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Bamian Investments Pte Ltd
v
Lo Haw and others

[2017] SGHC 166

High Court — Suit No 320 of 2015
Audrey Lim JC
28 – 31 March; 5 – 6 April; 17 May 2017

Companies – Directors – Duties

Civil procedure – Costs

11 July 2017

Audrey Lim JC:

Introduction

1 The plaintiff sought a declaration that the first and second defendants had breached their duties as directors of the plaintiff with respect to two general meetings of shareholders of Guangzhou Mayer Corporation Limited ("GMayer") held in 2014, and the resolutions passed at those meetings. The plaintiff, which was the majority shareholder of GMayer, also claimed damages arising from the alleged breach. The trial was bifurcated and first proceeded on the issue of liability against the first defendant, as the second defendant passed away in April 2015 and the plaintiff could not serve the writ on his estate. After hearing the parties and considering the evidence before me, I found that the first defendant had breached his duties as a director of the plaintiff. The first

defendant has appealed against my decision.

Background

2 The relationship between the plaintiff, GMayer, and other relevant corporate bodies at the material time in 2014 was as follows.[1] Mayer Steel Pipe Corporation ("Mayer Taiwan") wholly owned Mayer Corporation Development International Limited ("Mayer BVI"). Mayer BVI in turn owned 21.56% of Mayer Holdings Limited ("Mayer HK"). Mayer Taiwan therefore indirectly owned 21.56% of Mayer HK through its shares in Mayer BVI until 19 August 2014, when Mayer BVI's 21.56% shareholding in Mayer HK was transferred to two entities, Bumper East Ltd ("Bumper") and Aspial Investment Ltd ("Aspial"). Mayer HK wholly owned the plaintiff, which in turn held an 81.4% shareholding in GMayer.

3 The background details relating to the plaintiff and GMayer were largely narrated by the first defendant ("Lo") who has been involved in both entities since their incorporation. Mayer Taiwan was bought over in 1972 by Lo's father and the second defendant ("Wu"). Lo's father became the company's chairman and Wu its general manager. Lo joined Mayer Taiwan in 1995[2] as an "administration specialist"[3]. Wu became the chairman of Mayer Taiwan when Lo's father stepped down and remained a director of Mayer Taiwan until his passing.

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1 Exhibit A.

2 Notes of Evidence ("NE") for 30 March 2017, p 4.

3 NE for 30 March 2017, pp 34–35.

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4 In 1996, Lo and one Shen Heng-Chiang ("Shen") went to Guangzhou, China, to set up a steel pipe manufacturing plant[4]. The plant was owned by a Guangzhou entity, now GMayer, which was originally incorporated in 1997 as Guangzhou Mayer Metal Corporation ("GMayer Metal"). GMayer Metal was wholly owned by Mayer Taiwan through the plaintiff, a shell company.[5] When GMayer Metal was incorporated, the plaintiff appointed Lo and Wu as GMayer Metal's directors[6]; Wu and Lo were appointed the chairman and vice chairman respectively[7]. Lo and Wu were concurrently directors of the plaintiff from 15 January 1997 until they were removed from their respective positions on 31 December 2014. The plaintiff also issued a letter of authorisation to authorise Wu to "sign on all documents relating to the Shareholders' Meeting of [GMayer] on [the plaintiff's] behalf".[8]

5 In around May or June 2002, GMayer Metal became a sino-foreign equity joint venture enterprise.[9] The plaintiff's 100% shareholding in GMayer Metal was reduced to 77.52%, while the remaining shares became owned by six minority shareholders. One of these minority shareholders was WHI Limited ("WHI"), a company which was 49% owned by Lo, and which held 6.4% of GMayer Metal. The terms of the joint venture were set out in a contract executed by the plaintiff and the six minority shareholders ("GMayer Metal JV

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4 NE for 30 March 2017, p 6.

5 NE for 30 March 2017, p 9.

6 Lee Kwok Leung's Affidavit of Evidence-in-Chief ("LKL AEIC"), para 15; NE for 29 March 2017, p 75.

7 Lo Haw's Affidavit of Evidence-in-Chief ("LH AEIC"), para 17.

8 NE for 29 March 2017, p 76; Defendant's Bundle of Documents ("DB"), pp 118 and 133.

9 LKL AEIC para 7; P's Bundle of Affidavits of Evidence-in-Chief ("PAEIC"), p 328.

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Contract"). That contract named Wu as the plaintiff's legal representative in GMayer Metal[10] and provided that GMayer Metal's board of directors would comprise five directors appointed by the plaintiff and one by WHI. Lee Kwok Leung ("Lee"), the plaintiff's current chairman, explained that the purpose was to "safeguard the interest of the investment company and majority shareholder [of GMayer Metal]".[11]

6 In around October 2002, GMayer Metal was reincorporated as GMayer.[12] The plaintiff's shareholding in GMayer subsequently increased to 81.4% and WHI continued to have a 6.4% share in GMayer. Based on the agreement reincorporating GMayer ("GMayer Agreement")[13], Wu was appointed the plaintiff's legal representative. The plaintiff and WHI also jointly nominated Lo, Wu and four others as members of the first board of directors of GMayer for a term of three years.[14] According to Lo, Wu remained the plaintiff's legal representative and authorised signatory for all shareholders' meetings of GMayer until his demise, and WHI's legal representative and authorised signatory was one Shi Shu Ping ("Shi").[15] With GMayer's reincorporation, Lo became its chairman, and Wu remained a director.[16] The day to day running of GMayer was left to Lo and Shen (the general manager)

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10 NE for 29 March 2017, p 7.

11 NE for 29 March 2017, p 10.

12 Agreed Bundle of Documents, Vol 1 ("1AB"), p 258.

13 1AB, p 258.

14 NE for 29 March 2017, pp 77-78; NE for 30 March 2017, p 41; 1AB, p 273; LH AEIC, paras 30–33; and Tab C of LH-1.

15 LH AEIC, para 33.

16 LH AEIC, para 22.

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whilst Wu continued to run Mayer Taiwan's business. When Lo's first term as director of GMayer ended, he was re-nominated solely by WHI to be GMayer's director in 2006 and in 2010, whilst the plaintiff re-nominated Wu and four others as its representatives on GMayer's board. Lo remains the chairman of GMayer today.

7 Around 2004, Mayer Taiwan decided to list GMayer on the Hong Kong Stock Exchange through Mayer HK, a shell company.[17] Mayer Taiwan's interest in Mayer HK was restructured to be held by Mayer BVI as an intermediary. Essentially, Mayer BVI, Mayer HK and the plaintiff were shell companies meant to facilitate Mayer Taiwan's ultimate interest in GMayer[18]. Lo explained that the real manufacturing assets were concentrated in GMayer[19], and Lee stated that GMayer was the only company (among GMayer, Mayer HK and the plaintiff) which was in active trade and business[20].

8 By 2003, one Huang family in Taiwan had become the largest single shareholder of Mayer Taiwan. With diminished shareholding, Wu stepped down as chairman of Mayer Taiwan in 2004 but retained his seat on the board. He was also given the title of honorary chairman in recognition of his invaluable contributions to Mayer Taiwan, a title he retained until his passing.[21] Around 2012, Lo fell out with the Huang family and was not re-elected as a director of Mayer Taiwan in 2013. However, he kept his title as "administration specialist"

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17 LH AEIC, para 26.

