brief passage of a very long judgment seeking to give a definitive statement of the law relating to the interaction of sections 175 and 179(1)(c). The Court of Appeal do not say that they were putting fetters on the remedies available to an aggrieved shareholder or to the company itself, if section 175 was breached. It was speaking in the context of a claim by a shareholder under the Court's unfair prejudice jurisdiction, under which one of the main remedies is of course an order that the majority buy out the minority's interest, just as under section 179(1)(c). The Court of Appeal says nothing about any claims by the company itself; the point did not arise.

[124] Thus, I agree with Mr. Ayers QC that the "usual or regular course of business" exception potentially applies to the distribution in question. I disagree that only

Delco has a remedy for breach of section 175. Section 175 puts limits on the powers of a company and its directors. If a company acts beyond its powers, the directors are in my judgment potentially personally liable.

[125] In para 87.3, Mr. Ayers argues that the "transactions were informally approved at board level by the directors." I agree as a matter of law that transactions can be approved by a board of directors acting informally. I do not accept Mr. Ayers' submission as a matter of fact. The relevant decisions purportedly made on Green Elite's behalf were solely those of Mr. Fang. It is common ground that there was never any board meeting to agree the distributions. Nor did Mr. Fang consult with Fang Anlin, Ms. Ding or Mr. Gu about his receiving the sale proceeds direct from Tai Security and subsequently making the distributions. Still less did he ask them to decide on these matters. He just took the money from Tai Security and later distributed it. I do not accept that the approval of Fang Anlin, Ms. Ding or Mr. Gu *in their capacity as directors* can be inferred. In order to give informal approval, a director must in my judgment be acting *qua* director. In other words, the director must be purporting to act on behalf of the company. On the facts of this case, I find that Mr. Fang was acting unilaterally purportedly on behalf of Green Elite in making the payments. Fang Anlin, Ms. Ding and Mr. Gu were mere recipients of the monies transferred to them; they were agreeing on their own behalves, not agreeing on behalf of Green Elite, to the receipt of the funds by themselves.

Duomatic and the Agreed Purpose

[126] The key issue therefore is whether **Duomatic** principles apply to permit the payments to the Three Employees. This in turn depends on whether the Understanding was legally enforceable.

[127] In considering this, I remind myself of the way the Understanding was pleaded. "[T]he agreed purpose for which [Green Elite] was incorporated was to act as the corporate vehicle through which the Share Scheme would be given effect for the benefit of the Employees (**the Agreed Purpose**)." "As part of the 2008 Listing Plan, [it was] agreed that certain shares in CT be transferred by Delco and [HWH] and

new shares be allotted by CT upon its listing for the benefit of and/or allocated to [the Three Employees]… The purpose of the proposed share transfers, allotment and allocation was to reward the Employees for their substantial contribution to the JV Business over many years and to incentivise them to remain with the business after CT listed (**the Share Scheme**)."

[128] The way in which the Understanding was carried out initially was by the creation of the FDG Trust. Two important terms were agreed between Mr. Fang and Delco when the FDG Trust was set up. First, the Three Employees would have to pay for their shares. Second, there would be a lock-up period for the Three Employees (or for Mr. Ding, in Ms. Ding's case). The precise length or terms of the lock-up does not seem to have been agreed, although three years was in contemplation. In fact, the way in which the FDG Trust was set up was imperfect, in that it was open to Mr. Fang to change his letter of wishes. In practice (but not as a matter of law, since the discretion always vested in Standard Chartered) he could therefore waive the requirement for payment. He could also remove any of the employees or refuse to allow a distribution, whether or not any lock-up period had expired. Nonetheless, I find as a fact that there was never any change in the Understanding between him and Delco. There was always supposed to be payment by the Three Employees for the shares and a lock-up period.

[129] When the FDG Trust was unwound, I have rejected Mr. de Leeuw's case that the pre- and post-IPO share schemes replaced the Understanding. I find as a fact that the Understanding continued. However, this meant in my judgment that the key elements of the Understanding also revived. These were the requirements first that the Three Employees pay for their shares and second that there be a lock-up period. It will be recalled that the requirement for payment was something on which Mr. van Lint insisted for tax reasons. Mr. Fang never openly demurred from that in his dealings with Delco.

[130] In considering whether the Understanding was legally effective, the requirement that the Three Employees pay for the shares and be subject to a lock-up period raise

four problems. First, no price was agreed, nor any means of fixing the price. Since the whole purpose of the Understanding was to reward the employees, the price could not be the market price when the lock-up period ended. Whilst it could theoretically be the price when the share plan was implemented, there was in fact no date of implementation. The *de facto* implementation was simply Mr. Fang paying the whole of the money over to the employees. It follows that there is no scope for assessing the price on a *quantum valebat* basis either.

