THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS (COMMERCIAL DIVISION)

BVIHCMAP2014/0020

In The Matter Of Accufit Investments Inc.

and

In The Matter of Section 184C of The BVI Business Companies Act, 2004.

BETWEEN:

BASAB INC.

Appellant

and

[1] ACCUFIT INVESTMENT INC.
[2] DOUBLE KEY INTERNATIONAL LIMITED

Respondents

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Anthony E. Gonsalves, QC	Justice of Appeal [Ag.]

Appearances:

Mr. David Fisher and Ms. Monique Peters for the Appellant
Mr. Timothy Harry and Mr. David Welford for the First Respondent

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2015: May 19;
November 9.

Interlocutory appeal – Derivative proceedings – Whether shares in subsidiary company of 1st respondent sold at an undervalue – Application made by appellant in court below to bring proceedings on behalf of and in name of 1st respondent company – Whether learned judge erred in refusing application – Interpretation of s. 184C(2)(c) of BVI Business

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Companies Act, 2004 (as amended) – Meaning of 'likely' in wording 'whether the proceedings are likely to succeed' – Appeal against findings of fact made by learned judge

The first respondent ("Accufit"), is the wholly owned subsidiary of the appellant ("Basab"). Accufit owned 131 million shares ("the Sale Shares") in the company Kith Holdings Limited ("KHL"), which shares carried, roughly, a 51% stake in KHL. In September 2012, the company Superb Glory Holdings Limited ("Superb Glory") lent HK$140 million to Accufit and on the same day Accufit charged the Sale Shares in support of the loan. Basab guaranteed the debt and, in February 2013, granted a fixed and floating charge over all its assets, including its 100% interest in Accufit.

Superb Glory called in the debt in April 2013 and the following month, appointed Accufit company directors Mr. Fok Hei Yu ("Mr. Fok") and Mr. John Howard Batchelor ("Mr. Batchelor") (together, "the Directors") as receivers of Basab under the Basab debenture. Mr. Fok, in his capacity as receiver, voted Basab's shares in Accufit to appoint himself and Mr. Batchelor as directors of Accufit and removed Basab from the Board. In December 2013, the Directors caused Accufit to sell the Sale Shares to the second respondent, Double Key International Limited ("Double Key") for HK$49,780,000.00, approximately HK$0.38 per share. Superb Glory consented to the completion of the sale, and released its security to enable the sale to proceed. The sale was effected by Mr. Fok and Mr. Batchelor, not in their capacity as receivers of Basab, but rather, as directors of Accufit. The appellant alleged that the Directors had failed to market the Sale Shares properly or at all and had sold the shares at an undervalue. Accordingly, it sought leave, pursuant to section 184C(2)(c) of the BVI Business Companies Act, 2004 (as amended)[1] ("the BCA") to commence derivative proceedings in the name and on behalf of Accufit against: (1) Mr. Fok and Mr. Batchelor in their capacity as directors of Accufit, for damages for breach of fiduciary duty arising out of the sale of the Sale Shares; (2) Double Key, for an order setting aside the sale and transferring the Sale Shares back to Accufit on the grounds that Double Key was guilty of knowing receipt, alternatively for damages on the ground that Double Key dishonestly assisted the directors in the breach of their fiduciary duty; and (3) Superb Glory, for an order that Accufit be entitled to redeem the charge of the Sale Shares to Superb Glory, together with consequential relief.

The learned judge refused the appellant's application for leave. In arriving at a decision on the matter, the judge focused on section 184C(2)(c) of the BCA which states that one of the matters that the court must take into account in determining whether to grant leave to a member of a company to bring derivative proceedings or intervene in proceedings to which the company is a party, is 'whether the proceedings are likely to succeed'. The learned judge held that that the intention and effect of section 184C(2)(c) is that for a claim to be 'likely to succeed' it must be obvious, without any substantial consideration of or debate on the merits that it is likely to succeed. He further held that the intention and effect of subsection (2)(c) is that the proposed claim must appear to the court to be self-evidently strong without conducting an inquiry; the application for leave under s. 184C was not an

[1] Act No. 16 of 2004, Laws of the Virgin Islands (as amended by the BVI Business Companies (Amendment) Act, 2005, Act No. 26 of 2005, Laws of the Virgin Islands).

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occasion for painstaking analysis of valuation or other evidence. He ultimately concluded that the proceedings were not likely to succeed.
On appeal, the appellant challenged the learned judge's interpretation and application of section 184C(2)(c) of the BCA as well as his analysis of the valuation evidence adduced by the appellant.

Held: dismissing the appeal and ordering that costs be awarded to the respondent in the court below, to be agreed within 21 days, and in default thereof to be assessed pursuant to CPR 65.12; and also, that costs be awarded to the respondent in this court, to be calculated at 50% of two-thirds of the costs in the court below, that:

1. The correct meaning of the phrase 'whether the proceedings are likely to succeed' in section 184C(2)(c) of the BCA is 'whether it is more probable than not that the proceedings will succeed'. Accordingly, the applicant is not required to demonstrate that success is an absolute certainty, nor that the probability of success is very strong. The learned judge's interpretation of the phrase 'whether the claim is likely to succeed' seemed to suggest a higher threshold – he appeared to be moving into the realm of requiring a strong likelihood, or almost requiring certainty that the proceedings would succeed for leave to be granted under section 184C(2)(c). This interpretation was incorrect, and the learned judge therefore erred in this regard.

   Cream Holdings Limited and Others v Banjeree and Others [2004] UKHL 44 applied.

2. In any case, at an application stage, whether and to what extent an examination of the proposed case on the merits is required, must certainly depend on the applicable threshold, and the evidence before the court. With regard to the level of examination of the evidence required in the present case, the threshold for the grant of leave to bring derivative proceedings – 'whether it is more probable than not that the proceedings will succeed' – would require a full and proper examination of the evidence then before the court. The potential nature of derivative claims, especially those that may be both complex and defended, do not predispose themselves to a cursory review and require the court to evaluate the evidence before it and the arguments advanced by both parties in order to determine 'whether the proceedings are likely to succeed'. Therefore, in the present case, the learned judge erred in stating that the court should not attempt to conduct an inquiry, or in implying that the court should not conduct an evaluation of the material currently before it (assuming that in relation to an applicant's proposed pleadings, a viable claim in law has first been disclosed). Furthermore, the learned judge did not, in fact, undertake an evaluation of the material before him, in coming to the conclusion that the evidence adduced by the appellant was no basis for the allegation that the Sale Shares were sold at an undervalue. It therefore falls to the appeal court to evaluate the material which was before the court below.

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American Cyanamid Co. v Ethicon Ltd. [1975] AC 396 cited; **Cameron v Coleman** CIV-2010-485-2151 [2011] NZHC 724 (22nd June 2011, unreported) (High Court of New Zealand) cited.

3. It is insufficient that an expert merely supplies his/her conclusion on a matter in issue between the parties. It is necessary for him/her to also present the analytical process by which he/she reached the conclusion. In the present matter, the appellant's expert only gave his conclusion on the issue of whether KHL would have been able to satisfy the requirements to be listed on the Hong Kong stock exchange. He failed to present to the court the analytical process by which he had arrived at his conclusion.

   Pacific Recreation Pte Ltd. V S Y Tecchnology Inc and Another Appeal [2008] SGCA 1 applied.

4. The evidence adduced by the appellant to show that the true market value of the Sale Shares was higher than what they were sold for, provided no independent factual basis for it to be concluded on a balance of probability that, on the date that the shares were sold, KHL would have been able to maintain its listed status on the Hong Kong stock exchange. KHL not being listed would cause the value of the Sale Shares to be between HK$113 million and HK$130 million subject to the expectation of a discount, rather than between HK$288 million and HK$305 million, as was contended by the appellant. The burden was on the appellant to provide evidence to the court that the further discount would not have resulted in a reduction to bring the market price in line with the price that the Sale Shares were actually sold for. The appellant not having done this, it therefore failed to show that, on the evidence before the court, it was more probable than not that it would succeed in proving that the Sale Shares were sold at an undervalue.

JUDGMENT

[1] **GONSALVES JA [AG.]:** This case centres on an allegation of a sale of 131,000,000 shares ("the Sale Shares") in Kith Holdings Limited ("KHL"), owned by the first respondent ("Accufit"), by Accufit company directors, Mr. Fok Hei Yu ("Mr. Fok") and Mr. John Howard Batchelor ("Mr. Batchelor"), at an undervalue. The appellant ("Basab") sought permission under section 184C of the **BVI Business Companies Act, 2004** (as amended)[2] ("the BCA") to bring derivative

[2] Act No. 16 of 2004, Laws of the Virgin Islands (as amended by the BVI Business Companies (Amendment) Act, 2005, Act No. 26 of 2005, Laws of the Virgin Islands).

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proceedings in the name of and on behalf of Accufit, its wholly owned subsidiary, against the respondents. The proceedings were sought to be brought against:

(a) Mr. Fok and Mr. Batchelor, the directors of Accufit ("the Directors"), for damages for breach of fiduciary duty arising out of the sale of the Sale Shares.

(b) Double Key International Limited ("Double Key"), the purchaser of the Sale Shares, for an order setting aside the sale and that the Sale Shares be transferred back to Accufit on the grounds that Double Key was guilty of knowing receipt, alternatively for damages on the ground that Double Key dishonestly assisted the Directors in the breach of their fiduciary duty; and

(c) Superb Glory Holdings Limited ("Superb Glory") for an order that Accufit be entitled to redeem the charge of the Sale Shares to Superb Glory, together with consequential relief.

[2] Bannister J, in a judgment dated 22nd September 2014, dismissed the appellant's application. This is an appeal from that judgment. In summarising its case on appeal, the appellant stated at paragraph 14 of its submissions that 'It is the Appellant's case on this appeal that the learned judge erred in law in his interpretation of s184C, and in particular sub-section 184C(2)(c), and that he misdirected himself on the valuation evidence such that his findings in that regard are perverse.'

[3] In order for the appellant to have obtained permission under section 184C to bring the intended proceedings in the name of Accufit, the appellant was required to satisfy the provisions set out therein. Under section 184C(2), in determining whether to grant leave under subsection 1, the court was compelled to take a number of matters into account. Specifically, section 184C(2)(c) required that the court consider 'whether the proceedings are likely to succeed'. In his review of

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section 184C, Bannister J focused on section 184C(2)(c) upon which, he stated at paragraph 15 of his judgment, a large part of the debate turned at the hearing. He concluded, at paragraph 17 of his judgment, that the proceedings were not likely to succeed, and went on thereafter to explain why. This appeal turns on two points, namely, the interpretation and application by Bannister J of section 184C(2)(c) of the BCA and the judge's analysis of the valuation evidence adduced by the appellant.

The Background Facts

[4] The explanation of the application below and the background facts of the case are taken substantially from the judgment of the court below. The parties are all BVI registered companies. In September 2012, Superb Glory lent HK$140 million to Accufit. On the same day, Accufit, in support of the loan, charged such of its shares in its subsidiary company KHL as were then unencumbered. This was 131 million shares carrying roughly a 51% stake in KHL. Basab guaranteed the debt and on 14th February 2013 granted a fixed and floating charge over all of its assets. This included its 100% interest in Accufit.

[5] Superb Glory called in the debt on 12th April 2013 and on 6th May 2013 appointed Mr. Fok and Mr. Batchelor as receivers of Basab under the Basab debenture. On 7th May 2013, Mr. Fok, in his capacity as receiver under the Basab debenture, voted Basab's shares in Accufit to appoint himself and Mr. Batchelor as directors of Accufit and removed Basab from the Board.

[6] On 18th December 2013, the Directors caused Accufit to sell the Sale Shares to Double Key for HK$49,780,000.00, or approximately HK$0.38 each. The sale was completed with the consent of Superb Glory, which released its security to enable the sale to proceed. The sale was effected by Mr. Fok and Mr. Batchelor, not in their capacity as receivers of Basab, but in their capacity as directors of Accufit. As a consequence of the sale, Double Key was obliged under the Rules of the

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Hong Kong Stock Exchange where KHL was listed, to make a general cash offer to all the other members of KHL not acting in concert with Double Key.

[7] KHL was a listed company on the Hong Kong Stock Exchange ("HKEx"). Its shares were also dually listed on the Taiwan Stock Exchange. KHL together with its subsidiaries (together referred to as "the Group") had been specialising in providing high quality multi-colour paper and packaging products of which cigarette package printing was the core product line. In addition, KHL also engaged in the distribution of television business-related products in the USA ("the Distribution television business") and the distribution of electronic and related products in Hong Kong and the People's Republic of China ("PRC") ("the Distribution electronic business", and both together referred to as "the Distribution Business").

[8] On the day of the share sale, but before the sale was completed, KHL made an announcement in relation to the voluntary liquidation of its wholly owned subsidiary, Prime View Investments Ltd. ("Prime View"). Prime View held 100% in Ever Honest Industries Ltd. ("Ever Honest"). Ever Honest held 60% in Yunnan Qiaotong Package Printing Co. Ltd. ("Yunnan Qiaotong"). This was the Group's Yunnan printing and manufacturing of packaging products business and was its main profit generator. The announcement was published before the trading hours on 18th December 2013 and trading of KHL's shares was immediately suspended.

[9] The proposed claim against the Directors is premised on the assertion that they owed fiduciary duties to Accufit to act honestly, in good faith and in what they perceived to be in the best interests of Accufit and for a proper purpose, and without contravening the BCA or Accufit's memorandum or articles of association, and to exercise reasonable skill and care in the circumstances.

[10] Basab alleged that the Directors, who are professionals (members of FTI Consulting), failed to market the Sale Shares properly or at all and ought to have

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known that the sale price was at a gross undervalue. The Directors are charged with breaches of fiduciary duty, acting in reckless disregard of the interests of Accufit, and not acting bona fide in Accufit's best interests. It is alleged that the consequence is that the sale was not entered into for any legitimate or commercial purpose of Accufit or bona fide in its best interests. The Directors are accused of having acted dishonestly, as well as in bad faith and in breach of their duty of skill and care. The proposed claimant wanted the Directors to pay HK$339.2 million which is the difference between the value placed on the Sale Shares in the proposed statement of claim and the sale price paid by Double Key.

[11] The claim alleged against Double Key is that it was aware that the sale was proceeding in breach of the Directors' duties to Accufit and at a gross undervalue and likely amounted to a breach of the Directors' fiduciary duties owed by them to Accufit so that Double Key could not, as against Accufit, retain the benefit of what it must be taken to have known was a sale at an undervalue. The draft statement of claim accused Double Key of dishonestly assisting with the Directors' alleged breach of fiduciary duty in causing Accufit to enter into the share sale agreement.

[12] It is unnecessary to consider the claim against Superb Glory as the appellant did not seek to set aside the judgment of Bannister J insofar as it related to the proposed claim by Accufit against Superb Glory for damages for dishonest assistance.

Ground 1 of Appeal – The Interpretation of section 184C(2)(c) – Whether the Proceedings are Likely to Succeed

[13] The appellant's first ground of appeal relates to whether Bannister J correctly interpreted and applied section 184C(2)(c) of the BCA.

[14] Section 184C of the BCA reads as follows:

> "**184C.** (1) Subject to subsection (3), the Court may, on the application of a member of a company, grant leave to that member to

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(a) bring proceedings in the name and on behalf of that company; or
(b) intervene in proceedings to which the company is a party for the purpose of continuing, defending or discontinuing the proceedings on behalf of the company.

(2) Without limiting subsection (1), in determining whether to grant leave under that subsection, the Court must take the following matters into account
(a) whether the member is acting in good faith;
(b) whether the derivative action is in the interests of the company taking account of the views of the company's directors on commercial matters;
(c) whether the proceedings are likely to succeed;
(d) the costs of the proceedings in relation to the relief likely to be obtained; and
(e) whether an alternative remedy to the derivative claim is available.

(3) Leave to bring or intervene in proceedings may be granted under subsection (1) only if the Court is satisfied that
(a) the company does not intend to bring, diligently continue or defend, or discontinue the proceedings, as the case may be; or
(b) it is in the interests of the company that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders or members as a whole.

(4) Unless the Court otherwise orders, not less than 28 days notice of an application for leave under subsection (1) must be served on the company and the company is entitled to appear and be heard at the hearing of the application.

(5) The Court may grant such interim relief as it considers appropriate pending the determination of an application under subsection (1).

(6) Except as provided in this section, a member is not entitled to bring or intervene in any proceedings in the name of or on behalf of a company."

[15] In considering section 184C, at paragraph 12 of his judgment Bannister J explained:

"Basab, the Applicant under section 184C, clearly has standing to make its application. The opening words of sub-section 184C(2) make clear, in

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my judgment, that the Court has a complete discretion, fettered only by the need to act judicially, to decide whether or not to permit a derivative claim to proceed. Sub-section 184C(2) itself mandates the Court, when deciding whether or not to exercise its discretion, to 'take into account' the matters there specified. Although the words might be read as meaning no more than that the Court must have considered each of the specified matters, in my judgment they have a more prescriptive force than that. For example, if, having considered the *bona fides* of an applicant, the Court concluded that his real interest lay in achieving some undesirable collateral object unconnected with the interests of the company in question, then it seems to me that it would be almost inconceivable that the Court would sanction derivative proceedings at his suit, even if it thought that the matters set out in sub-sections 184C (2)(c), (d) and (e) were, if that is the right word, satisfied".

[16] At paragraph 13 of his judgment, Bannister J stated:

> "The temptation to paraphrase the plain words of a statute is firmly to be resisted, but in my judgment a fair reading of sub-section 184C(2) as a whole and in its context discloses that its purpose, always subject to the Court's overriding discretion, is to point the Court towards refusing permission if the applicant 'fails' on one or more of the matters referred to."

[17] At paragraph 14 of the judgment, commencing at line 9, the learned judge continued:

> "Sub-section 184C(2), in contrast, is giving the Court what amount to statutory guidelines, but which are nevertheless subject to the Court's overriding discretion. The wording is therefore necessarily different, but that does not mean that sub-section 184C(2) is nothing more than a check list. The very nature of the considerations listed in sub-section 184C(2) is such that 'failure' on any one of them will point, *prima facie*, towards a refusal of permission."

[18] Having established the contextual framework of section 184C, Bannister J proceeded to consider sub-section 184C(2)(c). In the judge's opinion, the words themselves were strong. He stated that the statute did not enjoin the court to consider the proposed proceedings' prospects of success, but that the court must take into account whether they are likely to succeed. In determining whether the test would be satisfied, he made comparisons with extreme case scenarios. At one end of the spectrum there would be the case that was self evidently hopeless

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because there was no cause of action, or because the claim was obviously purely speculative or a fishing expedition. At the other end would be the case that was self-evidently strong, with the current board having every interest in stifling it. Bannister J then described what he considered should be the court's approach to cases that fell between the two extremes, and it is to this analysis that the appellant objects. At line 5 of paragraph 16 of his judgment Bannister J stated:

> "Between these extremes, it seems to me that the Court should not attempt to conduct an inquiry similar to that which might be conducted on an application for summary judgment – still less a mini trial. I say that for two reasons. The first is the very nature of the question – whether the claim is *likely* to succeed. In my judgment, that connotes obviousness, in the sense that when the cause of action is explained and the surrounding facts presented, the Court can readily see that the claim is indeed likely to succeed – for example, a claim against a director refusing to repay a well documented loan from a company, or to return property to a company on demand. The second reason is that once a debate upon the merits, particularly the factual merits, is entered upon, the Court is being pushed from considering the question of likelihood towards a form of half baked adjudication. In this case, for example, the hearing took the best part of a day, with painstaking analysis of valuation evidence in an attempt to demonstrate that the price at which the shares were sold was at a gross undervalue. An application under section 184C does not seem to me to be the occasion for a process of that sort. If the merits of the proposed derivative action cannot be clearly and simply expounded, the Court should resist pressure from the applicant to conduct an evaluation of the materials in order to see whether some sort of viable claim can be extracted from them".

[19] In its first ground of appeal, the appellant alleged that Bannister J:

(a) erred in holding that the provision connoted a claim that was self-evidently strong, by which he appears to have intended that the claim must appear to be strong from a cursory examination, without debate on the merits and without any substantial evaluation of the materials before him;

(b) ought to have held that, on the correct interpretation of the provision, the court was required to inquire into and take account of whether there was credible evidence before the court which, if

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either unchallenged or accepted, would be likely to establish the proposed claim;

(c) erred in holding that an application for leave under section 184C was not an occasion for painstaking analysis of valuation or other evidence. The appellant submitted that the company (Accufit) is entitled to be heard on such an application and if, as in this case, the directors of the company cause the company to appear and oppose the application, then the court must evaluate the evidence before it and the arguments advanced by both parties, in order to determine whether 'the proceedings are likely to succeed'. It cannot have been the intention of the legislature that only claims which were so strong that they would warrant summary judgment should be permitted.

[20] In its written submissions, the appellant expanded on the rationale for its position. Derivative claims, it said, typically allege breach of fiduciary duty by the directors of the company, rather than being straightforward claims based on, for example, a 'well documented loan'. Such claims are frequently complex and often rely on valuation and forensic accountancy evidence. Such cases demand at least a preliminary review of the documentary evidence to enable the court to determine whether leave ought to be granted. This is all the more so, stated the appellant, when the application for leave to bring the derivative action is, as in this case, actively opposed by the directors of the company, taking advantage of the company's entitlement to submit evidence and appear at the hearing of the application. If the judge's interpretation was correct, argued the appellant, the derivative action in the BVI will rarely be available to remedy a breach of fiduciary duty by a director. The BVI would have one of the most, if not the most restrictive provisions for derivative actions in the common law world. To demonstrate this, the appellant referred to and compared corresponding provisions in legislation

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from five other jurisdictions, no doubt to highlight the thresholds applicable in those jurisdictions. The jurisdictions referred to were:

(a) **New Zealand, Companies Act 1993**, section 165(2)(a): the court must have regard to 'the likelihood of the proceedings succeeding', interpreted as an arguable case, per **Cameron v Coleman.**[3]

(b) **Hong Kong, New Companies Ordinance**, section 733(1)(b)(i): 'there is a serious question to be tried'.

(c) **Canada Business Corporations Act (1985)**, section 239(2)(c): 'it appears to be in the interests of the corporation … that the action be brought'; interpreted as requiring an arguable case.

(d) **Australia, Corporations Act 2001**, Part 2F.1A, section 237(2)(d): 'there is a serious question to be tried'.

(e) **England, Companies Act 2006**, section 261(2): 'a prima facie case for giving permission'.

[21] The appellant concluded that the approach that Bannister J should have adopted was that, unless the court was able to reject the appellant's evidence on the grounds that it was inherently incredible, or had been demonstrated beyond serious dispute to be incorrect, the role of the court was to ask whether, if the evidence adduced by the applicant was accepted at the trial, the claim would be likely to succeed, and had the judge asked that question, the answer, the appellant suggests, would have been in the affirmative.

[22] The first respondent rejected as being absolutely without justification the appellant's submission described in paragraph 20 above, describing it as being a wholly impermissible gloss on the clear wording of the relevant provision of the

[3] CIV-2010-485-2151 [2011] NZHC 724 (22nd June 2011, unreported) (High Court of New Zealand) per Glendall AsJ at para. 56.

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Act. The first respondent's position was that the judge was correct to construe section 184C(2)(c) of the BCA in the way that he did and was correct to determine that the proposed proceedings against the Directors and against Double Key were unlikely to succeed. The first respondent also drew comparisons with the phrases used in referenced derivative action schemes ('prima facie', 'serious question', 'arguable case' and 'likelihood of the proceedings succeeding') and suggested that the draftsman could have used those words and did not and that in the BCA there was an emphatic requirement to consider 'whether the proceedings are likely to succeed'. In relation to the provision that most closely resembled the BVI provision, section 165(2)(a) of the **New Zealand Companies Act 1993**, the first respondent noted that the requirement there, that the court must have regard to 'the likelihood of the proceedings succeeding' was clearly not as restrictive as the wording of section 184C(2)(c), that is, 'whether the proceedings are likely to succeed'. Additionally, the first respondent submitted that it was the first respondent, not the appellant, which had relied upon the legislative schemes in other jurisdictions to emphasise the stark contrast between the wording used in those regimes and the wording used in the BCA. The first respondent also drew the Court's attention to the way the case below had been put by the appellant in its skeleton argument before Bannister J where the appellant there had said:

> "'*[W]hether the proceedings are likely to succeed*' cannot, logically, mean that the court has to form a view as to whether the proceedings are more likely than not to succeed having regard not only to the evidence before it but also to all the evidence that might be ranged against the case by the proposed Defendants, and the possible course of cross examination of all the Company's and proposed defendant's witnesses. It is difficult to envisage how the court could undertake that task without, in effect, holding a trial of the proposed action."

The correct threshold under section 184C(2)(c)

[23] Having considered the arguments of the appellant and the first respondent, it is for this Court to determine what threshold is established by the phrase 'whether the proceedings are likely to succeed' and whether Bannister J was correct.

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[24] The phrases employed in the various legislative schemes referred to by the parties are different from that used in the BCA. Therefore a consideration of the respective thresholds established in those schemes offers no assistance to this Court. In addition to referring the Court to the other legislative schemes, the first-named respondent relied on **Craies on Legislation**,[4] for the following statement:

> "The cardinal rule for the construction of legislation is that it should be construed according to the intention expressed in the language used. So the function of the court is to interpret legislation 'according to the intent of them that made it'[1] [*4 Co. Inst. 330*] and that intent is to be deduced from the language used." (The golden rule).

[25] The respondent also relied on **Craies on Legislation** at page 716, under the heading 'Literal or Purposive Interpretation' for the following statements:

> "(1) It is beyond doubt that what the courts must do, and always have done, in construing legislation is to seek the true intention of the legislature.
>
> (2) It is equally beyond doubt that the starting-point, and very often the end-point, for the search is the natural meaning of the clear language used by the legislature".

[26] The first respondent concluded that the wording in section 184C(2)(c) is clear and effect must be given to it in the way determined by the judge. The first respondent was undeterred from this by the possibility that if the judge's interpretation was correct the BVI would have one of the most, if not the most, restrictive provisions in the common law world, and described that result as 'the consequence of the clear thrust of the relevant provision'.

Analysis

[27] The phrase is 'whether the proceedings are likely to succeed'. The operative part of this phrase is "likely". The Court adopts the view that the intention of the legislature must be gleaned from the language used to express it, and that the starting point must be the search for the natural meaning of the clear language used by the legislature. But the proper meaning to be ascribed to the operative

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[4] Daniel Greenberg, Craies on Legislation (10th edn., Sweet & Maxwell 2012) p. 701.

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word will also depend heavily on its context. In this regard the Court finds the approach taken in **Cream Holdings Limited and Others v Banerjee and Others**[5] to be helpful. In **Cream Holdings Limited**, the House of Lords had to interpret the meaning and application of the word 'likely' as used in section 12(3) of the Human Rights Act 1998 which imposed a threshold test that had to be satisfied before a court could grant interlocutory injunctive relief. The House's approach to determining the threshold established by the word 'likely' is instructive. Section 12(3) read:

> "No such relief [which might affect the exercise of the Convention right to freedom of expression] is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

[28] The background to that case is as follows. Ms. Banerjee, a former employee of one of the companies of the Cream group was dismissed in January 2001. On her departure she took with her copies of certain documents. She passed these on to Echo, a publisher of two newspapers, along with other information. Echo published articles about alleged corruption involving one director of the Cream group and a local council official. The group sought injunctive relief to restrain publication by the newspaper of any further confidential information given it by Ms. Banerjee. It was admitted that the information was confidential, but the defence was that disclosure was in the public interest. Lloyd J at first instance held there were seriously arguable issues both ways on whether this defence would succeed. Cream had established the 'necessary likelihood' of a permanent injunction for the purposes of section 12(3). He concluded that 'I do not say it is more likely than not, but there is certainly a real prospect of success'.[6]

[29] The defendants appealed. They alleged, inter alia, that the judge had applied the wrong test under section 12(3), that of a 'real prospect of success' rather than

[5] [2004] UKHL 44.
[6] At para. 6.

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'more likely than not'. The Court of Appeal was unanimous that the judge was correct in his interpretation of 'likely' in section 12(3).

[30] On appeal to the House of Lords, Lord Nicholls stated at paragraph 12:

> "As with most ordinary English words 'likely' has several different shades of meaning. Its meaning depends upon the context in which it is being used. Even when read in context its meaning is not always precise. It is capable of encompassing different degrees of likelihood, varying from 'more likely than not' to 'may well'. In ordinary usage its meaning is often sought to be clarified by the addition of qualifying epithets as in phrases such as 'very likely' or 'quite likely'. In section 12(3) the context is that of a statutory threshold for the grant of interim relief by a court."

[31] Lord Nicholls then proceeded to consider the legal background against which the statutory provision had to be interpreted. He commenced with a reference to the 1960s approach adopted by the courts to the grant of interlocutory injunctions of prima facie case, and continued with an examination of the test established under **American Cyanamid Co. v Ethicon Ltd.**:[7] a serious question to be tried. His Lordship explained that a concern was expressed when the Human Rights Bill was under consideration by Parliament at the adverse effect that the Bill might have on freedom of the press. The concern was that applying the conventional **American Cyanamid** approach, orders imposing prior restraint on newspapers might readily be granted by the courts to preserve the status quo until trial whenever applicants claimed that a threatened publication would infringe their rights under article 8 of The European Convention (guaranteeing the right to respect for private life). Section 12(3) was enacted to allay these fears. Its principal purpose was to buttress the protection afforded to freedom of speech at the interlocutory stage. It sought to do so by setting a higher threshold for the grant of interlocutory injunctions against the media than the **American Cyanamid** guideline of a 'serious question to be tried' or 'a real prospect' of success at the trial.

[7] [1975] AC 396.

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[32] At paragraph 16, Lord Nicholls stated:

> "Against this background I turn to consider whether, as the Echo submits, 'likely' in section 12(3) bears the meaning of 'more likely than not' or 'probably'. This would be a higher threshold than that prescribed by the American Cyanamid case. That would be consistent with the underlying parliamentary intention of emphasising the importance of freedom of expression. But in common with the views expressed in the Court of Appeal in the present case, I do not think 'likely' can bear this meaning in section 12(3)."

[33] In the latter part of paragraph 16, Lord Nicholls then proceeded to explain why 'likely' could not bear that meaning.

> "Section 12(3) applies the 'likely' criterion to all cases of interim prior restraint. It is of general application. So Parliament was painting with a broad brush and setting a general standard. A threshold of 'more likely than not' in every case would not be workable in practice. It would not be workable in practice because in certain common form situations it would produce results Parliament cannot have intended. It would preclude the court from granting an interim injunction in some circumstances where it is plain injunctive relief should be granted as a temporary measure."

[34] At paragraph 17, Lord Nicholls also highlighted the difficulty that would be caused if the threshold was 'a balance of probability'. With such a threshold, on any application the judge would need an opportunity to read and consider the evidence of both parties. Until then the judge would often not be in a position to decide whether on a balance of probability the applicant will succeed in obtaining a permanent injunction at the trial. But in the nature of things this will take time, and inevitably there will often be a lapse of some time in resolving such an application. It could not have been Parliament's intention, said Lord Nicholls, to preclude the judge from making a restraining order for the period needed for him to form a view on whether on a balance of probability the claim would succeed a trial. At paragraph 18, His Lordship also alluded to the cases where the adverse consequences of disclosure of information would be extremely serious, despite the applicant's claim to confidentiality being weak, and stated that it would be extraordinary if in such a case the court were compelled to apply a 'probability of success' test.

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[35] Lord Nicholls expressed the view at paragraph 20 that those considerations indicated that 'likely' in section 12(3) cannot have been intended to mean 'more likely than not' in all situations. He explained that:

> "The intention of Parliament must be taken to be that 'likely' should have an extended meaning which sets as a normal prerequisite to the grant of an injunction before trial a likelihood of success at the trial higher than the commonplace American Cyanamid standard of 'real prospect' but permits the court to dispense with this higher standard where particular circumstances make this necessary.".

[36] Lord Nicholls continued at paragraph 22:

> "There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success 'sufficiently favourable', the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion …. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite."

[37] For the purpose of interpreting 'likely' as used in 'whether the proceedings are likely to succeed' this Court finds the analysis in **Cream Holdings Limited** instructive. This Court would be justified in applying a literal interpretation to the word 'likely', unless this would make section 184C(2)(c) unworkable within the procedural framework established by section 184C for derivative proceedings applications, or would otherwise produce a result that Parliament could not have intended. The **Concise Oxford English Dictionary**[8] defines 'likely' as meaning 'such as well might happen or be true', 'promising', (adv) 'probably'. On a purely literal construction, this Court would interpret the phrase to mean whether it is more probable than not that the proceedings will succeed. Would such a literal

[8] Judy Pearsall: The Concise Oxford English Dictionary (10th edn., Oxford University Press 2002).

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interpretation produce a result that would be unworkable or which could not have been intended by Parliament?

[38] Unlike in **Cream Holdings Limited**, in a consideration of an application under section 184C, it is difficult to see any circumstance that would impose a restricted timeline within which a judge may be required to give a decision on an application, before he has had an opportunity to evaluate evidence and submissions. There would be no reason for the judge to have to render a decision before he has had an opportunity to fully read and appreciate the evidence and submissions. Consequently there would be no justification on that basis for imposing a threshold lower than 'more probable than not' in order to make section 184C workable. Neither is there any other identified compelling reason to suggest that either a flexible threshold, similar to that which was applied in **Cream Holdings Limited**, or any single lower threshold, than that resulting from an ordinary interpretation of the clear words, should be applied here. If interim relief is required, section 184C(5) enables the court to grant such interim relief as it considers appropriate pending the determination of an application under subsection (1).

[39] In **Cream Holdings Limited**, Lord Nicholls stated at paragraph 22 that 'the general approach should be that the courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial', and that '[i]n general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion'. That appears to have been an application of the ordinary meaning of 'likely' by Lord Nicholls to what His Lordship considered to be a standard or ordinary case. That interpretation would also properly apply to the word 'likely' in the context of section 184C(2)(c). Consequently, considering the dictionary interpretation of the word 'likely', and the guidance provided by **Cream Holdings Limited**, this Court determines that the correct meaning of the phrase 'whether the proceedings are likely to succeed' as used in section 184C(2)(c) is ***whether it is more probable than not that the proceedings will succeed***. It

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does not require that the applicant demonstrate that success is an absolute certainty, or that the probability of success is very strong. In the court below, Bannister J stated that the nature of the question 'whether the claim is likely to succeed' connotes obviousness. He did go on to explain what he meant by that, that is, in the sense that when the cause of action is explained and the surrounding facts presented, the court can readily see that the claim is indeed likely to succeed. He then continued to give the example of a claim against a director refusing to pay a well documented loan. The use of the word 'obviousness' and the context of Bannister J's explanation informed by the example he gave, suggests to this Court that the learned judge was interpreting 'whether the claim is likely to succeed' as requiring more than it being more probable than not that the proceedings would succeed and that the learned judge was moving into the realm of requiring a strong likelihood, or almost requiring certainty. If that was the learned judge's intention, we believe that was incorrect.

The Approach to Considering the Evidence Submitted

[40] Inextricably interwoven in the determination of whether the threshold had been met by the appellant, is a determination of what approach the judge was required to take in relation to his consideration of the evidence that was before him. The extreme cases described by the judge present little difficulty. What the appellant objects to is the explanation by Bannister J of the approach to be taken in relation to cases that fall between those extremes, in which he impliedly suggested this case fell. According to the judge, the court should not attempt to conduct an inquiry similar to that which might be conducted on an application for summary judgment – still less a mini trial. Bannister J's concern was that if the court engaged in entertaining a debate upon the factual merits, it was moving from considering the question of likelihood towards a form of half-baked adjudication.

[41] In any case, at an application stage, whether and to what extent an examination of the proposed case on the merits is required, must certainly depend on the applicable threshold, and the evidence then before the court. Thus, in **American**

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Cyanamid Co. v Ethicon Ltd., it was against the backdrop of the established threshold of 'a serious question to be tried' that Lord Diplock stated at page 407:

> "It is no part of the court 's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which will call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

And in **Cameron v Coleman**, When Glendall AsJ stated at paragraph 23 of his judgment, in the context of an application for permission to bring a derivative action, that on such an application the court is not to conduct an interim trial on the merits of the case, the threshold there was merely an arguable case. For a judge to decide at an application stage whether on a balance of probability, based on the evidence and submissions then before him, the applicant will succeed at the trial, must require him to read and evaluate such evidence and submissions.

[42] In relation to the level of examination of the evidence required, the threshold (that of determining whether the proceedings are likely to succeed) would require a full and proper examination of the evidence then before the court. The Court agrees with the appellant that the potential nature of derivative claims, especially those that may be both complex and defended, do not predispose themselves to a cursory review and require the court to evaluate the evidence before it and the arguments advanced by both parties in order to determine 'whether the proceedings are likely to succeed'. Bearing this threshold in mind, it is difficult to envisage how this test can be properly applied without the court carrying out a proper evaluation of the evidence then before it.

[43] The perceived danger of the possibility of engaging in a half-baked trial is in the circumstances a misconception. It not at this stage a trial. Notwithstanding this, the evaluation of the evidence then before the court cannot be half-baked – it must be complete. It is the statutorily established threshold that determines the level of evidence that must be placed before the court by an applicant, and also the level of judicial analysis of all the evidence currently before the Court.

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[44] In the present case, Bannister J took the position that between the two extreme case scenarios, he was not required to attempt to conduct an inquiry similar to that which might be conducted on an application for summary judgment – still less a mini trial. The learned judge stated at paragraph 16 (line 15) of the judgment:

> "In this case, for example, the hearing took the best part of a day, with painstaking analysis of valuation evidence in an attempt to demonstrate that the price at which the shares were sold was at a gross undervalue. An application under section 184C does not seem to me to be the occasion for a process of that sort. If the merits of the proposed derivative action cannot be clearly and simply expounded, the Court should resist pressure from the applicant to conduct an evaluation of the materials in order to see whether some sort of viable claim can be extracted from them."

[45] The learned judge then concluded at paragraph 17:

> "In my judgment, and applying these principles, these proceedings are not likely to succeed".

[46] It would therefore appear that the learned judge (in relation to whether there should be a painstaking analysis of the valuation evidence), was expressly following his own recently derived principles. It is therefore left for this Court to conclude that the analysis contained in paragraphs 17 through 23 of the judgment was merely cursory, and that he did not carry out a proper evaluation of the evidence. It is the Court's position that the learned judge was incorrect in stating that the court should not attempt to conduct an inquiry, or to imply that the court should not conduct an evaluation of the material currently before it. All of this is assuming of course, that in relation to an applicant's proposed pleadings, a viable claim in law has first been disclosed.

[47] Based on the foregoing, the appellant succeeds on ground 1 of its appeal.

Ground 2 of the Appeal – the Valuation Evidence

[48] In relation to this ground, the appellant asserted that Bannister J erred in fact in holding that the supplemental valuation report dated 18th July 2014 prepared by

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Mr. Choy of Greater China Appraisal Limited was no basis for the allegation that the Sale Shares were sold at an undervalue and that it told the court nothing about what another (presumably hypothetical) purchaser would have been prepared to pay for the Sale Shares. The appellant asserted that the learned judge ought to have held that the report was credible evidence that the true market value of the Sale Shares on 18th December 2013 was between HK$288 million and HK$305 million.

[49] The appellant further asserted that Bannister J erred if he intended that the appellant must have adduced evidence that some real person was prepared to pay more for the Sale Shares than they were in fact sold for. Alternatively, if his meaning was that the supplemental valuation report failed to address the question of what a hypothetical purchaser would have paid, then he erred in fact as that was precisely the issue addressed by the valuation evidence. According to the appellant, Bannister J having held that Mr. Fok and Mr. Batchelor had made no effort in marketing the Sale Shares, ought to have held that the appellant had adduced credible evidence on which, if it was unchallenged or accepted, it was likely that the proposed claim against Mr. Fok and Mr. Batchelor would succeed.

[50] This ground of appeal centres on Bannister J's treatment of the valuation evidence and immediately focuses the Court on paragraphs 21 and 22 of the judgment, where the learned judge stated:

> "Mr Fisher relies upon a supplemental appraisal, made on 18 July 2014 by Greater China Appraisals Limited, which refers to KHL's outstanding debt burden of some HK$516 million at end 2013; values its packaging business at HK$700 million; and says that if part of that business was sold to pay down the debt the residual assets would have a value somewhere between HK$226 and HK$260 million. Taking into account the premium over NAV enjoyed by listed companies, the appraiser reaches a valuation of the sale shares of between HK$288 and HK$305 million.
>
> "The difficulty with all of this is that it tells the Court nothing about what another purchaser would have been prepared to pay Accufit for 51% of KHL's issued share capital after the announcement of the voluntary liquidation of a major part of its mainland China packaging group. The appraisal is thus no basis for an allegation that the sale shares were sold

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at a gross undervalue – still less that Mr Fok and Mr Batchelor were guilty of dishonest (or indeed any) breaches of duty in causing Accufit to dispose of them as it did. The appraisal is no more than a view of what might have been the shape of KHL's balance sheet (plus listing premium) as a result of steps that, so far as the evidence goes, have never been taken. It throws no light on the claim actually proposed to be made."

[51] It was not clear to this Court what exactly Bannister J was focusing on in paragraph 22 of his judgment. Counsel for the appellant appear to have experienced the same uncertainty as in their written submissions, they approached Bannister J's statement at paragraph 22 from multiple perspectives, as follows:

"If, by '*another purchaser*', the judge intended that evidence ought to have been adduced of what an actual alternative purchaser would have paid for the Sale Shares, then he erred as a matter of law. Clearly, such evidence might be helpful, but typically the value of business entities is derived from an analysis of its financial fundamentals combined, where appropriate, with relevant market indicators."[9]

[52] If in fact Bannister J was requiring evidence of an actual offer made by an actual alternative purchaser, this was not correct. The applicable valuation principle of arriving at market value was expressed in **Warner v Ulysius International Trading Pty Ltd**[10] at paragraph 36:

"In relation to the valuation of shares and other property it is well settled that the best indicator of market value of property is what a willing but not over-anxious purchaser would pay to a willing but not over-anxious vendor and that an offer to buy is generally not admissible as direct evidence of the value of property or shares: see *Spencer v The Commonwealth* [1907] HCA 82; (1907) 5 CLR 418 at 432, 436-437; 440-441; *Gregory v Commissioner of Taxation of the Commonwealth of Australia* [1971] HCA 2; (1971) 123 CLR 547 at 562."

[53] In **Harbinger Capital Partners v Andrew Caldwell (As the Independent Valuer of Northern Rock plc), HM Treasury**,[11] Lewison LJ stated paragraph 21:

[9] para. 27 of Appellant's Written Submissions.
[10] [2011] NSWSE 329.
[11] [2013] EWCA Civ 492.

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> "It is also inherent in the concept of ascribing a monetary value to an asset such as a share that what you are asking is how much someone would expect to receive for it at the relevant time. And that in turn necessitates postulating a transaction of sale and purchase on the valuation date and asking what the purchase price would have been (see Waters v Welsh Development Authority [2004] UKHL 19 [2004] 1 WLR 1304 …)."

[54] The appellant alternatively submitted that if the judge intended that the appellant must have adduced evidence of what a hypothetical alternative purchaser would have paid, then that is precisely the issue addressed by the reports of Mr. Choy of Greater China Appraisal. The appellant referred to paragraph 2 of section IV of Mr. Choy's first report, where he stated:

> "We have performed valuation of the Shares on the basis of fair value. According to the International Valuation Standards, fair value is defined as '*the estimated price for the transfer of an asset or liability between identified knowledgeable and willing parties that reflects the respective interests of those parties*'."

[55] We would also agree with counsel for the appellant that this is what Mr. Choy's expert reports were purporting to do.

[56] Counsel for the appellant also addressed the possibility that the judge might have been concerned that the reports did not address the effect on the share valuation of the announcement of the voluntary liquidation of a major part of KHL's subsidiary, Prime View Investments Limited. Counsel for the appellant pointed to section VII, paragraph 9 of Mr. Choy's first report to show that Mr. Choy was undertaking the valuation exercise having regard to that announcement on 18th December 2013 of the voluntary liquidation of KHL's subsidiary. Counsel pointed out that in section V paragraph 2 of Mr. Choy's Supplemental Report, Mr. Choy stated in terms that it was his opinion that anyone valuing the Sale Shares on 18th December 2013 would have valued them at between HK$288 million and HK$305 million. Mr. Choy's conclusion was premised on there being three possible outcomes as at the valuation date, and that the scenario most likely to have been considered as a viable outcome by anyone valuing the shares as at that date is

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that KHL would have sold part of its business, i.e. its interest in the Yunnan Business, to repay the outstanding loan.

[57] The appellant's submission continued that Mr. Choy's valuation model, i.e. the sale of the Yunnan business, reduction or elimination of debt and retention of sufficient residual operating assets and profit generating capacity to retain listed status, was supported by the expert corporate finance report of Mr. (Tiger) Wong Hon Kit of Greater China Paxwell Limited, a company providing independent financial advice. Reference was made to sections 4 and 5 of Mr. Wong's report. On the evidence, the reports did seek to deal with the effect on the share valuation of the 18th December 2013 announcement.

[58] As Bannister J did not undertake an evaluation of the material before him, it is for this Court to do so.

The Expert Reports of Greater China Appraisal and the Greater China Paxwell Report

[59] In his judgment, Bannister J found that the Directors had made no efforts in marketing the Sale Shares. Further, no evidence was adduced to the effect that the Directors had obtained any valuation advice in relation to the Sale Shares. Consequently, as acknowledged by counsel for the first respondent in the court below, the heart of this matter is whether the Sale Shares were sold at an undervalue.

[60] In relation to this Court's approach to the issue of the Sale Shares valuation, the Court is aware of the admonition by Lord Toulson in **Caribbean Steel Company Limited v Price Waterhouse (a Firm)**,[12] where he stated at paragraph 11, 'Before embarking on a closer examination of the issues raised by the appeal, it is important to remember that the valuation of the shares in a company is an exercise requiring professional skill and judgment'. This Court also notes that, in

[12] [2013] UKPC 18.

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principle, a court is not bound to accept expert evidence, but if the court does reject expert evidence, it must first have scrutinised the reasons given by the expert for reaching his opinion, and also provide sound reasons for rejecting it.[13]

[61] The applicant relied on the two previously mentioned expert reports by Greater China Appraisal, produced by Mr. Choy. The first was headed 'Expert Report On The Fair Value of 131,000,000 Shares of Kith Holdings Limited' and was dated 28th January 2014 ("the First Report"). The second was headed 'Supplemental Report on The Fair Value of 131,000,000 Shares of Kith Holdings Limited' and was dated 18th July 2014 ("the Supplemental Report").

[62] The First Report stated that the valuation had been prepared in accordance with the International Valuation Standards on business valuation published by the International Valuation Standards Council. According to the International Valuation Standards, fair value is defined as 'the estimated price for the transfer of an asset or liability between identified knowledgeable and willing parties that reflects the respective interests of those parties'. It continued that the premise of value relates to the concept of valuing a subject in a manner that it would generate the greatest return to the owner of the property, taking into account what is physically possible, financially feasible, and legally permissible. The various premises of value included going concern, orderly liquidation and forced liquidation.

[63] The First Report considered, inter alia, the general economic overview in China where the profit of the Group was derived. It considered the cigarette-related packaging materials market in China and concluded that the cigarette-related packaging materials manufacturing industry has been experiencing a stable and promising growth and that the trend was going to be maintained in the foreseeable future due to cigarette demand as well as the smoking population being sustainable and steady. It divided the value of the shares into two components,

[13] Caribbean Steel Company Limited v Price Waterhouse (a Firm) [2013] UKPC 18 at para. 46.

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firstly the value of controlling the business of the Group and secondly, the value of controlling a listed company that is dually listed in the HKEx and the Taiwan Stock Exchange. It continued that the valuation of any business can broadly be classified into one of three approaches, namely the cost approach, the market approach and the income approach and went on to give a brief explanation of each.

[64] The income approach was dismissed at the outset on the basis that no detailed financial projection or budget had been provided for evaluation and there were significant changes in some business segments which made a future projection difficult to substantiate and there was a high uncertainty on the relocation plan of Yunnan Qiaotong (which, on the evidence was the Group's dominant entity in the packaging materials business). Applying the cost approach resulted in an attributed value to the Sale Shares of HK$219,500,000.00. The method by which this figure was arrived at was explained on page 22 of the First Report.

[65] The alternative was the market approach. Within this approach there were two methods utilised. The method 1 value was established by direct reference to the open market share price (then approximately HK$0.7 per share) resulting in a Sale Share valuation of HK$91,700,000. This, according to the First Report, reflected marketable minority interest and did not include the value that an investor would be willing to pay for control over the business of the Group and the value of controlling a listed company which was dually listed on the HKEx and Taiwan Stock Exchange. The First Report also stated that the calculation did not reflect the impact on the share price after the release of the new information on 18th December 2013.

[66] Under method 2, in order to capture the potential impact on the share price after the release of the new information and the control over the underlying businesses, the value of controlling the business of the Group was established based on the sum of the values of the individual business segments and is referenced to the

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share price of comparable companies ("Guideline Public Company Method"). As Prime View was solvent and the liquidation was voluntary, the liquidator is able to decide how to sell the asset to maximise the recoverable amount. Since Yunnan Qiaotong is an up-and-running and profitable business, the selling price of an assembled operation will be higher than selling the assets individually. The other relevant matters included the perceived fact that the business relationship with the major business partners was secured and long term as shown by the prospectus of KHL which showed that Yunnan Qiaotong had entered into a long term procurement agreement with a state-owned enterprise which operated a large factory in China until 2018.

[67] Valuation under method 2 involved utilising a price to earnings ratio ("P/E"), with an upward adjustment on the result to reflect the control premium that an investor would be willing to pay for control, with a downward adjustment in the form of a discount for lack of marketability. Relying on research by Mergerstat Control Premium Studies, the control premium was estimated at between 32.5% to 41.4%. At section XIV paragraph 28 of the First Report, Mr. Choy stated that 'Discount for lack of marketability is the valuation adjustment with the largest monetary impact on the final determination of value. Marketability is defined as the ability to convert an investment into cash quickly at a known price and with minimal transaction costs'. In selecting the appropriate discount for lack of marketability, Mr. Choy said he considered the length and effort required by the management in order to sell the controlling interest. This, he said would typically take at least three months to nine months if a transaction could be consummated. Mr. Choy did not provide any basis for his conclusion that typically such a sale would take between three to nine months. Additionally, his qualification at the end, 'if a transaction could be consummated', would be of some concern. At paragraph 31 he stated that the range of discount for lack of marketability for controlling interest based on 'different researches' was around 4-15%. His research in this area was neither identified nor explained. Considering the operating history and profitability of Yunnan

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Qiaotong and that it had performed an annual audit, he ascribed a 10% discount for lack of marketability.

[68] A number of comparable companies (listed on the HKEx and principally engaged in tobacco packaging or cigarette packaging in China) were identified to find the appropriate P/E ratio. This was calculated on average to be between 9.65 and 8.57. Due to poor performance, the contribution of the distribution and other electronic and related products segment was considered to be minimal. Applying these to a profit after tax of HK$69.01 million, and adjusting (increasing) for the control premium and further adjusting (discounting) for the lack of marketability, resulted in an estimated value of (what was essentially the printing and packaging manufacturing business, the other business segment contribution being nil) a low of HK$705.09 million to a high of HK$847.44 million, or a price per share of HK$2.70. Applying this to the number of Sale Shares of 131,000,000 resulted in a valuation of HK$353.7 million to HK$424.4 million. The report concluded at paragraph 42 of Part XIV that 'The value of controlling the business of the Group as at the Valuation Date based on the sum of values of the individual business segments using the Guideline Public Company Method under the market approach is HKD353,700,000 – HKD424,400,000'.

[69] The First Report also stated that the value calculated under method 1 was unsatisfactory because it did not take into account the new information about the voluntary liquidation and the premium paid for the control over the underlying business and the listing status. The Report concluded that the value of controlling the business of the Group was HKD389,000,000 as at the Valuation Date based on the average result from the market approach, method 2. No premium over net asset value was applied due to the potential overlap between this and the figure already applied for the value of controlling the business of the Group based on the market approach.

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[70] The first respondent did not submit any independent expert's report to rebut the appellant's case. The attack on the appellant's expert evidence came in the form of the affirmation of Mr. Zhang Xiaofeng ("Mr. Zhang"), a director of Double Key, and the affirmation of Mr. Fok. In his affirmation (which was in response to the affirmation of Mr. Hui King Chun ("Mr. Hui"), a director of Basab, made in support of the section 184C application), Mr. Zhang maintained that the purchase of the Sale Shares was an arm's length transaction, made through professional advisers, that Double Key had no relationship with the receivers (Mr. Fok and Mr. Batchelor), the directors of Accufit or Superb Glory or any knowledge of what Basab was alleging amounted to various breaches of fiduciary duty and breaches of trust on the part of the receivers in their capacity as directors of Accufit. He further stated that Double Key arrived at the offer price it made for the Sale Shares on an independent and purely commercial and objective basis, through its own independent research and analysis of the financial situation of KHL and the Group.

[71] According to Mr. Zhang there was nothing that could have or did put Double Key on notice of the breaches of fiduciary duty and breaches of trust that Basab was alleging against the receivers in their capacity as directors of Accufit. Any suggestion that Double Key assisted the receivers, as directors of Accufit, to sell the Sale Shares at an alleged undervalue was fantastical, and in any case, in light of the surrounding circumstances of the sale and purchase of the Sale Shares, and considering the financial difficulties of the Group, the Sale Shares could not be said to have been sold at an undervalue. The affidavit went on to speak to, inter alia, parallel proceedings occurring in Hong Kong, to give information as to Mr. Zhang's background and that of Double Key, to explain how the opportunity to purchase the Sale Shares came up, the financial distress of Accufit, the preparation for the purchase of the Sale Shares and preliminary discussions, and what occurred on the day of the bid. The affirmation specifically focused on the 18th December 2013 announcement of the voluntary liquidation of a wholly owned subsidiary of KHL which indirectly held a 60% equity interest in Yunnan Qiaotong.

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[72] Mr. Zhang also listed the factors considered by Double Key in arriving at the Sale Price, including the methods used prior to 18th December 2013 in arriving at an estimated value for each share in KHL before a decision was taken as to what price they were prepared to pay for the Sale Shares. The latter part of the affirmation sought to answer Mr. Hui's allegations. At paragraph 67 of the affirmation, Mr. Zhang stated that even if the Sale Shares had been sold at an undervalue (which he denied) it did not mean that Double Key was liable for knowing receipt or dishonest assistance in relation to the purchase of the Sale Shares. The affirmation repeated that the sale was conducted at arm's length, that the receivers were free to have rejected the offer and that Double Key was purchasing shares in a distressed asset on an 'as is, where is basis'. At paragraph 68 Mr. Zhang stated that Double Key was not aware of what steps the receivers had taken to value the shares (other than those outlined in his affirmation), that the receivers were senior managing directors of FTI Consulting (Hong Kong) Limited, part of the well-known FTI Consulting Group, and experienced professionals, that Double Key assumed, were entitled to assume and, remained of the view that the sale of the shares was conducted in a proper and valid manner and that the receivers progressed the sale in accordance with their professional obligations and duties. He maintained that if there was any breach of trust or any breach of fiduciary or any other duty that Mr. Hui alleged that the receivers, as directors, owed to Accufit, then Double Key had absolutely no knowledge of them. At all times, Double Key acted in good faith and as any ordinary commercial arm's length purchaser. The claims for knowing receipt and dishonest assistance and not being a purchaser for value were denied.

[73] Mr. Fok, in his affirmation, described himself and Mr. Batchelor as having over 15 years of experience in corporate recovery, restructuring and transaction advisory work, and as having significant experience in receiverships and as acting as directors of companies in receivership. He explained the background to his and Mr. Batchelor's appointment as receivers and directors. From paragraph 28, the

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affirmation went into an explanation of the sale of the charged shares (the Sale Shares). At paragraph 29, Mr. Fok stated:

> "It is not in dispute that we agreed, on behalf of Accufit, to sell the Charged Shares to Double Key on 18 December 2013 for a consideration of HK$49,780,000.00 …. However, contrary to Mr. Hui's assertions, and for the reasons set out below, the reality was that the Sale Consideration was the best price reasonably obtainable at the time of the sale."

[74] The affirmation continued with an explanation of the events leading up to and motivating the sale of the Sale Shares, and in particular what he described as the deterioration of the financial condition of KHL. The contents of the entire affirmation and the explanations offered/assertions made therein have been duly considered by this Court, including but not limited to the following references:

(a) the conclusion at the end of page 46 of KHL's Annual Report dated 31st December 2012 where it was stated that 'These conditions indicate the existence of a material uncertainty which may cast significant doubt on the Group's ability to continue as a going concern and that it may be unable to realise its assets and discharge its liabilities in the normal course of business'[14];

(b) the loss suffered of HK$188,550,000 for the 6 months ended 30th June 2013 compared with a profit of HK$84,041,000 for the year ended 31st December 2012, such loss being mainly attributable to the loss of HK$44,413,000 on the disposal of KHL's interest in an associate company Megalogic Technology Holdings Limited and an impairment loss on trade receivables of HK$168,080,000 (equivalent to around 22% of the total net assets of the Group). Mr. Fok's view was that such an enormous discount on the Megalogic sale strongly suggested that the disposal was a fire sale by a financially desperate parent company;

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[14] See para. 37(a) of Mr. Fok Hei Yu's Second Affirmation dated 27th June 2014.

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(c) the fact that according to the Interim Report of 30th June 2013 out of the Group's total borrowing of approximately HK$516,335,000 an aggregate amount of approximately HK$417,857,000 of trust receipts loans and other loans (which constituted more than 80% of the total borrowing) was overdue as at 30th June 2013 and that the Interim Report stated that these conditions indicate the existence of a material uncertainty that KHL may be unable to realise its assets and discharge its liabilities in the normal course of business (see pg 14 of the report);

(d) the issue a Lapse of Placing Agreement announcement which confirmed that the placing agreement dated 30th January 2013, whereby KHL had proposed 6% bonds to raise cash up to HK$300,000,000 had lapsed and that the placing would not proceed;

(e) the Trading Halt Announcement on 18th December 2013 pending release of an announcement of inside information by KHL in relation to the voluntary liquidation of its wholly owned subsidiary Prime View Investments Limited which in turn held 60% equity in Yunnan Qiaotong, a major operating subsidiary of KHL that was engaged principally in the printing and manufacturing of packaging products. That this voluntary liquidation meant that KHL would lose the packing business, the Group's most profitable and valuable asset, and KHL would be left with the loss making TV business and the insignificant electronics business.

[75] At paragraph, 46 Mr. Fok stated that Mr. Hui, in relation to addressing the effects of the voluntary liquidation (in his affirmation) was extremely selective in the information and figures he provided and Mr. Fok disagreed with Mr. Hui's assertion that that the voluntary liquidation did not have any material adverse effect on Yunnan Qiaotong, and/or the value of shares of KHL. The packaging business accounted for approximately 98% of the Group's consolidated net assets and approximately 81.9% of the Group's total gross profit. At paragraph 51 Mr. Fok asserted that once the packaging business, being the 60% equity stake in Yunnan

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Qiaotong (held indirectly by Prime View) was put into liquidation, the Group would lose control of the packaging business and the liquidators would assume the management and control of the packaging business. The Group's stake in the packaging business would only be limited to the dividends, if any, payable to the Group (as a shareholder) after full settlement of all creditors' claims by the liquidators. In such case the packaging business would be removed from the audited accounts of the Group. From this, he stated, flowed the possibility of KHL losing its listing status.

[76] At paragraph 55 of his affirmation Mr. Fok stated:

> "The above clearly indicates the severe financial difficulties of KHL, which formed part of our decision-making process in determining when Accufit should sell the Charged Shares and the Sale Consideration we were prepared to accept. The objective facts show that the Voluntary Liquidation was not part of some 'protective measures' as alleged by Mr Hui but rather its purpose was to urgently raise cash in order to improve the Group's dire financial position."

[77] At paragraph 57 he stated: 'For the reasons set out above (and summarised below), we determined that the Sale Consideration for the Charged Shares was the best price reasonably obtainable'. He then recounted the factors that were significant in agreeing the sale consideration with Double Key, which were essentially those mentioned above, including the serious uncertainty as to whether KHL would be able to comply with rule 13.24 in view of the voluntary liquidation and the real risk of KHL losing its listing status.

[78] At paragraph 60, Mr. Fok criticised the GCA Valuation Report for not taking into account three fundamental matters which, in his view, affected the value of the charged shares. Firstly, that pursuant to the voluntary liquidation that the liquidators would assume the management and control of the packaging business, the major profit generator of the Group and the effect that could have on the value of the charged shares. Secondly, the GCA Valuation Report does not consider whether KHL would be in a position to maintain its listing on the stock exchange in

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view of the voluntary liquidation and how that would affect the value of the charged shares. Thirdly, and more significantly, even if the GCA Valuation Report was correct in its assessment that the value of controlling the business of the Group was HK$389,000,000 (which he denied), all material assets of the Group, including the packaging business, had been charged to the Bank Creditors under the Bank Creditors Debenture to secure repayment of outstanding debts owed to the Bank Creditors advances. According to Mr. Fok, the alleged fair value failed to take into account these three very significant factors which, in his opinion, clearly affected the value of the charged shares.

[79] The first respondent also sought to rely on a letter dated 9th May 2014 from Grand Vinco Capital Limited ("Vinco"). As a result of the sale of the Sale Shares, Double Key was obliged to make a mandatory offer under Rule 26 of the Takeovers Code to all shareholders of KHL at the price of HK$0.38 (i.e. the price at which Double Key had purchased the Sale Shares). The Board of KHL issued a Response Document relating to the Unconditional Mandatory General Cash Offer by Double Key to acquire all the issued ordinary share capital of KHL. This response included what has been referred to as the Vinco letter. This was self described as a letter of advice from Vinco Capital to the Independent Committee and Independent Shareholders in relation to the Offer which has been prepared for the purpose of incorporation into the Response Document. In the letter, Vinco referred to their engagement as an Independent Financial Advisor to advise the Independent Committee and the Independent Shareholders with respect to the terms of the Offer. The letter comprised 26 pages. After setting out the basis of its review and analysis, the letter concluded '[W]e are of the view that the terms of the Offer are fair and reasonable so far as the Independent Shareholders are concerned'. However, as its purpose was to advise in relation to the Offer after and consequent upon the sale of the Sale Shares, with the sale having already established the offer price, we do not place any reliance on this in determining what would have been fair value on the sale date.

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[80] Subsequent to the affirmations of Mr. Zhang and Mr. Fok, the appellant obtained a further report from GCA, the Supplemental Report. The transcripts of the proceedings below show that the appellant considered that this Supplemental Report superseded the First Report. According to this report, its purpose was to evaluate the fair value of the Shares as at the valuation date based on the most likely scenario according to the information that was then available. It presented three possible scenarios, being:

(1) KHL undergoes restructuring by selling part of its assets and paying down all or part of its debt from the proceedings.

(2) KHL successfully seeks investors and injects new capital to KHL or restructures its debt.

(3) KHL is wound up by its creditors or pursuant to a court order and is liquidated and delisted from the Stock Exchange of Hong Kong.

[81] At section III, paragraph 8 of the Supplemental Report, Mr. Choy concluded that it was very likely that KHL could sell part of its Printing and Manufacturing of Packaging Products Business to pay down its indebtedness and produce a healthy cash surplus. In section IV at paragraph 1, Mr. Choy stated that the business of the Printing and Manufacturing of Packaging Products mainly comprised the business in Yunnan Province and the business in Anhui Province. He stated that the business in Yunnan Province was dominant. He said that as the outstanding loan was substantial to the overall business, he assumed the business in Anhui Province (Anhui Qiaofeng) would be kept to maintain the listing status, while the rest of the businesses including the business in Yunnan Province (i.e. the Yunnan Business) was sold to repay the outstanding loan.

[82] To determine the proceeds that would be collected from selling part of KHL's business, he selected comparable transactions. In total, 6 comparable transactions were identified and the consideration ranged from 7.4 to 14 times

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annual earnings. Using the selected P/E ratios of 8.88 and 11.51, taking the estimated earnings from the Yunnan Business (excluding Anhui Qiaofeng), applying a control premium of 37% and then discounting for lack of marketability by 10% (but only in the case where the P/E ratio of 8.88 was used) resulted in figures of HK$1,104.46 million and 1,161.4 million. KHL's effective 60 per cent interest would then yield a value of HK$662.67 million to HK$696.87 million. After payment of KHL's debt and adding the residual value of its assets, the resulting total net asset value of KHL was between HK$225.96 million to HK$260.15 million. This was without the premium over net asset value ("NAV") for listed companies.

[83] At section IV paragraph 11 of the Supplemental Report, Mr. Choy continued:

> "Assuming that the listing status can be retained, KHL should be able to enjoy the premium over NAV enjoyed by listed companies. Therefore, the fair value of the Shares would be HKD288 - 305 million, i.e. the sum of the total net asset value of KHL (HKD226.0 - 260.2 million) and premium over NAV (HKD348 million) times the percentage of share holdings."

[84] At paragraph 12 Mr. Choy went on to state a caveat and then to address that caveat:

> "Reasonably, the potential buyers might not prepare [sic] to pay full undiscounted value in order to make profit or to compensate [for] the underlying risk involved in restructuring. However, regarding this case, there are also some definite advantages that can sell at a higher price.
>
> - Account [sic] receivable for other businesses was assumed to be completely written off. Any recovery of the account [sic] receivable will be value added to the value.
> - KHL is also listed in Taiwan TDR. It provides a channel to get access to Taiwan's capital market. It provides additional liquidity advantage to KHL and its shareholders.
> - There are guaranteed orders in the Yunnan business until 2018. It significantly lower [sic] down the operational risk and secured the profitability of the Yunnan Business."

[85] A number of issues become apparent at this point. Firstly the valuation in the Supplemental Report is premised on the assumption that KHL would maintain its listing status. In both GCA Reports, the maintenance of listing status was

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considered to be a desired outcome. It will be recalled that the possibility of a delisting occurring was a specific concern expressed by Mr. Fok in his affirmation. By raising it as a necessary assumption in the Supplemental Report, Mr. Choy highlighted not only its importance, but its uncertainty. At section IV paragraph 5 of the Supplemental Report, Mr. Choy stated:

> "If it is assumed that part of KHL's business is sold to repay the outstanding loan balance, the net asset remaining and the premium over net asset value which is noted in Hong Kong listed companies should be considered, so long as the remaining business is sufficient to maintain the listed status of KHL." (Emphasis added).

Without listing being maintained, the reason for applying a premium over net asset value would disappear.

[86] However no factual basis was established in either GCA Reports to explain why listing would, more likely than not, be maintained.

[87] It would appear that the importance of the maintenance of listing status was recognised by the appellant as being pivotal to its case as it also submitted to the court below the Greater China Paxwell Report (prepared by Wong Hon Kit) also dated 18th July 2014. The Report described the three stages of the delisting procedure. It indicated that according to the Exchange monthly report, as at 31st December 2013 there were 34 main board listed companies which had been suspended for 3 months or more. The Exchange had considered 6 named companies failed to comply with Practice Note 17 of the Listing Rules. In the last 12 months there were 6 listed companies that successfully fulfilled all the Exchange resumption requirements and resumption of trading shares, in which 5 of them had been suspended for more than 3 years and have been placed in the third stage of delisting by the Exchange. It concluded that therefore even if KHL was placed in the first stage of delisting, that KHL had sufficient time to address the Exchange concerns and resume trading.

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[88] The report continued at page 13:

> "According to the valuation report prepared by Greater China Appraisal, the Yunnan Business (excluding KHL's indirect 25.8% equity interest in Anhui Qiaofeng) worth approximately HK$663M to HK$697M. Upon completion of the sales of Yunnan Business and after repaying the outstanding indebtedness to existing creditors; Anhui Qiaofeng will remain as KHL subsidiary (through a 54.8% direct equity interest) and KHL will have approximately HK$150M to HK$180M additional cash to develop the remaining business. The Hypothetical Scenario would improve the cash flow position, reduce the operating losses and reduce its gearing ratio."

[89] The report then recited the Listing Rule 13.24:

> "An issuer shall carry out, directly or indirectly, a sufficient level of operations or have tangible assets of sufficient value and/or intangible assets for which a sufficient potential value can be demonstrated to the Exchange to warrant the continued listing of the issuer's securities."

[90] At page 14 of the report at the bottom Mr. Wong states:

> "The voluntary liquidation and the sale proposed in the valuation model only involves certain assets of KHL, namely the Yunnan Business, which does not include Anhui Qiaofeng and Kith Consumer Product Inc., therefore, KHL would still have been carrying out sufficient level of operations under Rules 13.24. The voluntary liquidation will only be classified as a notifiable [sic] transaction of the company under the Listing Rules Chapter 14. The Hypothetical Scenario involves the disposal only of the Yunnan Business. The businesses of the remaining KHL group would include, Anhui Qiaofeng and Kith Consumer Product Inc. After the sale of the Yunnan Business, the remaining KHL group will be continue engaged [sic] in the Distribution Business and the Package Printing Business. According to the information provided by Mr. Hui, the pro forma revenue of the Anhui Qiaofeng amounted to approximately HK$112 million for the twelve months ended 30 June 2013 and the pro forma assets of the Anhui Qiaofeng amounted to approximately HK$175 million as at 30 June 2013. The above figures show that KHL still has sufficient level of operation to satisfy the Listing Rules 13.24 requirements. In addition, the Yunnan Business and Anhui Qiaofeng both are principally engaged in the tobacco packaging printing business, since Anhui Qiaofeng has not yet fully utilized its production capacity and KHL's management has excellent relationships with major tobacco factories in PRC so that KHL will be in a good position to increase operations at Anhui Qiaofeng. After considered [sic] the above, we are of the view that following the sale of the Yunnan Business and the paying down of KHL's debt, KHL would have been able

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to demonstrate its compliance with Listing Rules 13.24 minimum requirement to the Exchange".

[91] At page 16 the Report concluded:

> "In light of the above, we are of the view that KHL would have been able to comply with Rule 13.24 following the sale of the Yunnan Business which, following the repayment of KHL's debt would have enabled KHL to maintain a healthier financial position in long run and the true value of KHL could have been realized after the sale of the Yunnan Business …"

[92] Having reviewed this report, the Court is of the opinion that it smacks of partiality and of having been tailored to arrive at the desired conclusion. It provides no independent factual basis for this Court to conclude on a balance of probability that looking at the matter on the Sale Shares sale date, that after selling its interest in Yunnan Qiaotong, KHL would have been able to maintain its listed status. Thus the uncertainty remains as to whether KHL would have been able to maintain a listed status. The reasons are as follows.

(1) The GC Paxwell Report attempts to attach value to the remaining operations of KHL after the sale of Yunnan business by including the Distribution business. However, in the first GCA Report in Part XIV at paragraphs 36-48, there was a suggestion that the Distribution of Television Business Related Products business segment was losing money and that there was no sign of recovery. Its assumed value for that report was minimal.

(2) Nowhere in the GC Paxwell Report did Mr. Wong attempt to explain the listing requirements, that is, explain what would be considered 'a sufficient level of operations' or to define 'tangible assets of sufficient value and/or intangible assets for which a sufficient potential value can be demonstrated' or how this would be measured. It was insufficient that Mr. Wong merely supplied his conclusion and it was necessary that he

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present the analytical process by which he reached his conclusion.[15] What would be deemed sufficient and how the Exchange would determine this was not explained to the Court. A reading of the authority relied on by the first respondent, **Sanyuan Group Ltd. v Stock Exchange of Hong Kong Ltd.**[16] may explain why. That case concerned an appeal from an application before a judge for judicial review of a decision by the Listing Appeals Committee of the Stock Exchange, concerning a decision by the Listing Committee whereby the listing of the shares of the applicant was to be cancelled. The judge below had held that there was 'merit' in the applicant's argument that the respondent should have informed what quantum of turnover, profit or assets was considered sufficient for the purpose of Listing Rule 13.24. On appeal, the court agreed with the respondent Stock Exchange's submissions that each company had to be considered individually and, that it would be impossible for the respondent to set a benchmark which would apply to all companies and, in any event, even if an attempt were made to set a benchmark there would be ample scope for disagreement and challenge. The court further held that it was for the members of those committees, who were experienced professionals in various aspects relevant to the operations of the respondent, to give the matter proper consideration and to determine whether or not the applicant should be relisted. The court did not, as a practical matter, see how the various committees could with accuracy, give the various figures. The court went on to state that, in any event, if appropriate levels were to be considered, reference might be had to Chapter 8 of the Listing Rules which set out the qualifications for listing (profit levels, market capitalization and revenue levels), as providing some indication of what might reasonably be expected. In the present case, the first respondent, relying on the **Sanyuan** case, submitted that the question of relisting was a matter of wide discretion. This Court agrees.

[15] Pacific Recreation Pte Ltd. v S Y Technology Inc. and another appeal [2008] SGCA 1.
[16] [2009] HKCA 267.

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Consequently, without any specific thresholds to go by, the suggestion by the GC Paxwell Report that KHL would have been able to maintain its listing status after selling its Yunnan business was one of pure speculation. Neither did the GC Paxwell Report seek to explain and rely on, in a proposed comparative manner, KHL's ability to satisfy the qualifications set out in Chapter 8 of the Listing Rules, as a basis for concluding that KHL would have been able to maintain its listing status.

(3) The GC Paxwell Report also appeared to have attached certain positive attributes to Anhui Qiaofeng in relation to its business prospects without establishing any factual foundation for so doing. On page 15, the GC Paxwell Report stated that Anhui Qiaofeng had not yet fully utilised its production capacity. There was no factual basis explained in that report to justify this statement. The report stated that KHL's management has excellent relationships with major tobacco factories in PRC so that KHL will be in a good position to increase operations at Anhui Qiaofeng. Again no factual basis was provided to justify this statement. The statement was highly speculative at best. The report seemed to attach substantial significance to the Anhui operations which did not fit easily into the framework established in the first GCA Report. The first GCA Report at page 24, paragraph 15 stated that it was Yunnan Qiaotong that had entered into a long term procurement agreement with a state owned enterprise which operated a large factory in China until 2018. And in the Supplemental GCA Report at page 4, section IV, paragraph 1, it was emphasised that it was the Yunnan Qiaotong business that was the dominant player, suggesting that Anhui played a minor role.

[93] Taking the foregoing into consideration, there is no proper factual basis established to support the appellant's conclusion that KHL would have been able to maintain its listed status. In such a case, Mr. Choy would not have been justified in applying a premium over NAV in the valuation arrived at in the Supplemental GCA Report.

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[94] Without that premium, the total NAV of KHL would be between HK$226-HK$260 million as per paragraph 8 of section IV of the Supplemental GCA Report. But just as it was necessary in paragraph 11 of the Supplemental GCA Report for Mr. Choy to multiply the resulting KHL value figure (i.e. NAV plus listing premium) by the percentage of shareholding (50.1%) represented by the Sale Shares to arrive at the Sale Shares value, that would also be necessary here. On his own figures, this would then result in a value being attributed to the Sale Shares of between HK$113 to HK$130 million.

[95] Mr. Choy, in the Supplemental GCA Report, acknowledged that a potential buyer might not have been prepared to pay full undiscounted value in order to make a profit and compensate for the underlying risk of restructuring. It would appear reasonable that such caution would not be limited to a case where KHL had actually maintained its listing status, but would apply equally if not more so to a case where KHL had lost its listing status. What Mr. Choy did not do was state what discount or range of possible discounts a potential buyer might expect to receive, obviously because he thought no discount should apply due to the three countervailing factors he cited, namely, recouping written-off receivables, financing through the Taiwan Exchange and the guaranteed orders for the Yunann Business up to 2018. But in light of the financial situation of the Group, its difficulty in raising funds prior thereto, and the control of the Yunnan Business by the liquidators, none of these appear to be convincing. Having rejected these countervailing factors, on Mr. Choy's own evidence, the possibility of a potential buyer expecting a discount was very real. As no discount range was suggested, the Court is none the wiser. The appellant not having provided a sufficient factual basis to support its contention that listing would have been maintained, the value of the Sale Shares would have been somewhere in the region of HK$113 million to HK$130 million, subject to the expectation of a discount. The range of discount issue might be addressed in two ways. The burden was on the appellant to provide evidence to this Court that the discount would not have resulted in a reduction to bring the market price in line with the actual Sale Share price. It did not. Alternatively, the

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Court may very well be entitled to consider the fact that KHL had previously sold its interest in an associate company, Megalogic Technology Holdings Limited, at what was reported by Mr. Fok to be a discount of 68%. Either way, the appellant would have failed to discharge its burden to show that, on the evidence before the Court, it was more probable than not that it would succeed in proving that the Sale Shares were sold at an undervalue.

[96] Accordingly, applying the facts to the appropriate threshold, the appellant fails in relation to ground 2.

[97] In this case the appellant has succeeded on ground 1 in relation to the applicable threshold, but has failed on ground 2, which related to the application of the facts to the proper threshold. Ground 3, which addressed the claim in relation to Double Key, and ground 4 which addressed the redemption claim against Superb Glory, were both parasitic on the primary claims against Mr. Fok and Mr. Batchelor, and would consequently also fail.

[98] The respondent succeeded in the court below. In this Court the appellant succeeded on ground 1 but failed on grounds 2, 3, and 4. In the final analysis, it is the respondent who has been predominantly successful. The respondent shall have its costs in the court below, to be agreed within 21 days, and in default thereof to be assessed pursuant to CPR 65.12. The respondent shall have its costs in this Court, to be calculated at 50% of two-thirds of the costs in the court below.

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[99] The Court expresses its thanks to counsel for their very comprehensive and helpful submissions.

Anthony E. Gonsalves, QC
Justice of Appeal [Ag.]

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Louise Esther Blenman
Justice of Appeal

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