18 LH AEIC, para 28; NE for 29 March 2017, p 71-72.

19 LH AEIC, para 28.

20 LKL AEIC, para 6.

21 LH AEIC, para 39.

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to preserve his pension entitlements. Since then, Lo has been working almost exclusively at GMayer with Shen to expand its business.

The plaintiff's case

9 The plaintiff's case was set out by Lee, its director and chairman since 31 December 2014[22]. From 2013, Mayer HK started facing problems with GMayer. Primarily it was unable to obtain the cooperation of GMayer's management to conduct an annual audit of GMayer, despite numerous attempts. On 23 April 2014, the plaintiff's board of directors passed a resolution to take appropriate legal action to protect its rights given GMayer's failure to cooperate and comply with the audit requirements. Lo and Wu were not present at this meeting. The plaintiff's lawyers then wrote to GMayer on 30 April 2014 to inform it to cooperate and assist Mayer HK's auditors with the annual audit.[23] However, GMayer refused to do so.

First general meeting of 30 May 2014

10 Shortly after, GMayer held a general meeting of shareholders on 30 May 2014, in Guangzhou, China ("the First GM"). Lee claimed that the plaintiff did not receive any notification of that meeting.[24] At the First GM, a resolution to amend the Articles of Association of GMayer ("the Articles") was passed ("the First Resolution"). In particular[25]:

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22 LKL AEIC, para 44 and LKL-17.

23 LKL AEIC, paras 23-25.

24 LKL AEIC, para 27.

25 LKL AEIC, para 28 and exhibit LKL-14.

(a) Article 61 of the Articles was amended as follows: "… Special resolutions made by the General Meeting of Shareholders must be passed by ~~two-thirds~~ 85% or more of the votes of the shareholders ~~(including shareholder proxies)~~ present at the General Meeting of Shareholders."

(b) Article 66 was deleted entirely and replaced as follows: "Candidates for directors should obtain 85% or more of the votes of the shareholders present at the General Meeting of Shareholders in order to be elected. Likewise, 85% or more of the votes of the shareholders present at the General Meeting of Shareholders are required to dismiss directors from their posts before their term of office ends."

(c) Article 41 was amended to include the requirement for general meetings of shareholders (namely the annual meetings and extraordinary general meetings) to be held on GMayer's premises.

(d) Article 92.viii.b was amended to increase the scope of the directors' authority to approve investments as follows: "Deliberate and approve various investments with amounts below ~~30%~~ 50% of the Company's latest audited net assets."

(e) Article 92.viii.c was amended to increase the scope of the directors' authority to approve related transactions as follows: "Deliberate and approve related transactions with amounts below ~~5%~~ 10% of the Company's latest audited net assets and lower than ~~RMB30 million~~ RMB50 million."

11 The plaintiff asserted that the First Resolution was passed as part of Lo and Wu's wrongful plan to seize, maintain and consolidate their control over

GMayer and their power to approve investments and related transactions without the need for the plaintiff's approval. This was to the plaintiff's detriment. Before Articles 61 and 66 of the Articles were amended, the plaintiff (as the 81.4% shareholder of GMayer) was by itself able to pass special resolutions and resolutions regarding the appointment and removal of GMayer's directors. With the amendments, the plaintiff had lost the ability to do so, and so the amendments had effectively and substantially decreased the plaintiff's control of GMayer. Moreover the amended Articles 41 and 61 now required general meetings of shareholders to be held in GMayer's office in China, and proxy votes would no longer be counted for the purposes of passing special resolutions. This consolidated the power of GMayer in China and made it more difficult for the plaintiff to be involved in its business on a shareholder level. Finally, the amended Articles 92.viii.b and 92.viii.c vested more power in GMayer's directors to deliberate and approve investments and related transactions. With the plaintiff's power to control the appointment and removal of GMayer's directors removed, GMayer's directors had given themselves control over GMayer to the exclusion and detriment of the plaintiff.

12 Lo signed the First Resolution as the plaintiff's representative. He claimed that he did so on Wu's behalf and authority. The plaintiff thus claimed that Lo and Wu had acted without proper or any authority and in breach of their duties as the plaintiff's directors in voting in favour of, or agreeing to pass and procuring the passing of, the First Resolution.

Second general meeting of 30 September 2014

13 On 30 September 2014, another meeting of GMayer's shareholders ("the Second GM") was held in Guangzhou, China. Again, the plaintiff claimed that

it did not receive any notification of this meeting.[26] At the Second GM, a resolution ("the Second Resolution") was passed which included the following[27]:

(a) Article 20 of the Articles was amended to include the underlined words: "Unless agreed upon by a resolution of the Board of Directors, the Company or its subsidiaries (including affiliated companies) shall not provide any assistance in any form including gifts, capital injections, guarantees, subsidies or loans to any party that acquires or intends to acquire the shares of the Company."

(b) To allow one of GMayer's minority shareholders, Jiangsu Wuzhong Education Investment Co Ltd, to transfer its 1.16% shares in GMayer to Jiangsu Wuzhong Industrial Co Ltd.

(c) To allow one of GMayer's minority shareholders, Suzhou Ke Li Qi Advertising Co Ltd, to transfer its 0.19% shares in GMayer to Jiangsu Wuzhong Industrial Co Ltd.

(d) To extend the term of each of the directors of GMayer from three years to five years.

(e) To provide, with respect to the share transfers in sub-paragraphs (b) and (c) above, that "shareholders other than the parties involved in the transfer will be deemed to have given up their rights of pre-emption of the equity".

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26 SOC, para 15.

27 LKL AEIC, para 36 and exhibit LKL-16.

14 With the amended Article 20 of the Articles, Lo and Wu (as directors of GMayer) could now cause GMayer and its subsidiaries to provide financial assistance to any third party to purchase GMayer's shares, which might adversely affect the status of the plaintiff's ownership and control of GMayer as well as potentially reduce the amount of working capital available to GMayer. Such financial assistance was previously prohibited by GMayer's Articles. This amendment was thus not made *bona fide* in the plaintiff's interest. In addition, the sale or transfer of shares was subject to the rights of pre-emption set out in the GMayer Metal JV Contract[28], and Lo and Wu's unilateral decision to waive the plaintiff's right of pre-emption was not made *bona fide* in the plaintiff's interest. Finally, the extension of the term of directors of GMayer effectively secured the defendants' position as directors of GMayer and ensured that they would remain in control of GMayer for a further two years without the need for re-election.

15 The plaintiff asserted that taking the First and Second Resolutions (collectively "the Resolutions") together, the amendments to GMayer's Articles were primarily meant to consolidate Lo and Wu's control and power in GMayer while significantly reducing the plaintiff's control. Lo and Wu had thus acted without proper or any authority and were in breach of their duties as the plaintiff's directors in voting in favour of, or agreeing to pass and procuring the passing of, the Second Resolution.

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[28] PAEIC, p 331.

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Subsequent events

16 Around 9 October 2014, a new board was constituted in Mayer HK, with Lee appointed as a director. On 31 December 2014, Mayer HK removed Lo and Wu as the plaintiff's directors and appointed Lee (among others) as its director.[29] The plaintiff and Mayer HK again sought GMayer's cooperation to enable the plaintiff to fulfil its audit requirements but to no avail. The plaintiff thus commenced legal action to enforce its rights. It made two applications in China, to revoke the registration of the amendments to the Articles made pursuant to the Resolutions, and to access and inspect GMayer's books ("the China proceedings").[30] The plaintiff succeeded in both applications.

The first defendant's case

17 Lo, in his defence, maintained that he had acted continually in Mayer Taiwan and GMayer's interest. In late 2011, Lo heard of rumours that share certificates for some 200 million shares in Mayer HK (held by Mayer BVI) were missing.[31] These shares represented around 52.08% of Mayer HK's issued share capital and was accordingly a controlling block of shares. It transpired subsequently that those shares were the subject of contention in a Hong Kong lawsuit between Mayer BVI and Bumper and Aspial which claimed that Mayer BVI had sold the shares to them. The Hong Kong court awarded judgment to Bumper and Aspial, and Mayer BVI's appeal was eventually dismissed in July 2014[32]. According to Lo, Wu became extremely worried. By losing 200 million

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29 PAEIC, p 455.

30 LKL AEIC, para 50.

31 LH AEIC, para 45.

32 LH AEIC, para 60.

shares, Mayer Taiwan would effectively lose control of GMayer, which had substantial manufacturing assets.

December 2013 meeting between Lo and Wu and the First GM

18 On 20 December 2013, at GMayer's general meeting, Wu spoke to Lo about preparing amendments to the Articles that would effectively protect GMayer from being taken over by Bumper and Aspial in the event Mayer BVI's appeal to the higher courts in Hong Kong failed. The proposed amendments were to Articles 41, 61, 66, 92.viii.b and 92.viii.c of the Articles (as at [10] above). Wu wanted the amendments to be passed at the First GM.

19 However, Wu was worried that he could not attend the First GM due to ill health. Hence, he asked Lo to attend the meeting as his proxy and to vote in favour of passing the proposed First Resolution. To this end, Wu instructed Lo to prepare a letter of authorisation ("the Authorisation Letter") to authorise Lo as his proxy at the First GM. Lo claimed that although it was Wu's idea to amend GMayer's Articles in the manner stated in the First Resolution, Lo agreed with Wu as it was Lo's duty to protect GMayer from being stolen by "outsiders" through unscrupulous means. Hence, Lo was determined to assist Wu to protect Mayer Taiwan's investment in GMayer by "keeping the status quo".

20 Lo asked Shen to prepare the Authorisation Letter and go to Taiwan to obtain Wu's signature on that letter.[33] Lo, as chairman of the board of GMayer, presided over the First GM. With the Authorisation Letter executed by Wu, Lo

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[33] First Defendant's Bundle of Affidavit of Evidence-in-Chief ("DAEIC"), p 150.

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signed on the First Resolution approving the amendments to the Articles, as Wu's proxy. Shi signed on WHI's behalf.[34]

Second GM and Resolution

21 In August 2014, Jiangsu Wuzhong Industrial Co Ltd ("Jiangsu"), one of GMayer's minority shareholders, requested GMayer to convene an extraordinary general meeting in September to pass a resolution to allow Jiangsu Wuzhong Education Investment Ltd ("Jiangsu 2") and Suzhou Ke Li Qi Advertisement Ltd ("Suzhou") to transfer their shares in GMayer to Jiangsu. Jiangsu, Jiangsu 2 and Suzhou were related companies attempting to restructure their business holdings.[35] Lo consulted Wu who approved the request.[36] Wu also informed Lo that as the term of appointment of GMayer's directors was going to expire, a resolution should be passed to extend their term to five years. At that time, Wu was hopeful of attending the Second GM but was unable to do so subsequently due to his health. The Second GM thus took place at GMayer's premises without Wu, and the Second Resolution was passed and signed by all the attending shareholders. After the Second Resolution was signed, Shen brought it to Wu's home for Wu to sign.[37]

22 Lo maintained that he had always acted in the best interest of GMayer and Mayer Taiwan. He was never conscious that he might have owed any fiduciary duties to the plaintiff which was a mere shell company incorporated by Mayer Taiwan for the sole purpose of holding its interest in GMayer.

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34 DAEIC, pp 153, 170.

35 LH AEIC, paras 70–71.

36 LH AEIC, para 71; NE for 31 March 2017, pp 17–18.

37 LH AEIC, para 76; Tab K of "LH-1".

Evidence of Wu Yung-Chin ("Yung")

23 Yung, Wu's grandson, testified on Wu's meeting with Shen at the material time. In January 2014, Wu was warded in hospital for various serious illnesses and was discharged on 15 February 2014. On 7 March 2014, Yung returned to visit Wu in Taiwan. Shen went to see Wu around 14 March 2014 ("the meeting"). Yung recalled the approximate period when Shen visited Wu as he verified the dates of his return to Taiwan against his passport.[38]

24 Yung was seated beside Wu at the meeting. He saw that Shen had brought along only two documents, namely two copies of the Authorisation Letter. Shen explained the contents of the documents to Wu and asked Wu whether that what was he wanted. Wu nodded before signing the documents and Yung observed that Wu understood what he was signing.[39] In cross-examination, Yung clarified that he did not know the contents of the conversation between Shen and Wu as he was not paying attention.[40] After Wu had signed the Authorisation Letters, Shen left. Yung confirmed that he did not see the "Notice of 2013 Shareholders General Meeting" and the "2013 Shareholders General Meeting Agenda" of GMayer[41], nor did he see the proposed amendments to GMayer's Articles on that day[42], and he did not know if Shen showed these documents to Wu.

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38 NE for 31 March 2017, p 65.

39 Wu Yung-Chin's AEIC, para 19; NE for 31 March 2017, p 89.

40 NE for 31 March 2017, p 68.

41 Defendant's Bundle of Documents ("DB"), DB 11 and DB13.

42 NE for 31 March 2017, p 80.

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25 Yung's account above differed from what he had stated in a statement[43] made for the China proceedings (see [16] above) ("the Statement").[44] In the Statement, he claimed that Shen had visited Wu in May 2014. Yung explained in court before me that the meeting happened in March 2014, as at the time he made the Statement he did not verify the dates against his passport. However, he recalled Shen asking Wu to allow Lo to attend the shareholders' meeting of GMayer on Wu's behalf.[45]

My decision

26 The main issue in this case was whether Lo had breached his duties, as the plaintiff's director, in relation to his involvement in GMayer relating to the First and Second GMs and Resolutions passed. I deal first with the preliminary and factual issues.

27 First, although the plaintiff originally disputed the authenticity of Wu's signature on the Authorisation Letters and Second Resolution, it abandoned this issue at trial and accepted that Wu did sign the said documents.[46] Second, an issue pertaining to Lo's directorship in Mayer HK was raised. Lo's contract of employment ("the Employment Agreement")[47] with Mayer HK stipulated that he would "use his best endeavours to carry out his duties … and to protect and promote the interest of the Group", which included Mayer HK's subsidiaries

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43 3AB 1232–1233.

44 NE for 31 March 2017, pp 84–85.

45 NE for 31 March 2017, p 86.

46 NE for 29 March 2017, pp 24–25.

47 LKL AEIC, para 12 and exhibit LKL-7.

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and associated companies – Lo did not dispute that this included the plaintiff[48]. The plaintiff claimed that "Group" included GMayer and Lo asserted that it also included Mayer Taiwan. Lo's employment with Mayer HK was not relevant to my findings on whether Lo had breached his duties to the plaintiff. Lo ceased to be Mayer HK's director in 2012. Hence the Employment Agreement no longer applied, as the material events relating to this dispute occurred from late 2013. Even if Lo, as Mayer HK's director, had an obligation to protect Mayer Taiwan's interest as he claimed, it was clear from the Employment Agreement that he was also obliged to protect the plaintiff's interest.

28 Third, I found that Lo was not the plaintiff's representative on GMayer's board of directors at the material time, namely from late 2013. Although Lo and Wu were jointly nominated by the plaintiff and WHI onto GMayer's first board of directors in 2003, the documents showed that in 2006 and 2010, Lo was nominated to GMayer's board by WHI, whilst the plaintiff nominated Wu as its representative.[49] While the resolution of GMayer's general meeting of 20 December 2013 did not specify who nominated Lo onto GMayer's board, the parties subsequently agreed that it was more likely that Lo remained WHI's representative whilst Wu remained the plaintiff's.[50]

Role of Lo and Wu in the First GM and in the passing of the First Resolution

29 I found that Lo played a primary role in respect of the First GM and in the preparation and passing of the First Resolution. Contrary to Lo's assertions

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48 NE for 30 March 2017, pp 25–26.

49 LH AEIC, paras 35–36; Tabs D and E of LH-1.

50 See para 1 of Agreed List of Issues (filed by both parties on 10 April 2017).

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in his evidence-in-chief[51], I found that Wu neither instructed him on the specific amendments to be made to GMayer's Articles, nor was it Wu's idea to amend the Articles in the manner reflected in the First Resolution. Even if Wu had conveyed to Lo that he was worried about GMayer's interest, I found that it was Lo who decided on *how* GMayer's interest were to be protected and that he procured the specific amendments to the Articles and arranged for the preparation of the First Resolution.

30 First, Lo claimed that Wu first spoke to him on 20 December 2013 regarding the proposed First Resolution (see [18] above). He remembered "very clearly" that date because he claimed that Wu went to GMayer's office for the shareholders' general meeting.[52] However the contemporaneous documents showed that Wu was not there. This is supported by a letter from GMayer (issued in Lo's name) to Mayer HK's shareholders, and a statement by Wu that he had been unable to attend that meeting.[53] Although Lo initially claimed that he had "no impression" of the letter issued in his name, he later admitted that he had an impression of its contents, it would have been issued on his instructions and that it was a "very important document".[54] Hence, I found that Wu was not at the 20 December 2013 meeting and could not, at that time, have discussed any proposed amendments to GMayer's Articles resulting in the First Resolution.

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51 LH AEIC, paras 62, 65 and 80.

52 NE for 30 March 2017, pp 45–46 and 50.

53 NE for 30 March 2017, pp 50–51; 2 AB 514; 3AB 1066.

54 NE for 30 March 2017, pp 53–56.

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31 Next, although Lo initially gave the impression that it was Wu's idea to amend the Articles in the specified manner[55], he later stated that Wu merely gave him some brief "guidelines" on the gist of the amendments.[56] Lo admitted that, at the time of the purported discussion, they did not know how to amend the Articles as they were not legally trained and had not decided on which Articles to amend.[57] Hence, it was clear that Lo never discussed with Wu the specific amendments to the Articles.

32 I also found that Wu did not see the draft amendments to the Articles after they were prepared and prior to the First GM, and disbelieved Lo's assertion to the contrary. Although Lo might have informed Shen to bring the Authorisation Letter to Taiwan for Wu to sign, there was no evidence that Lo had also informed Shen to bring the draft amendments to the Articles for Wu to peruse. This was despite that Wu would be authorising Lo to act on his behalf to support the draft amendments. Shen did not testify. Additionally, Yung saw Shen bringing only the Authorisation Letters for Wu. Even if Wu understood the Authorisation Letter that he signed, this did not mean that he knew of the proposed amendments to the Articles (which he did not see at that time) and of the extent of his authorisation to Lo to act on his behalf.

33 It was only in cross-examination when Lo claimed that he visited Wu in Taiwan in February or March 2014 with the draft amendments and that Wu read through them then. Lo also claimed that Wu had asked him about the effect of the amendments to Articles 61 and 66.[58] I disbelieved Lo that this meeting

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55 LH AEIC, paras 62 to 65.

56 NE for 30 March 2017, p 47.

57 NE for 30 March 2017, pp 46–49.

58 NE for 30 March 2017, pp 84–87.

occurred. What Lo had asserted was not in his evidence-in-chief, whereby he gave the contrary impression that it was *Wu* who had suggested the specific amendments to the Articles.

34 All in all, I found Lo to be a dishonest and evasive witness. He claimed that it was Wu's idea to amend GMayer's Articles in the specified manner, yet it transpired otherwise. His account was riddled with inconsistencies and there were several instances where he changed his testimony on the stand. He claimed that Wu had informed him that Mayer Taiwan wanted to take active steps to protect its investments in GMayer (as a result of Mayer HK's shares being transferred to Bumper and Aspial and the ensuing lawsuits (see [17] above)) which resulted in Lo following Wu's instructions to do so. However, he later stated that it was neither Mayer Taiwan nor its board of directors who wished to protect GMayer's interest but only Wu.[59] Lo then claimed that he did not read the details of the draft amendments to the Articles, but later admitted that he read them a few times, was specifically aware of the draft amendments to Articles 61 and 66[60], and understood the intended effect of the draft amendments[61]. He was, after all, concerned to protect GMayer's interest from outsiders and it would have been in his interest to satisfy himself that the draft amendments would achieve his goal.

35 I therefore rejected Lo's attempt in creating the impression that he merely played a supporting role and did Wu's bidding, and that it was Wu who had instructed Lo on the specific amendments to the Articles. Even if Wu had

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59 LH AEIC, para 61; NE for 30 March 2017, pp 63–64.

60 NE for 30 March 2017, pp 72–77 and 87–90.

61 NE for 30 March 2017, p 80.

suggested to Lo to keep GMayer's interest status quo, I found that Lo had been the primary actor in respect of preparing the draft amendments to the Articles and the First Resolution. He actively procured the draft amendments to the Articles, as he claimed to have instructed Zhang (an independent director of GMayer and his good friend) to come up with the proposed amendments. He examined the draft amendments to ensure that they met his requirements and he readily acted as Wu's proxy in the First GM. Lo has been the chairman of GMayer since its incorporation; it was inconceivable that he was merely doing Wu's bidding in relation to GMayer's affairs. Additionally, it must be borne in mind that at the material time, Wu was in a frail condition, did not subsequently attend the First GM and passed on about a year later. His involvement in this whole matter would have been minimal at best. As such, I found that, more likely than not, Lo was actually making the decisions on how to protect GMayer's interest independently and without much input from Wu. For instance, a proposal to delay cooperating with Mayer HK's request for an audit of GMayer was only added during the First GM itself[62] – this would not have been at Wu's instructions as he was not there.

36 Pertinently, at the time Wu signed the Authorisation Letters, which was around 14 March 2014 (see Yung's testimony at [23] above), the notice and agenda for the First GM was not even ready[63]. Hence, it was unclear whether Wu knew of the precise agenda for the First GM and what he was actually authorising Lo to vote for. There was also no evidence that Wu even saw the agenda at any time. Additionally, the Authorisation Letter did not conform to the proper requirements of GMayer's Articles (see [50] below).

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62 NE for 5 April 2017, pp 2–3; DB13.

63 NE for 31 March 2017, p 45.

Whether the First Resolution passed was in the plaintiff's best interest

37 I found that the First Resolution passed, with the amendments to the Articles, did not only preserve GMayer's position "status quo" but actually improved its position to the detriment of the plaintiff. Lo was aware of this as borne out by his own testimony.

38 For instance, the amended Article 41 of the Articles, which now stipulates that general meetings of shareholders of GMayer must be held on its premises, meant that there would no longer be an option to hold such meetings outside its office in Guangzhou. This would make it more difficult for the plaintiff to enable the convening of a shareholders' meeting elsewhere, even though the plaintiff was GMayer's majority shareholder. Lo admitted that the amended Article 41 achieved the effect that he intended. Hence, it was beside the point for him to claim that shareholder meetings had always been held in GMayer's office and he merely wanted to institutionalise this practice.[64]

39 As for the amendments to Articles 61 and 66 of the Articles, Lo agreed that the appointment and dismissal of directors were now matters out of the plaintiff's control, that the amendments would make it harder for the plaintiff to remove directors of GMayer and appoint new directors, and that the plaintiff could no longer on its own remove Lo as the chairman of the board.[65] Indeed Lo confirmed that in the past, the plaintiff (which held 81.4% of the shares in GMayer) would have been able to appoint and dismiss a director on its own, but that it could no longer do so as the amended Articles now required a minimum 85% of the votes of shareholders, who must also be present at the meeting for

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64 NE for 30 March 2017, pp 88, 90 and 102.

65 NE for 30 March 2017, pp 92–94; 102–103; NE for 31 March 2017, pp 4-5.

their votes to be counted as valid, before a director can be elected to or dismissed from the post. Lo had, by his own admission, read the proposed amendments to Articles 61 and 66 prior to them being tabled at the First GM.

40 Next, Lo admitted that the amendments to Article 92.viii.b and 92.viii.c enabled GMayer's board of directors to now approve investments of a higher value and related transactions of higher amounts.[66] However, Lo was evasive when queried over whether "related transactions" would include transactions with WHI, a related party to GMayer. Instead, he only stated that, on retrospect, the amendment to Article 92 was unnecessary as it has not been utilised.[67] He also claimed that the amendment was not necessary to preserve GMayer's status quo, which I did not accept. It was clear that Article 92 as amended would vest more power in GMayer's directors to deliberate and approve investments and related transactions. Coupled with other amendments to the Articles which reduced the plaintiff's power to control the appointment and removal of GMayer's directors, the directors of GMayer had effectively vested more power in themselves and secured their own positions, while correspondingly reducing the degree of oversight that the plaintiff originally had. Indeed, Lo agreed that the effect of the articles amended via the First Resolution was to entrench his position as chairman of GMayer.[68]

41 Defence counsel claimed that Lo had not sought to use the new powers given to GMayer's board as a result of the amended Articles. This is irrelevant. Even if that were the case, it did not preclude Lo from using such powers at any

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66 NE for 30 March 2017, pp 98–101.

67 NE for 30 March 2017, p 101.

68 NE for 30 March 2017, pp 96–98; NE for 31 March 2017, p 5.

time that he wished. The fact remained that, with the amendments to the Articles, the plaintiff's power and ability to control the composition of GMayer's board and have oversight over the board's management of the company were already diminished. Clearly, the First Resolution which resulted in the amendments to the Articles was not in the plaintiff's best interest and was in fact to its detriment.

42 Defence counsel also submitted that Lo was not claiming that the amended Articles did not have the effect of increasing GMayer's board's control over the company. Rather Lo merely claimed that any increase in the board's control over GMayer was "merely collateral" to the main aim of preserving status quo at GMayer.[69] Quite apart from the fact that this was never alluded to by Lo in his own testimony, I had also earlier found that the amendments to the Articles actually improved GMayer's position to the plaintiff's detriment.

43 Lo also claimed on various occasions that the Articles were amended to protect GMayer from falling into the control of Bumper and Aspial who had taken over Mayer BVI's 21.56% shareholding in Mayer HK. This was irrelevant as the focus of the inquiry was whether the amendments were detrimental to the plaintiff's interest.

Role of Lo and Wu in the Second Resolution and GM

44 I accepted that Jiangsu wanted to convene a general meeting to pass a resolution to allow Suzhou and Jiangsu 2 to transfer their shares in GMayer to Jiangsu, which Wu acceded to. That said, I found that it was Lo who decided to make further amendments to GMayer's Articles and initiated the process for

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69 First defendant's closing submissions, para 25.

this to happen. He arranged for the preparation of the Second Resolution, convened and presided over the Second GM (as chairman of GMayer's board) and even ensured that the Second Resolution was signed by Wu (as the plaintiff's representative).

45 First, Lo stated in cross-examination that he met Wu in Taiwan to discuss Jiangu's request to convene an extraordinary general meeting and *it was Lo* who suggested to Wu and reminded Wu to pass a resolution to extend GMayer's board of directors' term from three to five years[70]. This was contrary to his evidence-in-chief where he claimed that it was Wu who suggested extending the directors' term.[71] Lo then claimed that the issue of extending the directors' term was already mooted by Wu in as early as May 2014[72], and that was why he approached Wu for this matter to be passed at the Second GM[73] – an assertion which in any event I disbelieved. It made little sense for Wu to suggest extending the directors' term in May 2014, so soon after the board was appointed on 20 December 2013.[74] At the time when Wu purportedly made the suggestion, the board's term was not due to expire until end 2016. There was also no explanation as to why the term needed to be changed from three to five years, when the board of directors could be reappointed after the expiry of their three-year term. It was more likely that Lo had initiated the proposal to extend the board's term as an agenda of the Second Resolution; Lo in fact admitted as such in his own testimony.

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70 NE for 31 March 2017, p 26.

71 LH AEIC, para 71.

72 NE for 31 March 2017, p 21.

73 NE for 31 March 2017, p 26.

74 NE for 31 March 2017, p 30.

(*cont'd on next page*)

46 Second, Lo stated that *he* had discussed with GMayer's directors and came up with the amendments to the Articles.[75] He then clarified that he discussed with the other directors specifically regarding the amendment to lengthen the term of the board of directors, and invited them to make other amendments to the Articles to prevent Bumper and Aspial from interfering with GMayer's business. Yet, there was no evidence from Lo or the other directors as to what proposals were eventually suggested by the latter. Going by Lo's testimony, he clearly played an active role in procuring amendments to the Articles to protect GMayer's interest. Lo had also read through the draft amendments and admitted that he understood the contents and was satisfied that it accorded with what he intended to achieve for GMayer.[76]

47 Third, there was no evidence that Wu was aware of the details of the proposed amendments to the Articles. Lo could not recall whether the proposed amendments were shown to Wu, but claimed that he merely informed Wu that other amendments may be made to the Articles. As Lo explained, he thought that Wu would be able to attend the Second GM in September 2014 whereby Lo would then brief him on the details. But the fact remained that Wu did not eventually attend the Second GM.[77]

48 Going by Lo's own evidence, it was clear that he initiated and took charge of procuring the amendments to the Articles and the passing of the Second Resolution. He was clearly not acting on Wu's instructions in this regard. In fact, Jiangsu had requested an extraordinary general meeting for the

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75 NE for 31 March 2017, pp 13–15.

76 NE for 31 March 2017, pp 35–37.

77 NE for 31 March 2017, pp 32, 34, 50, 51.

only purpose of the share transfer. Yet, the agenda for the extraordinary general meeting went much further with proposals to amend the Articles and to increase the board's term from three to five years. This could only have come at Lo's initiative, as he was concerned to protect GMayer's interest from outsiders.

49 Indeed, Lo (being the chairman of the board) did not care about the proper procedure for the First and Second GMs, although it was the board's duty to ensure that the proper procedure for shareholders' meetings are complied with.[78] First, under Article 42 of the Articles, a request by a shareholder to convene an extraordinary general meeting should be made in writing, but that was done here.[79] Second, Lo claimed that did not know whether a notice was sent to all the shareholders regarding the convening of the First and Second GMs, although the board of directors had an obligation to issue that notice pursuant to Article 45. In fact, there was no evidence that any notice was actually sent to the plaintiff and of what the notice contained. This was particularly so with regard to the Second Resolution and GM as Lo was clearly not Wu's proxy in that case and Wu did not even see the agenda for the Second Resolution and GM before the Second Resolution was passed.

50 Third and in particular, the Authorisation Letter signed by Wu did not conform to the requirements set out in the Articles; it did not state clearly the instructions for voting for, against or to abstain from voting on particular items on the agenda for the First GM, and it was not dated, contrary to the provisions in Article 49[80]. According to Yung, the Authorisation Letter was signed around

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78 NE for 31 March 2017, pp 39–51. See Agreed List of Issues, para 2.

79 NE for 31 March 2017, pp 16–17; DB, p 53.

80 LH AEIC, pp 262-263.

14 March 2014, which *pre-dated* the notification to the shareholders of the First GM that GMayer prepared. If so, there would have been no agenda or proposed resolution for the First GM on which the Authorisation Letter was purportedly to address. Fourth, and surprisingly, despite Article 61 being amended (at the First GM) just six months before the Second GM, the result of which was that shareholders must be present for their votes to be considered and voting by proxy was no longer allowed, the Second Resolution was brought to Wu's home in Taiwan (at Lo's instructions) for him to approve (as the plaintiff's representative) after the Second GM had concluded! Lo could not say that he did not know of the requirement in the amended Article 61, having read it and procured the amendment to that article.

51 Lo's reply to all these was essentially that he was not in charge of the procedural matters and left them to his staff. Lo's claim that he "[did] not remember" or "did not pay attention" to the contents of the Articles was clearly unbelievable. Lo had been the chairman of GMayer's board since its incorporation. He admitted that he had read the proposed Resolutions.[81] He even asserted that signing a resolution after a general meeting was over "was allowed in China because [Wu] was sick". It was clear that he was feigning ignorance of the procedural requirements set out in the Articles relating to shareholders' meetings and trying to deflect responsibility.

52 The above reinforced my view that Lo wanted to move the Second GM and Resolution along, ignoring the proper process for doing so, in order to achieve his primary purpose of keeping away outsiders' influence in GMayer. The "outsiders" in this case would have included the plaintiff, for by this time,

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81 NE for 30 March 2017, pp 84–90.

the shares in Mayer HK (which owned the plaintiff) were now owned by Bumper and Aspial. The above also fortified my view that Lo played the key role in preparing the agenda for the passing of the Second Resolution as well as for the First Resolution.

Whether the Second Resolution passed was in the plaintiff's best interest

53 I found that the Second Resolution, passed at the Second GM, effectively sought to vest more power in GMayer's board of directors and reduced the plaintiff's power to control the appointment and removal of GMayer's board. First, the amended Article 20 of the Articles now allowed the board of directors to approve the provision of financial assistance to a purchaser or potential purchaser of GMayer's shares, when such financial assistance was previously prohibited under GMayer's Articles. I agreed with the plaintiff that if such financial assistance was extended, it could potentially reduce the amount of working capital available to GMayer, and thus may not be in the interest of the plaintiff as the majority shareholder of GMayer.

54 Further the resolution to extend the term of the board of GMayer from three to five years, coupled with the amended Articles 61 and 66 (made at the First GM), was clearly to GMayer's board's advantage and was calculated to reduce the plaintiff's influence in GMayer. Lo agreed that with the amended Articles 61 and 66, the plaintiff could no longer dismiss a director of GMayer on its own. In addition, given that GMayer would still require the plaintiff's cooperation in electing a new board when the present term of the directors expired (as the plaintiff controlled 81.4% of GMayer's shares), the extension of the term of a director from three to five years would enable Lo to keep the plaintiff from having a say over the composition of the board for an additional two years.

55 As for the plaintiff's claim that the transfer of Jiangsu 2 and Suzhou's shares was the subject of a right of pre-emption as set out in the GMayer Metal JV Contract, I found that this was not the case. The GMayer Metal JV Contract was superceded by the GMayer Agreement, and the latter did not contain a clause conferring a right of pre-emption.[82] Nevertheless this did not affect my overall findings, that the Second Resolution, as with the First Resolution, was clearly intended to protect GMayer's interest by removing as much control of GMayer from the plaintiff's interference. Hence, the Second Resolution was passed to the plaintiff's detriment.

Was Lo acting in Mayer Taiwan's best interest?

56 Lo repeatedly claimed that, in preparing the Resolutions and in assisting Wu in that regard, he was acting in Mayer Taiwan's interest. In my view, this was highly doubtful. The evidence clearly showed that Lo was acting in GMayer's interest and most likely his own as well. WHI, of which Lo was a substantial shareholder, had a stake in GMayer. Lo had admitted that the effect of the amendments to the Articles was to entrench his position as chairman of GMayer's board, and defence counsel admitted that the Resolutions were passed to GMayer's advantage.[83]

57 By the time Lo purportedly met Wu in December 2013 to discuss the matter of preserving GMayer's interest, he had fallen out with Mayer Taiwan's majority shareholder and had not been re-elected as a director on its board. So it was hard to believe that he was looking after Mayer Taiwan's interest, even if he remained a minority shareholder of Mayer Taiwan. If Wu and Lo were

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82 NE for 29 March 2017, pp 42, 83–85; 1AB 258.

83 First defendant's closing submissions, paras 51–52.

indeed desirous of protecting Mayer Taiwan's interest in GMayer, they would have consulted Mayer Taiwan's board when GMayer intended to amend its Articles or to hold the First and Second GMs. There was no evidence that they did so. Lo in fact claimed that it was only Wu, and not Mayer Taiwan or its board, who was desirous of protecting GMayer's interest. Moreover, at the material time, Mayer Taiwan was not even a majority shareholder (albeit indirectly) of GMayer. In fact, Lo would have known, with the on-going lawsuits regarding Bumper and Aspial, that once the shares in Mayer HK were transferred to them, Mayer Taiwan would no longer hold any shares in, and would no longer have any control of, GMayer. This was the case by 19 August 2014, which was before the Second GM[84]. By then Mayer Taiwan no longer had any interest in GMayer to protect. I found that, essentially, Lo was trying to consolidate his own position in GMayer by protecting it from outside interference.

Lo's duties as a director of the plaintiff

58 A director owes duties to his company under statute and common law. Section 157 of the Companies Act (Cap 50, 2006 Rev Ed) states that a director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office. The duty to act honestly is the statutory equivalent of the duty under common law to act *bona fide* in the interest of the company (*Townsing Henry George v Jenton Overseas Investment Pte Ltd (in liquidation)* [2007] 2 SLR(R) 597 ("*Townsing*") at [59]). An important facet of this duty of honesty (or duty to act in good faith) is, in turn, a director's duty of loyalty to

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[84] NE for 6 April 2017, p 5.

his company (*Townsing* at [60]). This entails a duty for the director to safeguard the company's interest and not to put himself in a position of conflict.

59 Where a director of a company is also a director of other companies within a group, each company in the group is a separate legal entity and the director is not entitled to sacrifice the interest of one company in the group for that of another. The proper test for whether a director has breached his duty to the company concerned is whether an intelligent and honest man in his position could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company – *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62, cited in *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR(R) 1064 at [28] and in *Golden Village Multiplex Pte Ltd v Phoon Chiong Kit* [2006] 2 SLR(R) 307 at [36] ("*Golden Village Multiplex*"). In *Bristol and West Building Society v Mothew* [1998] Ch 1, cited in *Townsing* at [64], Millett LJ dealt with the "no conflict rule", and divided the rule in sub-categories which he called "the double employment rule", "the duty of good faith", "the no inhibition principle" and "the actual conflict rule" (at 18-19):

> A fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts himself in a position where his duty to one principal *may* conflict with his duty to the other: see *Clark Boyce v Mouat* [1994] 1 AC 428 and the cases there cited. This is sometimes described as "the double employment rule". Breach of the rule automatically constitutes a breach of fiduciary duty…
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> …
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> That, of course, is not the end of the matter. Even if a fiduciary is properly acting for two principals with potentially conflicting interests he must act in good faith in the interests of each and must not act with the intention of furthering the interests of one principal to the prejudice of those of the other … I shall call this "the duty of good faith". But it goes further than this. He must not allow the performance of his obligations to one principal to

> be influenced by his relationship with the other. He must serve each as faithfully and loyally as if he were his only principal.
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> … [T]he principle which is in play is that the fiduciary must not be inhibited by the existence of his other employment from serving the interests of his principal as faithfully and effectively as if he were the only employer. I shall call this "the no inhibition principle". Unless the fiduciary is inhibited or believes (whether rightly or wrongly) that he is inhibited in the performance of his duties to one principal by reason of his employment by the other his failure to act is not attributable to the double employment.
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> Finally, the fiduciary must take care not to find himself in a position where there is an *actual* conflict of duty so that he cannot fulfil his obligations to one principal without failing in his obligations to the other: see *Moody v Cox and Hatt* [1917] 2 Ch 71; *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453. If he does, he may have no alternative but to cease to act for at least one and preferably both. The fact that he cannot fulfil his obligations to one principal without being in breach of his obligations to the other will not absolve him from liability. I shall call this "the actual conflict rule".
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> [emphasis in original]

60 In the present case, there was no question of Lo breaching the double employment rule because the plaintiff was aware of his appointment as a director on GMayer's board at the material time and would have acquiesced to it. However, Lo had breached the duty to act *bona fide* in the interest of the plaintiff and the duty of good faith. He did not served the plaintiff faithfully and loyally as if the plaintiff was his only principal and had clearly subordinated the plaintiff's interest to that of GMayer and his. It was clear from his own conduct that he played a major role in the preparation of the amendments to GMayer's Articles, in convening the First and Second GMs, and in procuring the passing of the Resolutions during those meetings. Lo had acted as Wu's proxy in the First GM. There was also no evidence that the plaintiff, through Wu as its legal representative in GMayer or otherwise, was made aware of the contents of the First Resolution before it was passed. The plaintiff was clearly unaware of the contents of the Second Resolution before it was passed, as Wu signed the

Second Resolution only after the Second GM was over. Further it was Lo who ensured that the Second Resolution was handed to Wu for his approval (as the plaintiff's representative on GMayer). By engineering the passing of the Resolutions which Lo knew were to the plaintiff's detriment, he had favoured the interest of GMayer and his at the expense of the plaintiff and had put himself in a position of actual conflict. Clearly, Lo was not even concerned with the interest of the plaintiff (which he maintained was merely a shell company), and had categorically maintained that his interest was in protecting GMayer.

61 In *Golden Village Multiplex*, the defendant was a director of the plaintiff, Golden Village Multiplex Pte Ltd ("GVM"), as well as of Golden Harvest Films Distribution (Pte) Ltd ("GHFD"). GVM sued GHFD for breach of an agreement, and the defendant, from his attendance at board meetings of GVM and his access to GVM's correspondence, gained confidential information that could be used by GHFD against GVM in relation to the lawsuit. The court held that he was prohibited from using those information for the benefit of GHFD and to the detriment of GVM, as to do so would be in breach of his fiduciary duties owed to GVM. It found that the defendant was openly siding with GHFD in relation to the lawsuit, and so had clearly acted in conflict of his duties as GVM's director. The defendant could not subordinate the interests of GVM to those of GHFD in a situation where their interests were in obvious conflict and he should have adopted a "remain above the fray" stance and refrained from acting for or against the interests of either GVM or GHFD (see *Golden Village Multiplex* at [48]).

62 In the present case, it was clear that Lo, who was then the plaintiff's director, did not remain above the fray but was deeply embroiled in it. He was obviously favouring GMayer's interest over that, and to the detriment, of the plaintiff. He had thus also breached his duty of loyalty to the plaintiff. It did not

make a difference that when Lo committed the acts complained of, he was acting in his capacity as GMayer's director and not as the plaintiff's director, as a rigid compartmentalisation of a director's conduct vis-à-vis a subsidiary and its parent company is to be eschewed (*Townsing* at [62], see also *Gardner v Parker* [2004] 1 BCLC 417 at [16]–[23]).

63 In addition, having possessed information, acquired in the course of his duties as a director of GMayer, that resolutions may be passed by the shareholders of GMayer which would be detrimental to the plaintiff's interest, Lo had a duty to disclose this information to the plaintiff. In *Item Software (UK) Ltd v Fassihi and others* [2004] EWCA Civ 1244 ("*Item Software*"), the Court of Appeal held (at [41]) that while a director does not owe a *separate and independent duty* to disclose to the company information of relevance and concern to it, his fundamental duty to act in what he in good faith considers to be the best interests of the company requires him to make such disclosures. This was essentially the application of the duty of loyalty (*Item Software* at [41] and [67]). In that case, the defendant, Fassihi, was the sales and marketing director of the claimant company. While a director of the claimant, and without informing the claimant, Fassihi set up his own company to attempt to take over a distribution contract (with another company) that another director of the claimant was trying to secure for the claimant. The court held that Fassihi had a duty to inform the claimant that he was also vying for the contract. In *British Midland Tool Ltd v Midland International Tooling Ltd and others* [2003] BCLC 523 ("*British Midland*"), Hart J held (at [89]) that a director's duty to act so as to promote the best interests of his company *prima facie* includes a duty to inform the company of any activity, actual or threatened, which damages those interests. In that case, three directors of the company who stood by and did nothing when they found out that a fourth director was planning to set up a

competing business and was trying to poach members of the company's workforce, were held to have breached their duty to the company. They had a duty to take active steps to avert the process by alerting their fellow directors to what was going on.

64 The duty of a director to inform the company of information he possesses that he in good faith considers is in the interest of the company to know, extends to disclosures of the director's own breaches of duty or misconduct. In *Bell v Lever Bros Ltd* [1931] ALL ER Rep 1 ("*Bell v Lever Bros*"), the appellants had been employed by the respondents to act as the chairman and vice-chairman respectively of one of their subsidiaries. Subsequently, an agreement was entered into between the appellants and the respondents to terminate the appellants' contracts of service in return for a substantial sum. After they had paid the sums to the appellants, the respondents learnt that the appellants had, while in their employment, engaged in secret dealings which involved the diversion of trading opportunities which properly belonged to the subsidiaries. The respondents thus claimed for repayment of the sums, contending that they would not have entered into the agreements to compensate the appellants if they had known that they were entitled to dismiss them summarily. The majority of the House of Lords held that the appellants owed no duty to disclose their prior misconduct and that the agreements accordingly could not be set aside on the ground of its non-disclosure. Importantly, however, the appellants in *Bell v Lever Bros* were not directors but mere employees of the respondents, although Lord Thankerton stated (at 231 of the judgment), in *orbiter dicta*, that:

> In the absence of fraud … I am of opinion that neither a servant nor a director of a company is legally bound forthwith to disclose any breach of the obligations arising out of the relationship so as to give the master or the company the opportunity of dismissal …

65 The above *dicta* by Lord Thankerton, that a director is not legally bound to disclose to the company any breach of his own obligations as a director, has not been followed in subsequent decisions. In *Item Software* (discussed at [63] above), the Court of Appeal, in holding the defendant director liable, noted (at [34]) that the duties of a director are in general higher than those imposed by law on an employee, because a director is not simply a senior manager of a company, but is a fiduciary. Likewise, in *British Midland* (also discussed at [63] above), Hart J held that the fact that any one of the three directors in that case was himself in breach of duty did not absolve him from his duty to report breaches by the others.

66 Thus, in the present case, Lo had a duty, arising from his fundamental duty to act in what he in good faith considers to be the best interest of the plaintiff, to inform the plaintiff of the proposed amendments to the Articles to be passed at the First and Second GMs, which he knew would be against the plaintiff's interest. He did not do so. In fact, although Lo was the chairman of GMayer's board and the Articles required the board to send notices of general meetings to the shareholders (see [49] above), there was no evidence that GMayer had actually sent a notice to the plaintiff regarding the convening of the First and Second GMs nor had the plaintiff actually seen a copy of the proposed First and Second Resolutions before the First and Second GMs were held. This is even if Wu was the plaintiff's representative on GMayer.

67 Finally, although Lo maintained that the plaintiff was merely a shell company for Mayer Taiwan's investment in GMayer, this did not assist his case. Each company is a separate legal entity and a director of a particular company is not entitled to sacrifice the interest of that company for the interest of another company. Moreover, this "shell" company held an 81.4% share in GMayer which had real manufacturing assets and was in active trade. In any event, even

if, as Lo maintained, he only owed a duty to serve the interest of Mayer Taiwan and not of the plaintiff, I had found that Lo was not desirous of protecting Mayer Taiwan's interest (see [56]–[57] above). Indeed, around 19 August 2014, Bumper and Aspial had become substantial shareholders of the plaintiff and it ill behoves the defence to say that there was no harm done to the plaintiff since its control over GMayer was illusory or non-existent to begin with.[85] The plaintiff's control over GMayer was ultimately meant to be exerted by the plaintiff's controlling shareholders of the day (which defence counsel did not dispute[86]), which Lo already knew, before the First GM, was in a state of tussle. Lo was in essence protecting GMayer's and his interest from all outsiders' control and interference, including from the plaintiff itself.

Conclusion

68 In conclusion, I found that Lo, as a director of the plaintiff, had acted in breach of his duties to the plaintiff. He had breached the duty to act *bona fide* in the interest of the plaintiff and the duty of good faith. He had placed himself in a position of conflict with the plaintiff, consciously preferred his own interest over that of the plaintiff, and, where the plaintiff's and GMayer's interest were in direct conflict, preferred GMayer's interest over that of the plaintiff. As such, I granted the plaintiff's claim for a declaratory relief that Lo had acted in breach of his duties to the plaintiff.

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85 First defendant's closing submissions, paras 35–36.

86 First defendant's closing submissions, para 46.

Costs

69 Costs should normally follow the event, except when it appears to the court that in the circumstances of the case some other order should be made: see, *eg*, *Ho Kon Kim v Lim Gek Kim Betsy and others and another appeal* [2001] 3 SLR(R) 253 at [12]. Generally, a successful party who has not raised issues or made allegations improperly or unreasonably should not be deprived of his costs: *Tullio Planeta v Maoro Andrea G* [1994] 2 SLR(R) 501 at [24].

70 Defence counsel submitted, however, that the costs of the trial should nonetheless be reserved to after the assessment of damages hearing had taken place, as it could well be that the plaintiff may only obtain nominal damages. He cited the cases of An*glo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd* [1951] 1 All ER 873 ("*Anglo-Cyprian*") and *Alltrans Express Ltd v CVA Holdings Ltd* [1984] 1WLR 394 ("*Alltrans Express Ltd*") for the principle that a plaintiff who gets only nominal damages should not be regarded as successful at trial and hence the court should in such cases award costs to the defendant as if the defendant had succeeded in his defence. This principle has been adopted locally in the case of *Mahtani and others v Kiaw Aik Hang Land Pte Ltd* [1994] 2 SLR(R) 996 ("*Mahtani*"). As the court explained in *Mahtani* (at [57]), the policy behind the principle is to discourage frivolous litigation, since not every breach of contract will actually cause loss to the innocent party.

71 In my view, the principle was inapplicable here. In *Anglo-Cyprian*, the plaintiff initially claimed over £2,000 in damages for defects in wines bought under a sale of goods agreement. By amendment at the trial they pleaded in the alternative that they were entitled to £52, which was granted by the court. In *Alltrans Express Ltd*, the plaintiff claimed £82,500 for breach of a warranty given by the defendants in an agreement for sale of a company's shares, but the

court found that such damages could not be proved and only awarded the plaintiff nominal damages of £2. Similarly, in *Mahtani*, the court awarded nominal damages of only $10 for the plaintiff's claim against the defendant for breach of contract to construct a flat in a good and workmanlike manner.

72 In the three cases cited, the relief sought by the plaintiffs were monetary damages. Thus, having only been awarded nominal or trivial damages, they could not be said to have really succeeded in their claim and the successful party was in fact the defendants: see *Alltrans Express Ltd* at 401 and *Anglo-Cyprian* at 875. Consequently, in *Alltrans Express Ltd* and *Anglo-Cyprian*, it was the defendants which were entitled to costs. In *Mahtani*, the court awarded the plaintiffs costs of the action up to the commencement of trial. Apart from the claim for breach of contract to construct the flat in a good and workmanlike manner, the plaintiff had another claim based on a shortfall in the floor area of the flat (for which the court eventually awarded the full damages sought), and it was not until the start of the trial that the defendants conceded the shortfall claim and dropped a point challenging the plaintiff's right to sue. As for the costs incurred at the trial itself, the defendants were awarded only 50% of the costs even though the plaintiff only obtained nominal damages for the claim for breach of contract to construct the flat in a good and workmanlike manner. This was because the trial was unduly prolonged by the defendants' insistence that they had not breached their duty to construct the flat in a good and workmanlike manner, and the court was of the view that the defence was an academic defence which had little chance of success.

73 In contrast, in the present proceedings, the plaintiff's main claim was for a declaratory relief that Lo had acted in breach of his duty as a director of the plaintiff. The plaintiff had informed defence counsel, since the start of the trial (which had been bifurcated), that it might not proceed to the next phase on

assessment of damages, as its primary claim was for a declaration that Lo was in breach of his duties as its director. The claim was nevertheless defended vigorously by Lo. The plaintiff had not brought the litigation frivolously and had not conducted the litigation improperly or unreasonably. It was also not a case in which the plaintiff had little chance of success on its claim for a declaratory relief. As the plaintiff had succeeded in its claim, costs should follow the event. I therefore awarded the plaintiff costs of $93,500 with reasonable disbursements, which was well within the costs guidelines as set out in Appendix G of the Supreme Court Practice Directions. If the plaintiff proceeds to assess damages and only succeeds in obtaining nominal damages, the court hearing the assessment may take that into account in determining the costs of the assessment.

Audrey Lim
Judicial Commissioner

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