[131] The price could have been that at which the CT shares were sold to New Asset, but I can see no basis on which such a term could be inferred. Even if the 2008 price could be inferred, in fact of course the Three Employees were not required to pay anything.

[132] Second, no lock-up period was agreed between Mr. Fang and Delco. The one year lock-up for half the shares with the balance of shares due after three years, as set out in the letters of 10th March 2010, was a perfectly reasonable arrangement. However, it was Mr. Fang's unilateral decision. It was never agreed with Delco and they never knew of it. I have noted that three years had been in contemplation in 2008. If that had been a term of a binding agreement, there was still no basis on which Mr. Fang could alter it unilaterally.

[133] Third, the terms on which an employee would qualify on the expiry of the lock-up period were never agreed between Mr. Fang and Delco. Share schemes usually have detailed provisions for "good leavers" (who are entitled to shares) and "bad leavers" (who are not). The purpose of such provisions is to be fair to both the employer and the employee. A simple provision (such as that implied in the 10th March 2010 letters) that the share entitlement crystalises so long as the employee remain in the employer's employ at the date of vesting is defective. It would on the one hand allow an employer to give contractual notice to the employee expiring before the vesting date, thereby denying a deserving employee of his or her shares, and on the other hand allow an employee to receive the shares, notwithstanding major misconduct which only came to light after the vesting date.

[134] Fourth, the tax implications needed to be considered, not just for the Three Employees and Green Elite but also potentially for Delco.

[135] In my judgment as a matter of law, the failure to agree a price is fatal to the Understanding having legal effect. An agreement to sell is invalid, if no price is agreed or mechanism for fixing the price and an assessment of *quantum valebat* is not possible. There was never an agreement between Mr. Fang and Delco at any time that the shares should simply be given to the employees.

[136] As a matter of law too, the failure to agree the length of the lock-up is also fatal to the Understanding having legal effect. It is a key term of the share scheme. Without agreement on it, or any means of fixing the length, the Understanding lacks a key term.

[137] The failure to include a "good leaver/bad leaver" clause is not fatal as a matter of law to the validity of the agreement. The bare-bones requirement that the employee be employed on the vesting day is legally sufficient. However, it is relevant to the question as to whether the parties intended the Understanding to be legally binding. If an important term of an agreement is left vague, that supports an inference that no legal effect was intended. The same goes for the failure to consider the tax consequences of waiving the payment requirement.

[138] As to this last question of fact, even if I am wrong on the law in relation to the term as to price or the length of the lock-up, all these three matters are relevant to the parties' intention to create legal relations, which is a question of fact. As well as these issues of imprecision as to the terms, there are the six documents I have referred to when considering Mr. Fang's intention. These comprised the draft statements of interest circulated on 15th June 2010, the prospectus, the CT annual report for 2010, the management accounts of Green Elite from 1st April 2010 to 31st December 2013, the 2012 announcement of the sale of CT shares to Sims Metal and the 16th October 2016 instructions to Mr. Millett QC. If the Understanding was

intended to be a binding legal agreement, these documents would in my judgment have been expressed in different terms, making reference to the Share Scheme.

[139] As I have noted, I have heard no expert evidence of HKSE law and practice nor evidence from any of the legal practitioners and stock market professionals involved in the IPO. Insofar as there is mention of these matters in the papers, they would support the view that disclosure would have been required. However, in the absence of witness evidence, I put no weight on this aspect of the case.

[140] Standing back and looking at the evidence overall, in my judgment the Understanding was not, as a matter of fact, intended to be legally binding. There was never any meeting of minds on the terms which Mr. Fang believed gave him the absolute power to deal with the proceeds of sale of the CT shares held by Green Elite. The 16th October 2016 instructions summarise my findings as to what Mr. Fang and Delco agreed: Green Elite was to be set up first; how to reward the employees was to be determined later. That agreement is not capable as a matter of law of having legal effect. Nor, I find as a matter of fact, was it intended to have legal effect.

[141] In my judgment, as a matter both of law and of fact, the Agreed Purpose was not and was not intended to be legally binding.

Fang Anlin and Ms. Ding

[142] Mr. Ayers QC, whilst not representing either Fang Anlin or Ms. Ding, draws my attention to CPR 39.4, which provides:

> "If the judge is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules —
>
> (a) if any party does not appear at the trial, the judge may strike out the claim;
>
> (b) if one or more but not all parties appear, the judge may proceed in the absence of the parties who do not appear."

