

*A Balanced Approach to Causation in Breaches of Fiduciary Duty:
Sim Poh Ping v Winsta Holding [2020] SGCA 35*

I. Executive Summary

A fiduciary is someone who has undertaken to act for or on behalf of another (his principal). As such, a fiduciary owes an obligation of loyalty to the principal. Indeed, the principal relies on the fiduciary to act in his or her best interests, and is especially vulnerable to the fiduciary's breach of duty. Thus, it has been observed that a fiduciary owes his or her principal the highest standard of duty known to the law. It is also well-established that a director of a company has a fiduciary relationship with the company.

In *Sim Poh Ping v Winsta Holding* [2020] SGCA 35, it was alleged that certain directors of Winsta Holding Pte Ltd ("**Winsta Holding**") and its seven subsidiary companies (the "**Winsta Subsidiaries**") and together with Winsta Holding, the "**Winsta Group**") had breached their fiduciary duties to their respective companies. Winsta Holding and its majority shareholder M Development Ltd (collectively the "**Winsta Companies**") claimed that three directors of the Winsta Group, namely, Mr Sim Poh Ping ("**Mr Sim**") and his daughters Ms Sim Pei Yee ("**Ms Lynn Sim**") and Ms Sim Pei San ("**Ms Joyce Sim**") (collectively, "**the Sims**"), had breached the no-conflict rule¹ and the no-profit rule.² Specifically, the Winsta Companies alleged that the Sims had diverted business opportunities away from the Winsta Group to their own corporate vehicles³ (collectively, the "**Corporate Vehicles**"), or entered into interested party transactions⁴ between the Winsta Group and the Corporate Vehicles. The total value of the claims pursued was between \$16.3m and \$39.8m.

The High Court ("**HC**") held that the Sims had breached their fiduciary duties against the Winsta Group. However, the burden of proof then fell on the Winsta Companies to establish that its losses were causally linked to the Sims' breaches of duty (i.e. "but-for" causation). As the Winsta Companies faced significant difficulties in proving so, only two of their claims succeeded in the HC. They were awarded approximately \$1.4m as equitable compensation for those two claims, as well as nominal compensation of \$10,000 for the remaining claims. Appeals were subsequently filed by both the Sims and the Winsta Companies in the Court of Appeal ("**CA**").

While the CA upheld part of the HC's decision, it allowed the Winsta Companies' appeal regarding losses for another two of the Winsta Subsidiaries, awarding approximately \$1.2m to the Winsta Companies (in addition to the HC's award of \$1.4m). In doing so, the CA established that a *hybrid* approach should be taken towards the issue of causation. Once the principal has established that the fiduciary breached his duty, as well as the loss sustained thereby, there will be a rebuttable presumption that the fiduciary's breach caused the loss. The legal burden is then on the fiduciary to prove that the principal would still have suffered the loss despite the breach. If the fiduciary can do so, no equitable compensation can be claimed for that loss. Otherwise, the upper limit of equitable compensation is to be assessed by reference to the position the principal would have been in, had there been no breach.

II. Material Facts

A. Background

Winsta Holding was the holding company of six hostel subsidiary companies and one serviced

¹ Under this rule, a director must not place himself in a position where the company's interests come into conflict with either his own personal interest, or the interests of a third-party for whom he acts.

² Under this rule, a fiduciary must not make a profit out of his fiduciary position. One consequence of this rule is that a director who receives a business opportunity because of his directorship cannot divert the opportunity to himself or to an entity in which he has an interest.

³ Meaning certain companies in which the Sims had an interest (either directly or indirectly).

⁴ Generally, an interested party transaction is an arrangement between two parties who have a pre-existing business relationship or common interest.

apartment subsidiary company.⁵ The Sims, as well as being directors of the Winsta Group, owned the Corporate Vehicles which were allegedly used to facilitate their wrongdoing.⁶

The Sims, in particular Mr Sim, were the original driving force behind the Winsta Subsidiaries and the creation of the Winsta Group. Mr Sim entered the property leasing business and hostel business in 2002–2003, and expanded his holdings over time to include managing serviced residences. Winsta Holding was incorporated in February 2008 and became the holding company of the various individual hostel and serviced apartment companies owned by Mr Sim. M Development entered the picture in January 2010, when it bought 51% of the shares of Winsta Holding. Mr Sim was invited but declined to join the board of M Development, while Ms Lynn Sim was appointed to the board of M Development by September 2010. In accordance with the terms of M Development’s purchase of Winsta Holding shares, the Sims continued to manage Winsta Holding and its subsidiaries.

However, the profits of the Winsta Group declined between 2010 and 2012. In 2013, the Winsta Group registered a loss of \$8.5m, and further losses were projected for 2014. After certain additional directors were appointed to the board of Winsta Holding, Winsta Holding and M Development began to suspect very significant interested party transactions. After conducting an investigation into Winsta Holding, Winsta Holding and M Development commenced its suit in May 2015. Shortly thereafter, Winsta Holding engaged a third party to manage its businesses, which reported that the Winsta Group was expected to face a shortfall of about \$11.2m in December 2015. Subsequently, the Winsta Subsidiaries were placed under liquidation.

B. The claims

The Winsta Companies made eight categories of claims. Four of these claims were based on the diversion of business opportunities away from the Winsta Group to the Corporate Vehicles, and two were based on the Sims entering into interested party transactions between the Winsta Group and the Corporate Vehicles. The Winsta Companies sought compensation to place each Winsta Subsidiary in the position they would have been had the Sims not breached their fiduciary duties (“**pre-liquidation losses**”), and the Winsta Subsidiaries not been liquidated (“**post-liquidation losses**”).⁷

C. HC decision

The HC first considered the liability of the Sim sisters separately from that of Mr Sim.⁸ The HC found the Sim sisters liable for all six claims of breaches of fiduciary duty.⁹

As for Mr Sim, the HC accepted that he did not have any interest in or control of the Corporate Vehicles, apart from OSPC, where he was a director. Nonetheless, the HC held that in view of the relationship between Mr Sim and his daughters, and his knowledge of their wrongdoings, he could be regarded as having personal interests in the Corporate Vehicles. By taking no action, he must have agreed to those actions taken by the Sim sisters. Thus, he had also breached his fiduciary duty to act in the best interests of Winsta Holding.

⁵ The Winsta Subsidiaries involved were Katong Hostel Pte Ltd (“**Katong Hostel**”), Evan Hostel Pte Ltd (“**Evan Hostel**”), Hill Lodge@Mount Vernon Pte Ltd (“**Hill Lodge**”) and Global Residence Pte Ltd (“**Global Residence**”).

⁶ These seven companies were Overseas Students Placement Centre Pte Ltd (“**OSPC**”), ATAS Residence Pte Ltd (“**ATAS**”), Uni-House Pte Ltd (“**Uni-House**”), Unihouse@Evans Pte Ltd (“**Unihouse@Evans**”), Jiu Mao Jiu Hotpot Pte Ltd (“**JMJ Hotpot**”), ICS Catering Pte Ltd (“**ICS Catering**”), and I-Masters Air-Conditional Pte Ltd (“**I-Masters**”).

⁷ The last two category of claims were pursued against three other individuals and two of the Corporate Vehicles (OSPC and MJM Hotpot), for dishonestly assisting the Sims in breaching their fiduciary duties to the Winsta Group. The three individuals were: Mr Dave Kong, the director of ATAS, an employee of OSPC and a shareholder in MJM Hotpot; Ms Connie Ng, an employee of Katong Hostel seconded to Winsta Holding; and Mr Shawn Tan, Operation Manager of Winsta Holding and director of I-Masters.

⁸ This was because the Sims claimed that the Corporate Vehicles were managed by the Sim sisters, and Mr Sim was not involved in or consulted on the matters forming the subject matter of the Winsta Companies’ claims.

⁹ The HC also found that all claims of dishonest assistance against Mr Dave Kong, Ms Connie Ng, Mr Shawn Tan, OSPC and MJM Hotpot had been made out.

However, the HC held that the Winsta Companies had to prove but-for causation for their losses. Here, the expected shortfall of \$11.2m and the Winsta Subsidiaries' general financial predicament was due to "commercial" reasons that had nothing to do with the defendants' wrongdoings. Thus, the Winsta Companies failed to establish causation for its post-liquidation losses. As for the pre-liquidation losses, the HC found that the Winsta Companies only succeeded in establishing causation for two losses concerning the diversion of opportunities from the subsidiary Global Residence.

III. Issues on Appeal

A total of three appeals were filed: (a) Winsta Companies against the HC's decision requiring them to prove but-for causation for their losses; (b) Mr Sim against the HC's decision that he was liable for breaching his fiduciary duties to the Winsta Group; and (c) the Sim sisters (and the Corporate Vehicles) against the amount of the HC's award.

A. *Winsta Companies*

The CA first observed that there were three general types of breach of fiduciary duty: breaches leading directly to damage to or loss of the trust property; breaches involving an element of infidelity or disloyalty which engage the conscience of the fiduciary; and breaches involving a lack of appropriate skill or care. This case involved the second type of duty, which did not involve loss or damage to the property in the fiduciary's custody ("**non-custodial breach of fiduciary duty**"). The appropriate remedy for breach of such a fiduciary duty would be equitable compensation.¹⁰

The CA then dealt with the issue of causation.¹¹ The common issue that arises with regard to a breach of fiduciary duty, whether custodial or non-custodial,¹² is *whether* causation is required to be proved and, if so, *how* it is to be proved. The CA noted three possible approaches in this regard:

- **Approach 1:** Causation was *not relevant* once a breach of fiduciary duty has been established, as attributed to a strict reading of the rule in *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465. This meant that the fiduciary would not be permitted to claim that it was not responsible for the damage which the principal suffered, based on the argument that the damage would have occurred in any event (and hence that the defendant had not caused the damage). The underlying rationale for such a strict approach centered on the need to deter breaches of fiduciary duty.
- **Approach 2** (which the HC preferred): The complainant must *always* establish but-for causation.
- **Approach 3:** A hybrid approach which retained the requirement of causation, but reversed the burden of proof, meaning that the *defendant* would have to prove that the damage suffered by the complainant would have occurred in any event.

The CA held that with regard to non-custodial breaches of fiduciary duty, Approach 3 should be adopted in Singapore. Under this approach, the principal bore the legal burden of establishing its claim, i.e. proving on a balance of probabilities that the fiduciary had breached his or her fiduciary duty, and that a loss had been sustained. This created a *rebuttable presumption* that the loss would not have been sustained by the principal had the fiduciary not breached his or her fiduciary duty. The fiduciary then bore the legal burden of showing that the loss *would have* been sustained by the principal, *even if* the fiduciary had not breached his or her duty.

¹⁰ The CA clarified that the term "equitable compensation" referred *only* to compensation for loss in the case of a non-custodial breach of a fiduciary duty, because it sought to *repair* the loss caused to the principal. The term should not be used in situations involving a custodial breach of fiduciary duty, where the award seeks to *restore* the principal's funds.

¹¹ The concept of causation is that every effect must have a cause or a series of causes. Generally, a complainant must prove a causal link between the alleged breach and the alleged loss.

¹² The CA briefly discussed causation with respect to custodial breaches of fiduciary duty, but stated that it would only rule definitively on such matters when they came directly for decision before the court.

Where the fiduciary could show that the loss would be sustained in spite of the breach, no equitable compensation could be claimed for that loss. However, where the fiduciary was unable to show that the loss would be sustained in spite of the breach, the upper limit of equitable compensation would be assessed by reference to the position the principal would have been in had there been no breach.

The CA further stated that Approach 3 struck the appropriate balance between the interests of the principal and the fiduciary. The principal only bore the burden of showing the existence of a breach and loss for a rebuttable presumption of causation to arise, while the fiduciary was given a “narrow escape route” to prove that the principal would have suffered the loss in any event.

This approach was also consistent with the law on fiduciaries, which tried to ensure that fiduciaries did not abuse the power given to them, and that they were not tempted or distracted from acting in the best interests of their principals. The court intervened in such situations, not so much to recoup a loss suffered by the principal, as to hold the fiduciary to and vindicate the high duty owed to the principal. Finally, as a matter of practicality, the burden-shifting approach was preferred because the fiduciary was often in a better position to know how the loss was caused (or not caused).

However, this approach would only apply to claims for non-custodial breaches of the *core* fiduciary duties, i.e. the duty of no-conflict, the duty of no-profit and the duty to act in good faith.¹³ This approach would also apply even to a fiduciary who was not aware of his or her breach of the no-profit rule or the no-conflict rule, and had acted in the belief that the transaction was in the interests of his or her principal. This was because the fundamental concern of the no-profit rule and the no-conflict rule was the utmost protection of the principal: the fiduciary should and could have obtained the principal’s consent to enter into the transaction in question.

(1) *Post-liquidation losses*

Applying the above test, the CA rejected the Winsta Companies’ appeal regarding its post-liquidation losses. Since the Winsta Companies were able to show breaches of the core fiduciary duties of no-conflict and no-profit on the part of the Sims (and the other respondents)¹⁴ and were able to show that post-liquidation losses were sustained, the burden of proof lay on the Sims (and the other respondents) to show that the liquidation losses would have been sustained even if they had not breached their core fiduciary duties.

However, the CA stated that the HC’s findings afforded ample basis to discharge the respondents’ obligation to show that the losses would have been suffered in any event. The HC had found that the Winsta Group would have been in its financial predicament regardless, and hence had to be liquidated, even if the Sims had not breached their fiduciary duties. Specifically, the HC found that the businesses of three hostels had ceased when the action was commenced, due to the commercial actions of unrelated third parties. Further, the HC considered that it was clear that the reason why the Winsta Subsidiaries had to be liquidated was because of a projected shortfall of \$11.2m by December 2015 if the businesses of four other subsidiaries were to continue, especially given that M Development was unwilling to provide further funding. Thus, the Sims (and the other respondents) rebutted the presumption of a causative link between their breaches and the post-liquidation losses.

(2) *Pre-liquidation losses*

First, the Winsta Companies claimed that the Sim sisters breached their fiduciary duties to two properties (Hill Lodge and Evan Hostel) by subletting buildings at these properties to the Sims’ own vehicles (Uni-House and Unihouse@Evan), which were running competing homestay businesses.

¹³ This refers to the director’s duty to exercise his/her discretion bona fide in what they consider is in the interests of the company.

¹⁴ The other respondents were two of their Corporate Vehicles (OSPC and JMJ Hotpot), and the director of another Corporate Vehicle (ATAS).

The CA agreed that these home-stay businesses were very similar to the Winsta Subsidiaries' hostel business. Furthermore, evidence showed that the Winsta Group was contemplating entering the homestay business at the time of subletting. Thus, the CA held that Sim sisters had diverted opportunities away from the Winsta Group, thereby breaching the no-profit and no-conflict rules. The burden then shifted to the Sim sisters to disprove causation of loss. Since they were unable to do so, the CA held that the Winsta Companies were entitled to equitable compensation for those claims.

Second, the Winsta Companies claimed that the Sim sisters engaged in interested party transactions, by providing catering services to the Winsta Group through their vehicle ICS Catering, without disclosing their interest in it, and receiving personal benefits from ICS Catering in the form of monthly fees. The CA agreed that there had been a diversion of opportunity from the Winsta Group to ICS Catering, since the Winsta Group was in a position to provide its own in-house catering service. The burden then shifted to the respondents to prove that the Winsta Companies would have suffered the loss anyway, i.e. the Winsta Group could not have taken up the opportunity to operate the catering business. However, the CA found that they were unable to prove this, and hence the Winsta Companies were entitled to equitable compensation for the value of this lost business opportunity.

Third, the Winsta Companies claimed that the Sim sisters breached their fiduciary duties by housing a group of students at a property owned by Ms Joyce Sim's husband for a summer camp, when they could have been housed at one of the Winsta Group's hostels. The CA found that the Winsta Group could not have taken advantage of the summer camp opportunity as none of the hostels were available at that time. Furthermore, it was too speculative to assume that the Winsta Group could have rented separate accommodation to house the visiting students.

Fourth, the Winsta Companies claimed that the Sim sisters engaged in interested party transactions by awarding air-conditioning and general contracting and maintenance work to I-Masters, in which they held an interest through OSPC. The CA found that the Winsta Group was never in a position to provide such services. Thus, the Winsta Group could not have been said to have suffered loss, and the Winsta Companies were not entitled to compensation for this claim.

B. Mr Sim

The CA rejected Mr Sim's appeal against the HC's finding that he had breached his fiduciary duty towards the Winsta Group. Mr Sim reiterated that he did not know of his daughters' actions, and further that he had no interest in any of the Corporate Vehicles (except OSPC). However, the CA considered that the HC had comprehensively examined the way Mr Sim interacted with his daughters and how they worked with each other to run the Winsta Group,¹⁵ in concluding that Mr Sim must have known of his daughters' actions and must have agreed to them.

The CA also rejected Mr Sim's argument that he did not breach the no-conflict rule. He argued there was no evidence indicating that he had any personal interests in the Corporate Vehicles (except OSPC), meaning that he could not have favoured his own interests over the Winsta Group's interests. However, the CA noted the HC's findings that the Sims operated as a tight-knit family unit in their business dealings. Although the Sim sisters eventually took on more involved roles in the business, they clearly respected Mr Sim's business acumen and did not forget that he placed them in those positions of power. This led the HC to correctly infer that the Sim sisters would not have acted to the detriment of their father without his knowledge, and more importantly, that Mr Sim had personal interests in the Corporate Vehicles to which business opportunities that rightly belonged to the Winsta Group had been diverted.

¹⁵ The HC held that as Mr Sim was a shareholder and managing director of Winsta Holding, the Sim sisters would not have unilaterally taken steps to hurt his interests in the Winsta Group. Furthermore, Mr Sim was involved in several operational matters. Hence, it was difficult to believe that he did not know of his daughters' interests in the Corporate Vehicles, or that he was not consulted on any of the opportunities which were diverted away from the Winsta Group.

Furthermore, as Mr Sim was a shareholder and managing director in Winsta Holding, it was natural to infer that he would not have wanted or allowed the benefits he derived from that interest to be damaged, *unless* he was obtaining a benefit or advantage from having the opportunities diverted elsewhere. It was open for the HC to infer that Mr Sim was probably benefiting in some way from the Corporate Vehicles, taking advantage of the business activities instead of leaving them to the Winsta Group. Thus, the HC was right to infer that Mr Sim likely had personal interests in the Corporate Vehicles. This entailed that he had preferred those interests over his fiduciary duty to the Winsta Group, as he knew of the diversion of business opportunities from the Winsta Group but did nothing to stop that.

Finally, even if the HC was wrong to infer that Mr Sim had personal interests as mentioned above, it was nevertheless right to infer that Mr Sim, in essentially turning a blind eye to his daughters' breaches of fiduciary duty and failing to disclose the same to the Winsta Group or to take any action to stop his daughters, had preferred the interests of third parties, namely, the Corporate Vehicles and his daughters. The no-conflict rule was fundamentally concerned with securing the utmost protection of the beneficiary, and did not depend on whether the preferred interests are those of the fiduciary or those of a third party.

C. *Sim sisters*

The Sim sisters also filed an appeal to reduce the amount of equitable compensation and costs ordered by the HC to be paid to the Winsta Companies. Specifically, they argued that the amount of equitable compensation paid ought to be the amount of profits earned by one of their Corporate Vehicles *after* tax, and not *before* tax as the Winsta Companies' expert had proposed. Furthermore, they contended that the total costs should be lowered to account for the time wasted on cross-examining witnesses for the expert report and the fact that the Winsta Companies' action had failed in so many aspects. The CA dismissed this appeal as it found the HC's method of calculating the equitable compensation reasonable, and saw no reason to disturb the HC's decision on costs.

IV. Lessons Learnt

The CA has clarified the approach to follow in a claim for a non-custodial breach of a core fiduciary duty. However, the CA notably left open the remedial principles with respect to a custodial breach of fiduciary duty (i.e. where damage or loss has been caused to the property in the custody of the fiduciary). It remains to be seen how such a case would be determined.

Written by: Ng Sock Cheng, 3rd-year LLB student, Singapore Management University School of Law.

Edited by: Ong Ee Ing (Senior Lecturer), Singapore Management University School of Law.