[143] This is a matter which should have been raised much earlier. Instead, it first appears in the penultimate paragraph of Mr. Ayers' closing written submissions. If the rule applied, then it would have prevented me hearing the case against the three defendants who did appear. However, Mr. Ayers does not take this point and instead asks me to determine substantively the claim made against his clients.

[144] This consideration points in my judgment to the real purpose of the rule. It is directed at parties who have previously appeared in a case, not at parties who have never appeared. The rule provides that Court is not obliged to refuse to hear a trial where a party who has participated in the litigation fails to appear at trial, notwithstanding that party being aware of the date and place of the trial. Where, as here, two defendants have simply not engaged with the Court process at all, there is no purpose requiring them to be served with the notice of trial. Such defendants' interests are adequately protected by the provision of CPR 39.5, which allows a defendant to apply within fourteen days after service of the judgment or order to set aside a judgment given after a trial which he or she has not attended.

[145] A contrary reading of CPR 39.4 would have the absurd consequence that I would have had no power to hear the trial against the three defendants who did appear.

[146] Even if I am wrong in my construction of CPR 39.4, this would be a classic case for the Court exercising its powers under CPR 26.9 and dispensing with service under CPR 6.8. Fang Anlin and Ms. Ding have made a conscious choice not to participate in this litigation. There is no injustice to them in dispensing with service of the notice of the trial: there is no evidence they would have woken up and participated, if they had been given these details. That is sufficient to order that service be dispensed with, but even if that were not enough, I would have considered that it was likely that Mr. Fang would have told his brother and niece that a trial was looming.

Conclusions

[147] This allows me to deal with the causes of action relied on comparatively briefly.

[148] As to section 120(1) of the BCA, it is necessary for the Court to be satisfied that the directors acted dishonestly: **Nam Tai Property Inc v IsZo Capital LP and another**.[47] There are, as I have set out above, some indications that Mr. Fang was aware that what he was doing was not proper. Nonetheless, in my judgment Mr. Fang was not dishonest. He held a genuine, albeit mistaken, belief that he was entitled to do with the proceeds of sale from Tai Security as he sought fit. It was not put to Mr. Gu that he was dishonest. Despite the negative view I take of Mr. Gu's evidence, I acquit him of dishonesty. The same applies to Fang Anlin and Ms. Ding: there is no separate evidence that either of them was dishonest. Accordingly, the claim under section 120(1) fails.

[149] As to section 121 of the BCA, it was the duty of the four directors to satisfy themselves that the payment of the monies to three of them was for a proper purpose. The only proper purpose relied on by the defendants is the Agreed Purpose. Since that was, as I have found, not legally binding, the fulfilment of the Agreed Purpose cannot be a proper purpose. Accordingly, this claim is established. The first four defendants are jointly and severally liable to account for all the monies received from Tai Securities and the dividends received from CT.

[150] I agree with Mr. Machell QC's submissions in paras 138 and 139 of his written closing that where a director receives company property, the burden of proof is on the director to justify the transfer and that any property received is treated as held on trust. I also agree with his proposition in para 142 that where a director causes the company of which he or she is a director to make an unauthorised payment, the director is liable to the company for the amount of the payment. Indeed, I did not understand Mr. Ayers QC to demur from these general propositions: his case was that the fulfilment of the legally binding Agreed Purpose exonerated the directors.

[47] [2021] ECSCJ No 714 at [268].

[151] Accordingly, Green Elite is entitled to trace the monies paid to each of the Three Employees. The four directors are also on this further basis advanced by Mr. Machell QC jointly and severally liable for all the monies paid out.

[152] As to section 175 of the BCA, I have expressed my views above. Since the Agreed Purpose was not legally enforceable, this claim succeeds. Again the directors are jointly and severally liable for the monies paid out in breach of this section.

[153] The claim in restitution adds nothing to the above claims. Mr. Fang paid the monies over to the Three Employees, so there is no unjust enrichment of him. Each of the Three Employees is liable in restitution for the monies received individually by them. Mr. Gu's defence of change of position I have rejected.

[154] The claim in respect of the loan of HK$8,733,492.88 which appeared in Green Elite's management accounts is also subsumed by the main causes of action. No separate amount is owed. For completeness, however, I find that Mr. Fang (and he alone) is liable for this money as a loan which appeared in Green Elite's accounts.

[155] This leaves the claim against HWH. Although the claims against the first four defendants also pleaded against HWH, the only cause of action which lies against that company in my judgment is in respect of the sums of HK$2.2 million and HK$1.25 million paid to it by Green Elite in 2012 and 2013 respectively. These form part of the monies I have ordered in respect of the first four defendants and are not an additional liability.

[156] I shall hear counsel on what consequential orders I should make.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar