Tan Eck Hong
v
Maxz Universal Development Group Pte Ltd and others

[2017] SGHC 309

High Court — Suit No 581 of 2017
Judith Prakash JA
30 October; 2–6, 9, 11–12, 16–20, 30 November 2015;
12–15, 18–22 July; 3–5, 10–12, 22–26 August 2016;
16, 19–23 September 2016; 17 February 2017

Companies – Oppression – Minority Shareholders

1 December 2017 Judgment reserved.

Judith Prakash JA:

Introduction

Summary and parties

1 This is a long and involved case. It arises from the development of a piece of land in Sentosa from being the site of a former military barracks into a small hotel-cum-club and then into a multi-million-dollar resort hotel run by an international hotel group. The plaintiff, who is a minority shareholder of the company that owns and runs the hotel, complains that along the journey to this otherwise desirable outcome, the majority shareholder and many of the directors of the company carried on the affairs of the company in a manner which

oppressed, and was prejudicial to, his interests. The defendants resist the claims and allege that the plaintiff is trying to force them to buy out his shareholding at an inflated price.

2 I start by introducing the parties. These are:

(a) Treasure Resort Pte Ltd ("the Company"), a company incorporated in Singapore in 2005 and the second defendant in this action. The alleged oppressive actions took place in relation to the management of the Company;

(b) Tan Eck Hong ("the plaintiff"), the plaintiff in this action, who is the dissatisfied minority shareholder of the Company, holding less than 7% of its issued share capital;

(c) Maxz Universal Development Group Pte Ltd ("MDG"), a company incorporated in Singapore, which is the first defendant and the majority shareholder of the Company, holding 93.9% of its issued share capital;

(d) Seeto Keong ("Mr Seeto"), who is the third defendant and was a shareholder and director of MDG, and subsequently became a director of the Company;

(e) Tan Boon Kian ("Rodney Tan"), who is the fourth defendant and the majority shareholder of MDG and a director of both MDG and the Company since around June 2007;

(f) Poh Ban Leng ("Mdm Poh"), who is the fifth defendant and was a director of the Company between 24 May 2007 and 13 January 2010;

(g) Lim Kwee Wah ("Mr Lim"), who is the eighth defendant and is a director of both MDG and the Company (holding the latter position from March 2009); and

(h) Gn Hiang Meng ("Mr Gn"), who is the ninth defendant and has been a director of the Company from March 2009.

I will sometimes hereafter refer to Mr Seeto, Rodney Tan, Mdm Poh, Mr Lim and Mr Gn collectively as "the defendant-directors". Further for completeness, I note that the current plaintiff was, at the inception of the action in 2007, the seventh defendant but, after the original plaintiff dropped out, Tan Eck Hong took his place as the plaintiff and was removed as the seventh defendant. The sixth defendant was one Wong Choon Hoy but he passed away in the course of the proceedings and the action against him was not continued.

The background

3 Of necessity what follows is a very brief account of what happened over the years, intended to set the scene and promote understanding of the claims.

4 In late1994, by way of a Building Agreement, the Sentosa Development Corporation ("SDC"), leased certain land and premises on Sentosa Island to a company called Sijori Resort Pte Ltd ("Sijori RPL") which developed the buildings on the land (two blocks of old British Army barracks) into a small hotel and club ("Sijori Resort"). The Sijori Resort took in casual guests and also offered memberships ("Sijori Memberships") which entitled the members to a certain number of free days' stay at the Sijori Resort each year. Due to its location, the Sijori Resort had considerable potential for development.

5 MDG was incorporated as a property development company in March 2000. In about May 2003, Mr Seeto became the chief executive officer of MDG and held shares in the MDG from then till May 2007. He ran MDG with one Sebastian Wong Cheen Pong ("Sebastian Wong") whose wife was a shareholder but who could not himself hold office as he was a bankrupt. They saw potential in the Sijori Resort as Sentosa Island itself was being developed into a leisure and tourist hub. In 2005, MDG negotiated with SDC for permission to acquire both the Sijori Resort and also an additional piece of land from SDC in order to develop a 200-room, five-star hotel ("the Project"). The Project had two phases. Under the first phase, the existing buildings housing the Sijori Resort would be refurbished and outfitted to a much higher standard. Under the second phase, a new multi-storey building would be constructed on the additional plot and outfitted to five-star standards. At some point, MDG entered into a contract with Movenpick Hotels & Resorts Management AG ("Movenpick AG") under which the completed new hotel would be run as a "Movenpick Hotel".

6 In June 2005, the Company was incorporated to be the owner and operator of the hotel and to run the Project. MDG was the Company's majority shareholder and there were some minority shareholders including one Shen Yixuan ("Mr Shen"). The plaintiff met Mr Seeto sometime in mid-2005 when the latter was searching for investors to help the Company develop the Project. The plaintiff agreed to invest $720,000 and was allotted 65,600 shares in the Company in October 2005.

7 The Company had to pay Sijori RPL for the acquisition of the Sijori Resort and the transfer of the Building Agreement. Part of the purchase price was to be paid by settling the debts of Sijori RPL. In June 2006, MDG obtained credit facilities, from what was later called VTB Bank, of up to $8m to be used

towards the purchase, renovation and refurbishment of the Sijori Resort. I will refer to this as the "VTB Facility". About half the facility limit was to be used to settle Sijori RPL's debts to the Bank of China and SDC, to wit, the sums of $3,657,144 and $342,856 respectively. The security for the facility comprised:

(a) A mortgage over the lease of the Sijori Resort to the Company from SDC;

(b) A fixed and floating charge over all the Company's assets;

(c) A legal assignment of all tenancy proceeds of the lease and an equitable assignment of all monthly membership subscriptions payable to Sijori Resort; and

(d) A corporate guarantee from the Company and a personal guarantee from Mr Seeto.

8 On 27 September 2006, MDG gave notice to VTB Bank that it wished to make a drawdown of $4m on 29 September 2006 by way of a cashier's order for $3,657,144 payable to the Bank of China and another cashier's order for $342,856 payable to SDC. These cashier's orders were duly issued on 29 September 2006 but were not released to MDG and, accordingly, could not be handed over to either the Bank of China or SDC. Nevertheless, MDG considered that it had applied $4m to settle payments on behalf of the Company to Bank of China and SDC and that therefore the Company was indebted to it in this amount. Concurrently, the debt of $4m to MDG was entered in the Company's books.

9 One of the conditions that SDC had imposed for the transfer of the Sijori Resort from Sijori RPL and for the lease of the additional plot was that the Company should have and maintain a minimum issued paid-up capital of $4.5m.

At that time, however, the Company's total issued share capital was only $820,000. On 12 October 2006, an extraordinary general meeting of the Company was held to authorise its directors to issue and allot new shares. On 13 October 2006, a directors' resolution was passed to allot an additional four million shares in the Company to MDG and to approve payment of the allotment moneys being satisfied by offsetting the debt of $4m that the Company owed MDG by reason of the book entries referred in to [8] above. The additional four million shares were duly issued and allotted to MDG and the Company's indebtedness to MDG was duly capitalised.

10 On 14 November 2006, completion of the acquisition took place. The cashier's orders from VTB Bank were released to SDC and the Bank of China. The Building Agreement between SDC and Sijori RPL was novated to the Company pursuant to a Deed of Novation and the Company leased an additional plot of land pursuant to a Supplemental Agreement with SDC. The combined plots of land and premises thereon are now known as 23 Beach View, Sentosa ("the Property"). The Supplemental Agreement with SDC contained the Company's obligations to refurbish the Sijori Resort and to build a new wing with the temporary occupation permit for the same being obtained by 30 June 2008. Upon completion, the Company took over the running of the Sijori Resort and Mr Seeto and Sebastian Wong looked around for further funds with which to implement the Project. Under the agreement with SDC, Phase 1 of the Project was supposed to be completed by the end of May 2007.

11 Enter Rodney Tan – he was approached in or around May 2007 to invest in the Company. Rodney Tan was then, and still is, the Group Chairman of the Cairnhill Group of Companies, including Cairnhill Group Holdings Pte Ltd ("CGH") which would become a major player in the development of the Project.

Rodney Tan is, indirectly, practically the sole owner of CGH. He comes from a hotelier background – his father having owned and managed the Cairnhill Hotel in Singapore. Under the CGH banner, Rodney Tan was involved in running a 34-storey hotel in Tianjin, China, and a 28-storey block of service apartments in Hong Kong. According to Rodney Tan, it was because of his substantial personal net worth, good reputation and experience in the hotel management and hospitality industry generally, and his strong relationships with banks, that Mr Seeto approached him to invest in the Company.

12 Rodney Tan saw the investment potential in the Property and the Project; he was confident that he and his team could convert Sijori Resort from a run-down "zero-star dying hotel" into a five-star hotel. In May 2007, he invested in MDG through a British Virgin Island corporate vehicle, Roscent Group Ltd, by buying 54% of the shares in MDG, including Mr Seeto's shares. On 1 June 2007, Rodney Tan was appointed a director of MDG, having been appointed a director of the Company slightly earlier, on 24 May 2007. I should state that various changes of shareholding in both MDG and the Company took place thereafter, details of which I need not go into here. As of October 2015, there were only two shareholders in the Company: MDG, holding 12,836,319 fully paid-up ordinary shares, and the plaintiff, holding 833,485 fully paid-up ordinary shares. By then, MDG itself was owned as to 45.2% by Rodney Tan and 52.4% by Cairnhill Treasure Investment (S) Pte Ltd, a company in which Rodney Tan owned 99.98% of the shares.

13 At the time Rodney Tan invested in MDG, it was clear that the Company would not be able to complete Phase 1 of the Project by end May 2007 as it was required to under its contract with SDC. In fact, Rodney Tan required SDC's consent in order to hold an indirect majority interest in the Company via MDG.

He had not yet obtained this in May 2007 but to show his good faith to SDC he began to invest money and work hard on the Project. At that time the Company had very few employees and Rodney Tan considered that it did not have the personnel, expertise, ability or resources to complete Phase 1, let alone the whole Project.

14 Rodney Tan asserted that, to get such a big project off the ground, various teams had to work together to provide a variety of services required by the Company. Based on his knowledge and experience of the hotel industry, he considered that the only company that could provide the Company with all the services necessary to complete both phases of the Project successfully at a reasonable price was CGH. Over the course of the next few years, starting on 1 June 2007, the Company entered into various management agreements with CGH. Pursuant to these management agreements, according to Rodney Tan, CGH provided the Company with the following services:

(a) Project management services;

(b) Finance management services;

(c) Information technology ("IT") services; and

(d) Administrative services (including accounting, secretarial and logistics services).

The management agreements and the services provided and fees charged by CGH form the basis for some of the plaintiff's complaints in this action.

15 Quite soon after Rodney Tan became involved in MDG, the Company and the Project, he became the main person in charge of all three. Mr Seeto resigned as a director of the Company and MDG a few months later. Sebastian

Wong, however, continued to work for both entities. Subsequently, Rodney Tan brought in Mr Lim and Mr Gn to run various aspects of the Project. Mdm Poh, who was Rodney Tan's wife at all material times, was involved with the Company, first as a supplier of furniture and fittings and, later, as a director at Rodney Tan's request. Sometime in 2015, the marriage broke down and divorce proceedings were started by Mdm Poh.

16 Rodney Tan understood from the start that the Company did not have sufficient financial muscle to implement and complete the Project. He therefore made an effort to obtain fresh loan facilities for the Company. In this respect, he approached Maybank, a bank with which he had good relations. By a letter of offer dated 2 August 2007, Maybank offered the Company a banking facility of $26,100,000. This facility was to be secured by a mortgage over the Property as well as a personal guarantee from Rodney Tan for the same amount. Rodney Tan executed his personal guarantee on 13 August 2007. The mortgage required SDC's consent and this was only given about a year later, in June 2008, which meant that for some time Rodney Tan's personal guarantee was the only security for the Maybank facility. The Maybank facility was used to pay back the indebtedness owing to VTB Bank by MDG and also for the costs of the Project.

17 It turned out that the Maybank facility granted in 2007 was insufficient for the Company's needs. In about August 2008, the Company approached Maybank for a substantial increase in its loan facilities. By its letter of 26 August 2008, Maybank offered the Company banking facilities totalling $105,300,000. The security for the enhanced facilities was to be provided by a mortgage-in-escrow over the Property and a personal guarantee from Rodney Tan. Rodney Tan was willing to provide a guarantee for the enhanced amount provided that

the Company indemnified him. As a result on 10 September 2008, a Deed of Indemnity (the "First Indemnity") was executed by the Company and Rodney Tan. Shortly thereafter, on 15 September 2008, the First Indemnity was superseded by a second Deed of Indemnity (the "Second Indemnity") between the same parties. On 21 September 2008, the Second Indemnity was supplemented by a Supplemental Deed of Indemnity. These three deeds will be referred to collectively as "the Indemnities".

18 By the First Indemnity the Company agreed to indemnify Rodney Tan against all liabilities incurred to Maybank in respect of his personal guarantee, to pay him a fee for giving the guarantee and to provide him with cash equivalent to 20% of the guaranteed amount as security for his liability to Maybank. Under the Second Indemnity, as supplemented, the Company agreed to give Rodney Tan an initial security deposit of $2m, a further cash security equivalent to 20% of the guaranteed amount and fees at the rate of 1.5% per annum of the amount guaranteed, such fees to be paid after the Company had discharged its payment obligations to Maybank.

19 As time went by, the Maybank facilities increased, first to $143,653,000 and then to $199,300,000. By August 2013, the quantum of the guarantee provided by Rodney Tan increased to $200m. Rodney Tan stated that as at September 2015 he was entitled to a cash security deposit in the aggregate sum of $41,860,000 but had only received $40m up to that date. I point out that the granting of the Indemnities and the payments made to Rodney Tan thereunder form the basis of one of the plaintiff's complaints in this action.

20 Rodney Tan and his team ran the Project and the Company from June 2007 onwards. The first phase of the Project which comprised the refurbishment

of the original building was completed in December 2007 when it was re-opened as the "Heritage Wing" of what was then called the "Treasure Resort Hotel". The second phase involved the construction of a new multi-storey building. This was undertaken after completion of the Heritage Wing. It proceeded apace until it was completed and opened as the "New Wing" in March 2011. Thereafter, the management of the hotel was taken over by Movenpick AG who ran it as the Movenpick Heritage Hotel, Sentosa until the Company terminated the management agreement some years later. The hotel is now run by another hotel group and is known as Le Meridien Hotel, Sentosa.

21 I end the account of the factual background here. I have not described all the plaintiff's complaints. These will be detailed in the section below dealing with the analysis of each complaint. Before I do that, I give a short account of the long and complex history of the present litigation.

This action

The initial proceedings

22 This action was started on 12 September 2007 by Mr Shen, then a minority shareholder in the Company. He sued MDG, the Company, Rodney Tan, Mr Seeto, Mdm Poh and Wong Choon Hoy for relief against oppressive actions undertaken by them in connection with the management of the Company. One of the things that he complained about was the allotment of four million shares to MDG in October 2006 by way of capitalisation of the alleged debt owing by the Company. At about the same time, another minority shareholder, one Mr Chiang Sing Jeong ("Mr Chiang") had commenced Suit 568 of 2007 ("Suit 568") in the High Court against MDG to claim shares in the Company.

23 The litigation took a rather tortuous course thereafter. Sometime in late 2008, the present plaintiff, Tan Eck Hong, found out about the action. Thereafter, he applied to be added to it as the seventh defendant. This was to enable him to make his own claim of oppression. Tan Eck Hong became the seventh defendant in January 2009. Shortly thereafter, on 14 April 2009, he filed a Notice of Claim against MDG. In this Notice, Tan Eck Hong claimed that MDG was in breach of a shareholders' agreement made between them in respect of the Company and that MDG had to transfer to him 740,400 shares in the Company.

24 Subsequently, Mr Shen's claim was settled and he disposed of his shares in the Company and dropped out as plaintiff. In January 2012, Tan Eck Hong applied for Mr Lim and Mr Gn to be added as the eighth and ninth defendants respectively on the basis that they were party to the oppressive actions of MDG and Rodney Tan. These orders were granted and, subsequently, Tan Eck Hong became the plaintiff. Several amendments of the Notice of Claim took place thereafter. The original claim for 740,400 shares was dropped at some point but, by the time hearing commenced, a number of other claims had been added, some of which echoed the complaints of Mr Shen.

The plaintiff's claims

25 As I have mentioned, the plaintiff's claims in this action went through various changes in the course of the proceedings. At the start of the hearing, the plaintiff presented his Opening Statement and I asked his counsel, Mr Alvin Tan, to confirm that the claims which the plaintiff was proceeding with were those set out in the Opening Statement. I did this because I wanted to be quite sure as to which claims in the Statement of Claim were being prosecuted in view of the number of changes that had taken place. Additionally, I wanted counsel

for the various defendants to know what to focus on so that the trial would not be unduly prolonged. Mr Alvin Tan duly gave me this confirmation. In this section therefore, I am recounting the plaintiff's claims as set out in the Opening Statement. The defendants have alleged that there are differences between the Plaintiff's Closing Submissions and the Statement of Claim and Opening Statement and that the plaintiff should not be allowed to expand his claims in that way.

26 First, I set out the complaints of oppression in respect of MDG and Rodney Tan. These are as follows:

(a) Wrongful extraction of funds by CGH by way of the management fees;

(b) Wrongful extraction of funds by MDG by way of management fees;

(c) Wrongful debiting in the Company's books of legal fees that should have been paid by MDG and Rodney Tan themselves;

(d) Payments totalling $40m made to Rodney Tan pursuant to the Indemnities;

(e) Wrongful disposal of the Sijori Memberships for no known consideration to a wholly-owned subsidiary of MDG;

(f) Wrongful allotment of the shares of the Company to MDG by way of capitalisation without sufficient debt backing;

(g) Wrongful allotment of four million shares in the Company on 13 October 2006; and

(h) Allotment of shares pursuant to an order of court obtained by fraud.

27 Secondly, I set out the plaintiff's complaints of breach of fiduciary duties on the part of Mr Seeto, Rodney Tan, Mdm Poh, Mr Lim and Mr Gn. The specific complaints, most of which are closely related to the charges of oppression, are as follows:

(a) **Mr Seeto** breached his duty to act honestly under s 157(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act"), including his duty to act in the Company's interests and not in the interests of some other body and his duty not to place himself in a position where his duty to the Company and his personal interests might conflict, by:

(i) allowing Rodney Tan to procure the payment of management fees by the Company to CGH and, in particular, the payment of the increased fees of $550,000 per month to CGH;

(ii) procuring the appointment of MDG to provide management services to the Company and/or the wrongful and/or the excessive debiting of management fees by MDG to the Company;

(iii) being involved in the arrangement of the loan taken by MDG from VTB Bank based principally on security given by the Company and the subsequent conversion of capital to equity. The Company's assets were improperly

used to the advantage of MDG and for Mr Seeto's personal gain as a director and shareholder of MDG;

(iv) causing the Sijori Memberships to be disposed of to MDG without consideration;

(v) approving the Company's entry into the Indemnities; and

(vi) allowing Rodney Tan to extract money from the Company pursuant to the Indemnities.

(b) **Rodney Tan** breached his duty to act honestly under s 157(1) of the Act, including his duty to act in the Company's interests and not in the interests of some other body, and his duty not to place himself in a position where his duty to the Company and his personal interests may conflict, by:

(i) engaging CGH to provide management services to the Company on the terms of seven management agreements entered into between the Company and CGH between 1 June 2007 and 1 January 2012;

(ii) procuring the payment of management fees by the Company to CGH and, in particular, the payment of the increased fees of $550,000 per month;

(iii) procuring the appointment of MDG by the Company to provide management services to it and/or wrongfully and/or excessively debiting management fees;

(iv) causing the Sijori Memberships to be disposed of to MDG without any consideration. This was also a breach of his fiduciary duties;

(v) causing legal fees incurred by parties other than the Company to be debited to the Company;

(vi) procuring the issue of the Indemnities by the Company to himself on terms that were grossly and/or unfairly disadvantageous to the Company, and at the same time grossly and/or unfairly advantageous to himself;

(vii) approving the Company's entry into the Indemnities by way of resolutions dated 10 September 2008 and 3 June 2009;

(viii) appointing Glo Fabrics House Pte Ltd ("Glo Fabrics"), which was owned by Mdm Poh, to provide supplies to the Company, without obtaining competitive quotes.

(c) **Mdm Poh** breached her duty to act honestly under s 157 (one of the Act) including her duty to (a) act in the Company's interests and not in the interests of some other body, and (b) not place herself in a position where her duty to the Company and her personal interests may conflict, by involving herself in the following:

(i) allowing Rodney Tan to procure the payment of inflated management fees by the Company to CGH;

(ii) allowing Rodney Tan and Mr Seeto to procure the appointment of MDG to provide management services to the Company and/or the wrongful and/or excessive debiting of management fees by MDG to the Company;

(iii) allowing the Sijori Memberships to be disposed of to MDG without any consideration and this was also a breach of her fiduciary duties;

(iv) approving the Company's entry into the Indemnities by way of resolutions dated 10 September 2008 and 3 June 2009;

(v) allowing Rodney Tan's extraction of moneys from the Company pursuant to the Indemnities; and

(vi) appointing Glo Fabrics, which she owned, to provide supplies to the Company without obtaining competitive quotes.

(d) **Mr Lim** breached his duty to act honestly under s 157(1) of the Act, which required him to act in the Company's interests and not in the interest of some other body, by doing the following:

(i) allowing Rodney Tan to procure the payment of inflated management fees by the Company to CGH;

(ii) signing various management agreements between the Company and CGH;

(iii) allowing Rodney Tan and Mr Seeto to procure the appointment of MDG to provide management services to the Company and/or the wrongful and/or excessive debiting of management fees by MDG to the Company;

(iv) approving the Company's entry into the Second Indemnity by way of resolution 3 June 2009; and

(v) allowing Rodney Tan's extraction of moneys from the Company pursuant to the Indemnities.

(e) **Mr Gn** breached his duty to act honestly under s 157(1) of the Act, which required him to act in the Company's interest and not in the interest of some other body, by doing the following:

(i) allowing Rodney Tan to procure the payment of inflated management fees by the Company to CGH;

(ii) allowing Rodney Tan and Mr Seeto to procure the appointment of MDG to provide management services to the Company and/or wrongful and/or excessive debiting of management fees by MDG to the Company;

(iii) approving the Company's entry into the Second Indemnity by way of resolution dated 3 June 2009; and

(iv) allowing Rodney Tan's extraction of moneys from the Company pursuant to the Indemnities.

28 When the various complaints made by the plaintiff are considered together, it can be seen that they involve ten separate situations. The defendants are involved in these situations to different degrees with Rodney Tan being allegedly involved in all but one, whilst Mr Lim and Mr Gn are each involved in only four. As can be seen from the summaries in [26] and [27] above, the plaintiff has made a claim against MDG for "oppressive acts" while his claims against the defendant-directors are for breach of directors' duties. It seems that the plaintiff is relying on the alleged breaches of directors' duties by the defendant-directors to establish his case of minority oppression.

29 The defendants deny that there was any oppressive conduct or any breach of directors' duties. They also contend that the plaintiff has no standing to bring his various claims because these are claims of wrongs done to the Company rather than of personal wrongs done to him as a shareholder. Additionally, MDG and Rodney Tan contend that because the defendants had made reasonable buy-out offers to the plaintiff, his continuation of the action was unsustainable and an abuse of the process of the court.

30 On a separate note, there is an indemnity claim by Mdm Poh against Rodney Tan in the event that she is found to be liable to the plaintiff. For the most part, the indemnity claim has been dealt with by a settlement agreement dated 2 November 2016 between the parties but an issue has arisen under that agreement which they wish the court to resolve.

The legal principles

31 The plaintiff's claim is brought under s 216(1) of the Act which allows any shareholder of a company to apply to the court for relief on the basis, *inter alia*, that the affairs of that company "are being conducted" or the powers of the directors "are being exercised" in a manner oppressive to that shareholder or in disregard of his interests as a member of the company. The courts have considered the meaning and ambit of this section many times over the years and the principles to be applied in considering whether there has been a breach of the section entitling a shareholder to relief are relatively uncontroversial. A brief statement of the applicable principles should be sufficient to set the scene.

32 The touchstone of a minority oppression claim under s 216(1) is the element of commercial unfairness. Prejudice to the claimant may be an important factor in the overall assessment of unfairness but it is not an essential

requirement. The test of commercial unfairness involves a consideration of whether there has been a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect. Conduct that is technically unlawful may not be fair and conduct can be unfair without being unlawful. The foregoing summary of the applicable principles comes from *Lim Kok Wah and others v Lim Boh Yong and others* [2015] 5 SLR 307 ("*Lim Kok Wah*") which in turn drew on various pronouncements from preceding cases.

33 It should be noted that s 216 does not allow the court to interfere with the internal management of companies which are being managed honestly and in accordance with the law. Mismanagement of the company generally does not constitute oppression or disregard of a member's interests (see *Halsbury's Laws of Singapore*, vol 6 (Lexis Nexis, 2010 Reissue) at para 70.161). As it was put in *Lim Kok Wah* at [135] and [154], the role of the court is not to assess or judge the business or commercial merits of the company's management decisions.

34 A particular problem that has arisen for consideration in oppression cases is whether the plaintiff shareholder actually has a complaint that falls under s 216 or whether his action is a disguised derivative action in that he is, in truth, pursuing against the directors of the company causes of action that belong to the company itself. In the present action, various defendants have made the argument that the plaintiff lacks the standing to prosecute the suit against them. They submit that the wrongs alleged in this suit, if they are wrongs, would be wrongs done to the Company and not wrongs suffered by the plaintiff in his personal capacity as a shareholder of the Company. They argue that the plaintiff should not be allowed to use the personal remedy for oppression under s 216 because he should have pursued a derivative action in

the name and on behalf of the Company. This argument is partly based on the numerous allegations of breach of fiduciary duties owed to the Company which the plaintiff has made against the defendant-directors.

35 The leading case in the area is the Court of Appeal decision of *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 ("*Ng Kek Wee*"). At [61]–[63] of that case, the court notes the distinction between the personal rights of a shareholder and the corporate rights of the company concerned. This distinction applies even though a managerial or directorial action that impinges the company's rights may also adversely affect the interests of the shareholder. An action under s 216 is designed to vindicate personal rights and not corporate rights. Despite this, as the court also notes, the distinction between a personal right and a corporate right is rarely clear, and there is nothing objectionable in a s 216 action which is founded upon facts that also disclose a concurrent wrong against the company.

36 The court in *Ng Kek Wee* also observes (at [67]–[69]) that an action under s 216 is appropriately brought where the complainant is relying on the wrongfulness of the wrongdoer's conduct as evidence of the manner in which the wrongdoer has conducted the company's affairs in disregard of the complainant's interests as a minority shareholder and where the complaint cannot be adequately addressed by the remedy provided by law for that wrong. To that end, the analytical framework adopted by the Newfoundland Supreme Court in *Pappas v Acan Windows Inc* (1991) 2 BLR (2d) 180 (Canada) ("*Pappas*") (at [67]) provides useful guidance to determine whether a complaint is of an essentially personal or derivative nature (*Ng Kek Wee* at [70]):

> The concept of incidental injury serves a useful purpose in the resolution of the threshold question of whether the action is personal or derivative. The answer involves two considerations.

> *First, is the individual's injury distinct from the corporation's injury in that it does not occur simply because the corporate injury exists? Second, is the individual's injury in an area where the shareholders by their own representative actions are exercising a power in bad faith, or the directors are abusing a duty owed to the minority shareholders different from that owed to the corporation?*
>
> If the answer to either consideration is affirmative, then a personal cause of action will exist. Admittedly, there may, in some circumstances, still be uncertainly as to the nature of the cause of action.
>
> [emphasis in original]

37 In *Pappas*, the Newfoundland Supreme Court (at [110]–[111]) considered also the question of whether a personal remedy for oppression can be brought to vindicate intermingled derivative and personal rights, and held that a personal action should not be brought where the derivative and personal claims are interwoven to the extent that they cannot appropriately be separated.

38 In the circumstances, a close analysis is required of the facts and complaints to decide whether they are more properly wrongs to the Company rather than wrongs to the plaintiff himself. The analysis must take into account whether those wrongs that may be proven caused damage to the plaintiff which was more than simply reflective of the damage caused to the Company so that any relief offered to the Company would not also cure the damage suffered by the plaintiff. Additionally, it must be considered whether the proven wrongs, although in their nature wrongs against the Company rather than wrongs against the plaintiff, demonstrate that the Company was run in a manner which benefited the majority shareholder and the defendant-directors, particularly Rodney Tan, and in disregard of the plaintiff's interests as a minority shareholder.

39 I now turn to consider the various complaints in detail. The complaints fall into various categories and I will therefore refer to them by an overall numerical reference, for example, the First Complaint.

Analysis of the Complaints and the defences to them

The First Complaint: Management fees paid by the Company to CGH

40 Between 1 June 2007 and 1 January 2012, the Company entered into a total of eight management services agreements with CGH as follows:

(a) Management services agreement dated 1 June 2007 ("the First MSA") under which CGH would provide the Company with four types of services, *viz*, project management services, hotel management services, IT management services, and membership management services for the members of Sijori Resort, all at a fee of $73,000 per month;

(b) Management services agreement dated 1 November 2007 ("the Second MSA") under which CGH's monthly fee was increased and apportioned as follows:

(i) for project management, $56,500 from November 2007 to January 2010;

(ii) for asset management and pre-opening support, $31,500 from November 2007 to August 2008 and $56,000 from September 2008 to January 2010; and

(iii) for IT management, $12,000 from November 2007 to January 2010.

(c) Management services agreement dated 6 December 2007 ("the Third MSA");

(d) Supplemental agreement to the Second MSA dated 10 November 2009 ("the First SA");

(e) Second supplemental agreement to the Second MSA dated 25 November 2009 ("the Second SA");

(f) Third supplemental agreement to the Second MSA dated 12 April 2010 ("the Third SA");

(g) Fourth supplemental agreement to the Second MSA dated 18 July 2011 ("the Fourth SA"); and

(h) Fifth supplemental agreement to the Second MSA dated 1 January 2012 ("the Fifth SA").

The plaintiff has made a number of allegations of wrongdoing in connection with these management agreements and the fees paid to CGH pursuant to them. These allegations fall into different categories and I will deal with them accordingly.

The propriety of the agreements

41 The plaintiff criticises the general propriety of the First, Second and Third MSAs on the following grounds:

(a) The First, Second and Third MSAs were not strictly legally binding because no board resolution was passed authorising the Company's entry into these agreements nor was such entry ratified later by the Company's board.

(b) By procuring the appointment of CGH by the Company, Rodney Tan put himself in a position of conflict of interest as he was also a director of CGH at the material time and there was no evidence that he had disclosed this conflict to the board of the Company at the time the First MSA was entered.

(c) That it was wrong to appoint CGH as the manager of the Company because the assertion that it had significant hotel experience, expertise and proven track record in the hotel business was exaggerated and at the time of the appointment CGH did not have any other hotel project running.

(d) The appointment of CGH was carried out without any tender or enquiry and at a rate far higher than the market rate.

42 In my view, the first two criticisms above are points that indicate a casual approach to corporate governance rather than mismanagement as such. The directors of the Company were fully aware of Rodney Tan's association with CGH before they asked him to invest in the Company and, indeed, it was because of that association that they approached him. In these circumstances, there was no need for formal disclosure of Rodney Tan's directorship of CGH. Further, although no board resolution was passed to approve the agreements, the evidence established clearly that the board was aware of the agreements and their implementation.

43 On the point of experience, whilst CGH might not have had as much experience in the hotel industry as it made out, it had previously run a hotel in Tianjin and Rodney Tan was known as an hotelier because of his experience in the family business that ran the Cairnhill Hotel. Certainly, he had more

experience with hotels than Mr Seeto, Sebastian Wong or the plaintiff himself. Considering that the Company had to quickly come up to speed in managing a hotel, it was not obviously unreasonable for it to appoint a manager with more experience in this area rather than try to build up its own team from scratch.

44 In relation to the fourth point, the plaintiff says that there is no evidence of any tender or enquiry in relation to the first and second agreements. Although the Third MSA has an appendix that shows quotations obtained from other parties, these are said to be "inadequate and purely for the purpose of whitewashing". The plaintiff submits that the result of the inadequate process was that the first three management agreements were unduly advantageous to CGH and the Company paid fees that were higher than average for the services to be provided.

45 I do not accept the plaintiff's submission. As I have pointed out, Mr Seeto brought Rodney Tan on board for his expertise and connections and these were intended to be used for the Company's benefit. There is no legal requirement for a private company to carry out a tender exercise whenever it wants to engage the services of a contractor. I accept that at the time CGH was first appointed in June 2007, work on Phase 1 (which was supposed to have been completed by May 2007) had not even started and the Project was on the verge of collapse. The Company was therefore at risk of the Building Agreement being terminated by SDC and its priority was to complete Phase 1 as quickly and cost-effectively as possible, in order to persuade SDC that it could carry out the Phase 2 works. In addition, Mr Seeto's unchallenged evidence was that the Company had no funds to pay its contractors and that CGH was appointed precisely because it was willing to, and did, finance this

work. In those circumstances, the delay involved in carrying out a tender exercise might have been prejudicial to the Company.

46 Secondly, the only evidence which the plaintiff adduced to support his claims that these agreements were unduly advantageous to CGH and that the Company was paying unduly high fees for the project management services was that of his expert, Mr See Choo Lip ("Mr See"). Mr See testified that: (a) based on the estimated construction cost his firm would have charged $1,188,000 as its project management fee, a sum that is lower than the $1,468,000 charged by CGH under the Second MSA; and (b) that his firm's fees were slightly higher than the market rate. Mr See's evidence on this point cannot, however, be regarded as evidence of the average market rate and Mr See was not suggesting that it was. Further, his evidence at best relates only to the fees charged by one firm. Apart from Mr See's evidence, the plaintiff provided no evidence of the average market rates for the services covered by the First, Second and Third MSAs. He has not proved his assertion.

Fees for hotel management charged from June to October 2007

47 The plaintiff's next criticism was that CGH charged the Company fees for hotel management from June to October 2007 although the hotel was not in operation during this period as renovations were being carried out. The difficulty with this criticism is that there is insufficient evidence that the hotel was entirely closed during this three-month period. Mr Seeto testified that it was but Rodney Tan asserted the contrary. The plaintiff has not proffered any reason why Mr Seeto's evidence should be preferred to that of Rodney Tan. As Rodney Tan was the prime mover of events during that period and was actively trying to raise funds for the Project, he is more likely to have been aware of what was occurring on site at the time. Mr Seeto, on the other hand, had sold his shares in

MDG upon Rodney Tan's entry and he admitted in court that thereafter he was not at the site on a regular basis. I therefore conclude that the plaintiff has not established that the charging of fees for hotel management services from June to October 2007 was improper.

Pre-opening support services

48 Under the Second MSA, the Company was to pay CGH for "Asset Management & Pre-Opening Support" $31,500 per month from November 2007 till August 2008 and $56,000 per month from September 2008 to January 2010. The plaintiff's criticism is that this was an unnecessary service and an unnecessary fee because Movenpick AG was obliged to, and did in fact, provide these services pursuant to the pre-opening services agreement dated 18 January 2007 ("Pre-opening Agreement").

49 Rodney Tan submits that while Movenpick AG was supposed to provide such services, it did not in fact provide them (with the exception of giving some suggestions for food and beverage concepts) which necessitated the engaging of CGH. The plaintiff, however, contends that:

(a) as at November 2007, it was still contemplated that Movenpick AG would carry out the pre-opening services pursuant to the Pre-opening Agreement;

(b) even if no services had been provided as at November 2007 when the Company entered into the Second MSA, it was unreasonable for Rodney Tan to assume that Movenpick AG would not be providing such services, given that this was still early in the day;

(c) the Company's directors should have insisted on Movenpick AG performing its legal obligations under the Pre-opening Agreement; and

(d) Movenpick AG did in fact provide pre-opening services to the Company and Rodney Tan was aware of this.

50 The plaintiff has provided little evidence to support his allegation. In court he asserted, that while he knew that Movenpick AG had done a lot of work, he was "not sure" as to "exactly what the specifics are". He confirmed that he received no e-mails from Movenpick AG and did not know whether it had formed a pre-opening team. The evidence from the defendants, on the other hand, was that Movenpick AG had provided minimal services and these therefore had to be supplemented by the CGH team. This evidence includes the following:

(a) Mr Seeto stated that from January to May 2007, Movenpick AG did not provide pre-opening support services;

(b) Gary Koh (who was the Company's CEO from January to June 2007) gave evidence that Movenpick AG was not involved, beyond an advisory role in respect of Phase 1;

(c) Rodney Tan's evidence was that, from the time he came into the Company, Movenpick AG did not do anything substantial and was providing suggestions that were not sufficiently detailed to be worked on; and

(d) Mr Gn's evidence that in November 2009 when Phase 2 was afoot, no Movenpick AG people came in to prepare for the

> opening of the hotel and that in the first half of 2010 it was the staff of CGH who were doing this.

51 The evidence also showed that although Movenpick AG did provide some pre-opening services, these were not substantial. The plaintiff pointed out a collection of documents and correspondence as evidence of Movenpick AG's provision of the requisite services. These documents do not, however, detract from the point that the services were unsatisfactory. In fact, the documents reinforced the defendants' point. They comprise 102 pages and 22 e-mail chains in respect of a project that spanned 5½ years and three openings of the hotel. Rodney Tan explained that the e-mails simply contained suggestions rather than the comprehensive plans that were required for the hotel.

52 The defendants also produced evidence that CGH had provided the necessary pre-opening services. It made arrangements for a pre-opening team for the Company and Mr Lim was given the job of assisting that team in HR matters. Mr Lim's evidence was that the team comprised more than 20 people and he identified not only the members of the team but also, in detail, the work that they did. Mr Gn testified that CGH provided the Company with all necessary functions required for the pre-opening support such as the general manager, the executive assistant manager, the IT and finance staff, the engineering support and the procurement office.

53 Having assessed the evidence, I hold that in the circumstances it was reasonable for the Company to hire CGH to provide pre-opening services notwithstanding the Pre-Opening Agreement.

Amount charged by CGH

54 The plaintiff claims next that the amount charged by CGH was manifestly excessive. He has both general and specific complaints. I deal first with the general complaints.

55 The plaintiff points to tabulations prepared by Ms Tan Poh Swan ("Ms Tan"), a sister of Rodney Tan, who was employed by CGH. These tabulations show the contribution of CGH employees to the Company for the years 2007 to 2013. A column sets out the percentage of each employee's time spent on the Project. The plaintiff argues that: (a) this table overstates the staff costs incurred by CGH in the provision of the management services; and (b) even on the allegedly inflated figures, the tabulations show that the management fees charged by CGH were manifestly excessive and that it would have been cheaper for the Company to have employed the relevant personnel directly.

56 The tabulations are not, however, complete in relation to the cost of the employees to CGH. They do not include costs such as the employer's CPF contributions and the employees' insurance, medical benefits and training fees. Additionally, they were prepared by Ms Tan within a week and the percentage contribution was derived by observation rather than any formal objective method. Whilst this means that they are only rough estimations of the time that the various employees spent on the Company's matters, it is worth noting that CGH itself was not running any other substantial hotel business at the same time and most of its activity and that of its staff was focussed on the Project. In this regard, Mr Tan Chin Ren, the Company's auditor, was able to testify that he and his team had reviewed documents which indicated that CGH did indeed provide to the Company the services referred to in both the First and Second MSAs.

These documents were adduced in evidence. Further, Mr Jeffrey Chua, the Company's chief operating officer between August 2008 and April 2010, provided evidence of what he described as "broad ranging" services that CGH had given the Company. Among other things, it had recruited the necessary staff for the Project, attended meetings, provided the Company with detailed planning and follow-up in respect of different aspects and concepts for the hotel, managed the Company's cash flow, engaged and supervised the Project consultants and designers, and ensured the security and proper maintenance of the hotel.

57 The defendants also submit that engaging CGH resulted in cost savings for the Company. This was because centralising the provision of all the services required to re-develop and refurbish the hotel meant that the vision of a five-star hotel could be achieved in a cost efficient manner. The plaintiff asserted in court that if the Company had engaged separate service providers instead of CGH for each service, this would have been cheaper. The plaintiff, however, did not adduce any evidence to support this point except for Mr See's evidence in relation to project management expenses. Further, the plaintiff bases his position on his own alleged experience in the IT industry and his assumptions on what Movenpick AG was going to do. The plaintiff's experience in the IT industry cannot be considered independent evidence of costing. Even if it were it would be only one example of what may be charged and would not be sufficient to establish a market rate. I have already commented on the Movenpick AG point and do not need to repeat it.

58 The plaintiff relied on Mr Seeto's assertion at trial that the management fees charged by CGH were at a premium and "above reasonable". This, however, was really Mr Seeto's opinion rather than established fact. The

plaintiff's further contention was that the management fees were too high because CGH also charged the Company monthly rental despite the fact that the premises concerned were occupied by its own employees. This point does not take the plaintiff very far as it can be assumed that if the Company had had its own staff, it would have had to rent premises to house them. It is not unreasonable that some rental was paid by the Company to CGH for premises occupied by CGH employees who serviced the Company.

Project management fees

59 Moving on to the plaintiff's specific allegations, the first of these is that the amount of project management fees charged by CGH was excessive. The plaintiff insists that this allegation is directed at the entire duration of the MSAs, even though in his closing submissions he focussed on the Second MSA, under which the monthly management fees were charged for three services: (a) project management; (b) asset management and pre-opening support; and (c) IT management.

60 Project management services were charged at $56,500 per month. The plaintiff attacks this fee on two grounds. The first is that the fee was charged on a monthly basis without any reference to the value of the Project. According to Mr See, it is unusual for project management fees to be structured such that they are payable on a monthly basis, as the fees are normally linked to the progress of the relevant project. He also suggested that project management fees are normally agreed on the basis of the total construction cost with a maximum time period stated for the project. Using (a) Mr See's evidence on the fees quoted by his then employer, KDK Consultancy Pte Ltd; (b) Mr Seeto's evidence on the project management quotes provided to him by two other firms; and (c) the quotation from a fourth firm that was obtained by Lawrence Chia, appointed

project manager by CGH between October 2007 and June 2009 (all of which were based on a percentage of the total construction cost), the plaintiff has put together a comparison table showing the project management fees that would have been charged by these firms as well as those charged by CGH for Phase 2. CGH's fees total $2,147,000 ($56,500 multiplied by 38 months (January 2008 to February 2011)), and this is said to be 11% to 55% more than the fees of the other firms.

61 In my view, not much can be made out of the plaintiff's first argument. First, One Marina Property Services Pte Ltd ("OMPS") was appointed as project manager in June 2009, and OMPS's quote showed that its fees were charged on a monthly basis as well. At trial, Mr See explained that this would be the case if the project was already halfway through or was not a "full service" from the beginning. His subsequent explanation for such a difference in approach was:

> COURT: Why do you go per month when it's halfway through?
>
> A: Because, going by percentage, a certain proportion of the fee already paid off at certain milestone. So if the project already started work on site, a lot of milestone would have been covered. And one of the milestone in the percentage arrangement during the construction time, that full percentage during the construction time is paid equally per month. So that's how that's the basis is.

This explanation, however, does not mean that project managers cannot choose to charge on a monthly basis from the beginning of a project – it just suggests that if a manager takes over halfway, it would prefer not to charge on a percentage basis because if the manager followed the usual practice at that stage, there would be little left for it to charge for.

62 Moreover, there was also some evidence that CGH's project management services were more extensive than normal. Rodney Tan gave evidence that while the project management team comprised an in-house technical assistance team, which ensured that problems on-site would be fixed quickly and efficiently, most project management companies did not provide such technical support services, instead requiring the client to employ a separate technical support services team. Furthermore, while Mr See conceded that he assigned only one full-time and one part-time employee for one of the two hotel projects referred to in his expert report, and only one full-time employee for the other, there were more than five full-time personnel in CGH's project management team.

63 As for the comparison of CGH fees with those of other firms, I agree with MDG and Rodney Tan that this is a judgment with the benefit of hindsight in the sense that parties could not have known that completion of the Project would be delayed until March 2011. From the Second MSA itself, it is clear that project management fees were contemplated to be payable only from November 2007 to January 2010, *ie*, a period of 27 months. On this basis, CGH's project management fees would have come to the lower figure of $1,525,500, well within the range of the fees of the other firms. In his reply submissions, the plaintiff suggests that, once the Project was delayed, the project management fees should have been adjusted. While there may be some superficial attractiveness to this suggestion, it is not clear why this should have been so or, more importantly, on what basis this could have been done. Surely the mere fact of delay alone would be a poor reason for such an adjustment?

64 The plaintiff's second ground of attack is that the salary of the CGH project management team does not justify the project management fees charged.

Relying on another set of tabulations totalling the salaries of employees for each service provided by CGH to the Company, the plaintiff submits that CGH was making a profit of at least 72%. Relying next on Ms Tan's tabulations and her evidence that there were only three CGH personnel involved in project management, the plaintiff submits that the salaries of these three personnel for 2009 totalled a mere 17% of the project management fees charged by CGH to the Company.

65 The plaintiff's second ground loses its force when it is realised that more than three employees were involved in project management as shown by the evidence overall. Ms Tan's identification of the three CGH personnel involved in project management was based on her being referred during cross-examination to meeting minutes of two site/progress meetings which had the names of these three personnel. In this regard, it appears that she was almost led to give this evidence, which I think cannot be taken to be representative of all the CGH personnel involved in project management. Rodney Tan's own evidence was that he assigned more than five full-time employees to work on the Project.

66 Accordingly the plaintiff has not established that the amount of project management fees charged by CGH was excessive though they might have been high.

OMPS's consultancy fees from June 2009

67 The plaintiff's second allegation is that in addition to charging project management fees, CGH also debited to the Company the consultancy fees of OMPS from January 2010 to March 2012. In June 2009, on Lawrence Chia's retirement, OMPS was appointed as the project manager. The plaintiff points to

contemporaneous documents indicating that it was CGH (and not the Company) that appointed OMPS. His complaint is that CGH should have absorbed the OMPS fees under the management fees charged by CGH instead of debiting them to the Company. The plaintiff also relies on Mr See's evidence that the scope of works to be undertaken by OMPS was comprehensive for the remaining activities of the Project and covered all items of work that were yet to be carried out at the time of OMPS's proposal to CGH in June 2009. The point here is that once OMPS took over, there was no project management function left to be performed by CGH.

68 There was evidence, however, that even after Lawrence Chia left and OMPS was appointed, CGH's employees continued to assist OMPS. Moreover, Mr See was challenged on his evidence under cross-examination and it became apparent that his evidence may not have been entirely accurate. The upshot of the evidence is that CGH continued to be involved in project management even after the appointment of OMPS. Notwithstanding that, however, it is arguable that CGH's project management fees ought to have been *adjusted* (specifically, lowered) to take Lawrence Chia's departure and OMPS's appointment into account. At the least, serious consideration ought to have been given to whether an adjustment was required and whether some part of CGH's project management services could have been dispensed with. The plaintiff's complaint therefore has some basis although there is insufficient evidence to assess how much money could have been saved. Although Rodney Tan's evidence is that he did not know of this charging arrangement as the decision-making was delegated to and undertaken by his assistant Jeffrey Chua, I find this difficult to believe. As the plaintiff points out, Rodney Tan was a director of both the Company and CGH and must have or ought to have known that CGH was charging OMPS's consultancy fees to the Company.

Clause 4 of the Second MSA

69 The plaintiff's next allegation relates to cl 4 of the Second MSA which provides, *inter alia*, that:

> The Company shall also reimburse all associated costs properly incurred by the Management Service Provider in carrying out its management services under the Engagement. All expenses include [*sic*] for copies, blue prints, telecommunications, remuneration of staff and benefits etc will be invoiced monthly by the Management Service Provider to The Company at cost and The Company agrees to make payment promptly.

The plaintiff's case is that this provision is "to the undue advantage of CGH, and is not in accordance with general commercial practice". In his statement of claim, the plaintiff says this clause is to the "undue advantage" of CGH because it effectively means that CGH's fees are exclusive of all costs and expenses incurred including its staff costs. In addition, the invoices issued by CGH to the Company for the management fees contained a note that the management fees exclude all travel, out-of-pocket, printing and miscellaneous expenses. The plaintiff says that while Rodney Tan initially insisted that he could not remember if such expenses were in fact charged to the Company in addition to the management fees, he eventually accepted when shown the evidence that CGH regularly billed the Company for out-of-pocket expenses. The amounts charged by CGH as out-of-pocket expenses were substantial, and included invoices for the amounts of $100,040.94, $88,192.83, $167,566.29, $82,363.79, $156,432.69.

70 In itself, it is not unreasonable to have a clause allowing CGH to recover out-of-pocket expenses. The reasonableness of the clause depends, however, on what is covered by out-of-pocket expenses. While cl 4 mentions "copies, prints, telecommunications" as examples, and these are expenses that would be

generally be accepted as out-of-pocket, it also states "remuneration of staff and benefits" which are not typical out-of-pocket expenses for a manager who is obtaining a management fee. As director of the Company, Rodney Tan had a duty to ensure that it did not pay unusual fees and expenses. The invoices that CGH sent the Company for out-of-pocket expenses were, sometimes, for very large amounts and Rodney Tan/CGH should have been able to justify these expenses as being properly classified as out-of-pocket expenses. There is no evidence of that. In this regard, the plaintiff's complaint has weight.

Mr Gn's consultancy fees

71 The plaintiff's fourth allegation relates to Mr Gn. He provided consultancy services to CGH at a monthly fee. This fee of $5,000 per month from February 2010 to January 2011, and of $10,000 from February 2011 up to 2012, was charged by CGH to the Company. There was evidence that Rodney Tan approved these payments by the Company. The problem for the plaintiff in regard to this allegation is that it was not pleaded and therefore cannot be considered since Rodney Tan had no opportunity to answer it.

Management fees when hotel ceased operations

72 The plaintiff's fifth allegation is that CGH continued to charge the same management fees even though the hotel ceased operations in June 2009 and only resumed them in March 2011. The plaintiff submits that there should have been some adjustment to the management fees (save for project management) charged over this period as CGH would have had less work to do.

73 The evidence shows that CGH remained engaged during this period and that the hotel's closure meant that there were *other* things that needed to be

done. Mr Lim gave evidence that post-June 2009, work had to be done with regard to, *inter alia*, the inventory as well as housekeeping and food and beverage matters. On the human resource front, recruitment strategies had to be formulated in order to ensure that the hotel would be adequately staffed. Rodney Tan also gave evidence that CGH took the opportunity to revise its plans.

74 Despite these points made on behalf of the defendants, it appears that Rodney Tan gave no thought at all to the extent to which the work which CGH had to do had been reduced though he must have been aware that the hotel's closure would be for an extended period. He was content for CGH to continue collecting fees at the old levels. This might have been acceptable for part of the work. It would be recalled that under the Second MSA, the monthly management fees comprised fees for:

(a) project management;

(b) asset management and pre-opening support; and

(c) IT management.

As noted earlier, the plaintiff does not assert that (a) ought to have been adjusted during the period of the hotel's closure. I agree. As between (b) and (c), (b) was the more significant component as it involved monthly fees of $56,000 during this period, as compared to the monthly fees of $12,800 for (c). However, it is logical to assume that both would have required less attention and fewer personnel during the period that hotel operations ceased entirely. If $56,000 a month was a reasonable fee for providing asset management and pre-opening services while the hotel was operating, obviously it would not be reasonable for pre-opening services alone. The problem here is that it is difficult to assess by how much items (b) and (c) were excessive. As a director of the Company,

Rodney Tan had a duty to ensure that it did not incur unnecessary expenses. He does not seem to have done much to discharge this duty during the period in question. While I find him to be in breach of duty to the Company in this regard, whether his omission was merely neglectful or demonstrates a deliberate course of promoting the interests of CGH above those of the Company so as to make it oppressive to minority shareholders is something I will consider later in this judgment.

Pre-opening support fees

75 The plaintiff's sixth complaint is two-fold. First, the evidence of Rodney Tan (which was, to some extent, corroborated by Mr Gn) was that the pre-opening support services for Phase 2 only commenced in March 2010. The plaintiff claims that, as CGH was charging the Company for pre-opening support from November 2007 pursuant to the Second MSA, the pre-opening fees commenced too early, or were, in the alternative, grossly excessive for the period up to March 2010 at the very least. Second, the plaintiff contends that, notwithstanding Rodney Tan's evidence that half of the pre-opening support work would have been done by the completion of Phase 2 in March 2011, this was not taken into account and the fees for pre-opening support remained the same under the Third, Fourth and Fifth SAs.

76 There is a difficulty in that the pre-opening support fee was charged as a lump sum under "Asset Management & Pre-Opening Support". In other words, there was *no individual component* for pre-opening support on its own. This poses a problem for the plaintiff at the outset because it makes it difficult for him to even establish *what* the pre-opening support fees were. However, it can be inferred that the pre-opening support fees were not insubstantial in view

of the evidence which Rodney Tan gave on the contributions which CGH made to the pre-opening requirements of the hotel.

77 I take the same view towards this complaint as I did to the previous one. It shows some neglect of Rodney Tan's duty to the Company but whether it is also demonstrative of an intention to prefer the interests of CGH (and thus also himself) is something I postpone for further consideration below.

Rodney Tan's director's remuneration

78 The plaintiff's seventh allegation relates to Rodney Tan's director's remuneration of $15,000 per month. The plaintiff points to Mr Seeto's evidence that this remuneration was paid on the basis that Rodney Tan would, *inter alia*, liaise and negotiate with SDC with respect to the various contractual obligations owed by the Company. The plaintiff submits that this overlaps "largely" with the asset management services that CGH was to provide and that, given this overlap, the $56,000 charged as asset management fees by CGH was excessive.

79 It should first be clarified that Rodney Tan's director's remuneration was paid only up till June 2009 and that, as already mentioned, the sum of $56,000 was a lump sum charged for *both* asset management and pre-opening support. More importantly, however, I do not think that the plaintiff has sufficiently proved the validity of this complaint. First, it is not clear why Mr Seeto's evidence should be taken as the final word as to the basis for Rodney Tan's remuneration. Second, even if it were so, the overlap alleged by the plaintiff is by no means self-evident. The Second MSA (which is what the plaintiff relies on) sets out the following concerning asset management and pre-opening:

> **2. Asset Management & Pre-Opening**

> This Agreement is intended to be the basis for a fruitful cooperation between the Management service provider and the Company and it is the goal of both parties to maximise the Gross Operating Profit by ongoing business support and development, reflects the successful combination of experience and professionalism of our management teams.
>
> The appointment of an exclusive operator and manager herein will be referred to as "Consultants". This will be subjected to the approval of the Company and the Management Service Provider.
>
> The Consultants will be given the authority at his sole discretion to assist in operate the name and for the account of the Company relating to the hotel.
>
> The Consultants will assist to co-ordinate, operate and supervise the project of the hotel subject to the provision of this agreement.
>
> The Consultants will be give full assistance in control and discretion in connection with the project, management supervision of the hotel.

In this connection, MDG and Rodney Tan rightly point out that the plaintiff has not identified with precision a single area of specific overlap between Rodney Tan's work *qua* director of the Company, on the one hand, and the asset management services that CGH provided to it, on the other. I also note MDG and Rodney Tan's objection that this case was not put to Rodney Tan during cross-examination. Consequently, I find little substance in the plaintiff's complaint over Rodney Tan's director's remuneration.

Increase of fees in the Fourth SA

80 The plaintiff's eighth allegation relates to the increase in management fees from $125,300 to $130,000 under the Fourth SA, for the period from August 2011 to December 2012. The plaintiff rejects Mr Lim's evidence that this was on the basis that the Company's working capital requirements had increased and submits that this increase was unwarranted because by this time,

the hotel had already opened and a large part of the pre-opening support had already been completed.

81 In my view, the plaintiff has not sufficiently proved why this increase was unwarranted. His rejection of Mr Lim's evidence is misplaced because Mr Lim subsequently clarified that he did not remember why there was such an increase. Any number of reasons could have explained this increase. Rodney Tan points out that this submission was unpleaded and not made in the plaintiff's opening statement either. It is therefore unsurprising why no such reason has been forthcoming from the defendants. I note further that the increase in fees complained of (3.75%) is not particularly significant. Accordingly, I do not think that there is much merit to this complaint either.

Adjusted management fees under the Second SA

82 The plaintiff's next allegation concerns the adjusted management fees payable by the Company to CGH under the Second SA, which the plaintiff contends was to inflate drawdowns from facilities with Maybank. For clarity, it should be noted that the Company drew down on its working capital facility from Maybank whenever it had to pay fees under the Second SA. Under the Second SA:

(a) the management fees were adjusted from $125,300 to $550,000 per month;

(b) the management fees were to be paid up to six months in advance;

(c) upon receipt of the management fees, CGH was to transfer each month, at the Company's request, up to an aggregate sum of

$424,700 (from the management fees received) to the Company as working capital; and

(d) the balance remaining after the transfer was to be retained by CGH as the net management fees received.

MDG and Rodney Tan emphasise that the amount of $424,700 was repaid to the Company, such that the management fees paid to CGH remained at $125,300. The same point is made by Mr Lim and Mr Gn, and this does not appear to be disputed by the plaintiff.

83 The plaintiff rejects Rodney Tan's reasons for the adjusted management fees. Rodney Tan's first reason is that CGH was essentially providing a treasury function for the Company as the Company did not have its own finance management team. He says that this prepayment arrangement was important "from a controls perspective": as the Company would raise a fund request letter with a list of specific expenses to CGH for approval whenever it required funds, this ensured that there were adequate controls over the management and use of the Company's funds. The plaintiff submits, however, that CGH's personnel would still be in control of the Company's funds in any event, since it was Rodney Tan's own case that CGH was providing the services of a finance management team to the Company. Mr Gn explains, however, that the working capital component had been incorporated because CGH was settling, and would frequently have to settle, project expenses and interest costs on the Company's behalf. Mr Gn also stated at trial that Rodney Tan had explained to him that the bank preferred this arrangement as it was simple and straightforward.

84 Rodney Tan's second reason is that the adjustment of management fees provided a means to obtain more working capital for the Company from

Maybank because Maybank would only provide funds upon submission of invoices issued by the Company's service providers. The plaintiff submits that Rodney Tan was misleading Maybank by providing CGH management fee invoices for $550,000, when a large proportion of this fee was not for actual services that were provided to the Company. Rodney Tan's evidence (which the plaintiff appears to accept), however, was that it was one of *Maybank's own* representatives, who had suggested this arrangement so that the Company could obtain more working capital. In any event, the main victim of this deception would have been *Maybank* and not the Company. I note also that the plaintiff also "draw[s] [the court's] attention to" substantial sums of the Company's money spent by Rodney Tan to entertain Maybank's officers, but stops short of suggesting that this was improper.

85 In addition, the plaintiff submits that the level of debt owed by the Company to CGH (approximately $13.7m as at 31 December 2010, $19.9m as at 31 December 2011 and $25m as at 31 December 2012) is inexplicable in light of the adjusted management fees and Mr Lim's evidence that the working capital requirement of the Company was about $404,000 (*ie,* less than the $424,700 prepayment) as of November 2007. In any event, there was also evidence that CGH would extend loans to the Company from time to time in the interests of operational effectiveness and efficiency, and that there were times when the Company's request to CGH to make payments on its behalf exceeded the prepayment of $424,700. Finally, the plaintiff, in his reply submissions, also appears to have resurrected the point made in his statement of claim but abandoned in his closing submissions that there was an element of "funding" in so far as the funds were payable six months in advance.

86 In my view, the plaintiff's submissions have weight. In the first place, since CGH was providing and charging for staff to manage the Company's finances, among other things, there was little reason to agglomerate the Company's drawdowns from Maybank. The Company could have made drawdowns to pay bills on a monthly basis as and when the bills came in instead of drawing down the money in advance in anticipation of the bills' arrival. The staff would in any case be checking the bills and ensuring that only proper ones were paid and it would not have been much extra work for them to draw up a schedule of outstanding invoices on a monthly basis for submission to Maybank. Secondly, there was even less reason to provide for the management fees (including the working capital requirements) to be paid so much in advance. The six-monthly payment scheme only increased the Company's interest burden without commensurate benefit. Thirdly, as the plaintiff emphasises, the amounts drawn down from the Maybank facilities were usually sufficient to meet the Company's working capital expenditure and therefore the increasing level of the Company's debt to CGH over the years is hard to explain. The reasons provided by Rodney Tan for this procedure, in my view, were obfuscatory rather than clarificatory. The upshot of this manner of paying management fees to CGH was that that entity was able to receive large amounts of cash every six months and only had to hand over a fraction of the same to the Company on a monthly basis. It is hard not to conclude that this arrangement benefited CGH far more than it did the Company. It also resulted in the Company being unnecessarily indebted to CGH while at the same time increasing both its interest and capital indebtedness to Maybank, so that putting such a system in place was not only a breach of directors' duty but also commercially unfair to other shareholders.

Disclosure of the First and Third MSAs

87 The plaintiff's next allegation is that Rodney Tan failed to disclose or sought to conceal the First and Third MSAs. He refers to Rodney Tan's affidavit in a separate suit (*viz*, Suit 568) and says that Rodney Tan "sought to give the impressions that the only management fees payable by [the Company] to CGH were those under the [Second] MSA". The plaintiff seems to suggest that the Third MSA only emerged fortuitously during the final tranche of the trial and that it was not voluntarily disclosed by the Company even though the plaintiff's solicitors had previously made a request for documents which he says included the Third MSA.

88 It is unclear what this assertion is intended to go towards. The plaintiff's allegations relate to Rodney Tan's conduct *vis-à-vis* his discovery obligations and it is difficult to see how they can be the evidence of a breach of director's duties (in the context of a claim under s 216 of the Act). In any event, MDG and Rodney Tan have explained that Rodney Tan's affidavit was filed in support of the Company's application for leave to raise funds for, *inter alia*, project management fees payable to CGH and that, in this context, only the Second MSA was relevant. As regards the Third MSA, counsel for MDG and Rodney Tan had stated in an e-mail to counsel for the plaintiff dated 19 September 2016 that matters relating to the Third MSA had not been pleaded and that it was never acted upon by either CGH or the Company. Although this e-mail came *after* the Third MSA was provided to the plaintiff on 15 September 2016, it does shed some light on Rodney Tan's position *vis-à-vis* the relevance of the Third MSA. The plaintiff has attempted to argue that the Third MSA is "clearly relevant as it sheds light on the circumstances and the intention behind the

various MSAs", but it is unclear how this is so. In the premises, I do not think that the plaintiff's arguments on this point support the First Complaint.

The plaintiff's calculations regarding the First Complaint

89 The last set of submissions in this area by the plaintiff does not allege any impropriety but rather sets out the plaintiff's calculations of the amount that, in his view, should have been paid under the First Complaint. Two alternative calculations are proposed in this regard.

90 The first calculation is based on the plaintiff's submission that the management fees stipulated in the Third MSA should have overridden those under the Second MSA from 6 December 2007 (the plaintiff claims that the Company was charged the management fees *per* the Second MSA up till 31 December 2012). The difference between the monthly management fees in both agreements is as follows:

<table>
<tr><th colspan="4">Management fees under the Second and Third MSAs</th></tr>
<tr><th colspan="2">The Second MSA</th><th colspan="2">The Third MSA
(November 2007 to May 2009)</th></tr>
<tr><td>Project management</td><td>$56,500 (November 2007 to January 2010)</td><td>Project management</td><td>$38,000</td></tr>
<tr><td rowspan="2">Asset management and pre-opening support</td><td>$31,500 (November 2007 to August 2008)</td><td>IT services</td><td>$12,800</td></tr>
<tr><td>$56,000 (September 2008 to January 2010)</td><td>Membership management</td><td>$20,000</td></tr>
</table>

<table>
<tr><td>IT management</td><td>$12,800 (November 2007 to January 2010)</td><td>Hotel management</td><td>$30,000</td></tr>
<tr><td rowspan="2">Total:</td><td>$100,800 (November 2007 to August 2008)</td><td rowspan="2">Total:</td><td rowspan="2">$100,800</td></tr>
<tr><td>$125,300 (September 2008 to January 2010)</td></tr>
</table>

The plaintiff further proposes deducting the $20,000 membership management fees under the Third MSA from March 2008 onwards, on the basis that there is no evidence that membership management services were being provided by CGH to the Company or that the Company was in need of such services after the Sijori Memberships were transferred out in February 2008. This leaves monthly management fees of $100,800 from November 2007 to February 2008 and of $80,800 from March 2008 to December 2012. The plaintiff further submits that the Company was charged asset management fees of $51,169 per month after 31 December 2012 up till "at least" 31 December 2014, and that on the basis of the Third MSA, this should have been no more than the $30,000 provided for hotel management. In light of these submissions, the plaintiff proposes that the total payable in management fees should be $6,174,600 (before GST).

91 However, the plaintiff does not have any basis for suggesting that the Third MSA had superseded the Second MSA. As mentioned earlier, MDG and Rodney Tan's position is that the Third MSA was never acted upon by either CGH or the Company. This position is supported by the fact that unlike the First and Second MSAs, the Third MSA was not engrossed on CGH's letterhead (even though it is, admittedly, signed). More significantly, the SAs (which were

all entered into after the Third MSA) all refer to the Second MSA. Accordingly, I accept the submission of MDG and Rodney Tan that the Third MSA was effectively mutually abandoned.

92 The plaintiff's second calculation is based on the CGH staff costs that are attributable to the Company for the years 2007 to 2012 (notwithstanding his position that Ms Tan's tabulations overstate these figures). For the years 2013 to 2014, the plaintiff contends that the management fees should be no more than the asset management fees that were actually charged by CGH. On this basis, the plaintiff's calculation gives rise to a total sum of $7,450,974.04.

93 However, there is absolutely no basis for such a calculation and indeed the plaintiff offers no reason why this should be the case. On the contrary: (a) Ms Tan's tabulations do not state the full cost of the employee; and (b) CGH, as a business, would be profit-making and thus entitled to charge a mark-up on the cost of the services to itself. These matters would point away from such a calculation.

94 In the premises, the plaintiff's calculations regarding the First Complaint are not of much help in an assessment of whether the cost of the same to the Company was excessive.

Contribution of each defendant to the First Complaint

95 The plaintiff claims that when the First MSA was entered into on 1 June 2007, Rodney Tan was both a director of the Company and CGH and therefore in a position of conflict of interest. No evidence was adduced to show that Rodney Tan had disclosed this conflict to the Company's board. Even if such disclosure had been made, the plaintiff avers that it would be "of questionable

effect because the board consisted of his nominees". Rodney Tan had also signed the resolutions authorising the entry into the First and Second SAs despite this conflict. The plaintiff further alleges that the First and Second MSAs were initiated by Rodney Tan.

96 As against Mr Seeto, the plaintiff charges that by signing the First and Second MSAs as well as the resolutions authorising entry into these agreements and by allowing the debit of management fees by CGH to the Company, without proper regard or enquiry as to the services to be provided or the fees to be charged, Mr Seeto was in breach of his fiduciary duties to the Company. With respect to Mdm Poh, the plaintiff points out that Mdm Poh had signed the resolutions authorising the Company's entry into the First and Second SAs. The plaintiff's case is that Mdm Poh had neglected to pay any or any sufficient attention to the affairs of the Company even though she generally knew what her role as director was. In not applying her mind to the affairs of the Company, Mdm Poh allowed the wrongful and/or excessive debiting of management fees by CGH to the Company. As for Mr Lim, he had signed the resolutions authorising the Company's entry into the First and Second SAs and the First to Fifth SAs. The plaintiff submits that Mr Lim had breached his fiduciary duties to the Company by allowing the wrongful increase of management fees that was payable by the Company to CGH. In relation to Mr Gn, the plaintiff contends that he was in breach of his duty to the Company by signing the resolutions approving the Company's entry into the First and Second SAs, as there was no good reason for the increase of management fees, which was to the obvious disadvantage of the Company.

97 The plaintiff's claims against Mr Seeto, Rodney Tan, Mdm Poh, Mr Lim and Mr Gn fall into two categories. The first involves claims which refer back

to – and are therefore parasitic upon – some aspect of the alleged impropriety. These claims fall away upon a finding that there was no impropriety. The second category involves independent claims (*eg*, those having to do with the neglect or position of conflict of the defendants). For these claims, a finding that any of the transactions impugned by the First Complaint was proper means that no loss can arise from the same. Where appropriate, this applies to the other Complaints as well. The discussion above indicates that I have found five aspects of the First Complaint that support an inference that one or more defendant-directors acted improperly. These aspects are set out in [68], [70], [74], [77] and [86] above. Aside from these points, the rest of the plaintiff's claims, *vis-à-vis* the First Complaint, would fall into one of the two aforementioned categories and nothing further needs to be said concerning them.

98 In [68], [70], [74] and [77], I have explained why allowing those transactions was a breach of duty on the part of Rodney Tan. As regards [86], Rodney Tan must also be held responsible for endorsing an agreement with CGH which was unfairly beneficial to CGH at the expense of the Company. I note MDG's and Rodney Tan's submission that the plaintiff has not identified the directors' duties alleged to have been breached by Rodney Tan. It is, however, not necessary to decide this point because it is obvious that the various failures to consider the Company's interests and obtain necessary adjustments of the amount and manner of fees payable to CGH would *at least* constitute a breach of the duty to act in the Company's interests. In relation to the First Complaint, my findings support an inference of a tendency on the part of Rodney Tan to place the interests of CGH (an entity in which he had a substantial interest) above those of the Company.

99 The plaintiff's submissions concerning Mr Seeto, Mdm Poh, Mr Lim and Mr Gn are phrased very generally. They do not show how these directors had contributed to the matters set out in [68]. As for [70], Mr Lim and Mr Gn were not directors of the Company in November 2007 when the Second MSA was signed and, although Mdm Poh was a director of the Company, she had nothing to do with its accounts nor did she participate in the operations of CGH. These three defendants therefore cannot be made responsible for the matters set out in [70]. By the time of the matters set out in [74], Mr Lim and Mr Gn were directors but neither they nor Mdm Poh were handling the accounts of the Company and the plaintiff has not shown how they contributed to those matters. The same goes for the matter set out in [77] and [86]. Therefore, I make no findings against Mdm Poh, Mr Lim and Mr Gn in relation thereto.

The Second Complaint: Debiting of management fees by MDG to the Company

100 The Second Complaint concerns the debiting of management fees by MDG to the Company. This relates to a management support services agreement ("the MSSA") entered into between MDG and the Company on 8 January 2009. Under the MSSA, MDG charged the Company a monthly fee of $50,000. Up to the start of the trial the monthly fee was still being charged. The plaintiff asks that the MSSA be set aside in its entirety, and all the management fees paid by the Company to MDG (amounting to $4.8m as at 31 December 2016) be returned to the Company.

Basis of the Second Complaint

(1) Nature of the MSSA

101 The plaintiff claims that the MSSA and the purported services to be provided thereunder were a sham. Two arguments are mounted in support of this claim. The first is that Mr Lim, who had signed the MSSA on behalf of the Company, had no authority to do so as he was only appointed a director of the Company two months later, in March 2009. Moreover, there was no discussion in relation to the MSSA on the Company's side, no resolution authorising Mr Lim to sign the MSSA on behalf of the Company, and no resolution ratifying the MSSA. Accordingly, the plaintiff submits that the MSSA is not legally binding on the Company and should be set aside. I point out here that apart from anything else, procuring the setting aside of a contract to which a company is a party is something that has to be done by the company itself, if at all, as the cause of action belongs to the company and not its shareholders.

102 This allegation of the plaintiff is a serious one. Yet, MDG and Rodney Tan point out that this was not pleaded by the plaintiff. Nor does it seem to form part of the plaintiff's opening statement, which only states generally that the MSSA and the purported services to be provided thereunder were a sham. In any event, I find merit in Mr Lim's submission that even if Mr Lim was not formally authorised to sign the MSSA, any defect in his authority was subsequently cured by the Company's ratification. In *Yongnam Development Pte Ltd v Springleaves Tower Ltd and another* [2004] 1 SLR(R) 348, the High Court accepted (at [53]) the proposition that ratification will be implied whenever the conduct of the person in whose name or on whose behalf the act or transaction is done or entered into is such as to amount to clear evidence that he adopts or recognises such act or transaction in whole or in part, and may be implied from the mere

acquiescence or inactivity of the principal. In the present case, the plaintiff himself accepts that MDG continues to charge the monthly management fee of $50,000, which must imply that the Company continues to pay the same. In my view, this must be taken to be a ratification of the MSSA.

103 The plaintiff's second argument is that the MSSA was intended to cover the salary of MDG's employees, and did not contemplate any actual services being provided by MDG to the Company. The plaintiff suggests that some of MDG's employees were not doing work and that the Company did not require their services. Yet, MDG's employees were retained because they (especially Mr Seeto and Sebastian Wong were important witnesses for MDG in ongoing legal disputes) and this was Rodney Tan's means of keeping these potential witnesses happy.

104 In claiming that some of MDG's employees were not doing work and that the Company did not require their services, the plaintiff relies on Rodney Tan's oral evidence in relation to Sebastian Wong. I am, however, doubtful that Rodney Tan's evidence in this regard unequivocally states that Sebastian Wong did not do any work in the first place. The exchange between the court and Rodney Tan relied on by the plaintiff is as follows:

COURT:	… So your rationale is that since MDG is servicing [the Company], and since [the Company] needs all this work and would have to pay for it anyway, it must therefore pay [MDG] for the work? If [MDG] did not do it, [the Company] would have to employ somebody else to do it and would have to pay those persons; right? Yes/no?
A:	No.
COURT:	No? If [MDG] did not do it, it would not need to be done?

A:	Probably. I'm not sure, but probably may, but now they not need to be done.
COURT:	So if it doesn't need to be done, why does it need to be paid for?
A:	Well, it's an agreement, otherwise I don't know how to pay Sebastian and … it's just an agreement, a management agreement that --
COURT:	Does [the Company] need Sebastian [Wong's] services?
A:	I think just do a lot of background information that only Sebastian [Wong] have.
COURT:	So you are paying him, what, as a resource person, or are you paying him to do work? For his institutional memory or for daily work, what are you paying him for?
A:	Actually it's like continuous like employ.
COURT:	He is an employee?
A:	Of [the Company].
COURT:	He is doing work for [the Company] every day now?
A:	I don't think so, but I mean, it's a cost I can't reduce.

105 Rodney Tan's evidence above is unsatisfactory as to what Sebastian Wong was being paid for. But the lack of clarity here cuts both ways and therefore renders it unfair to conclude on that basis alone that Sebastian Wong did not do any work.

106 In contrast, Sebastian Wong stated in his affidavit of evidence-in-chief ("AEIC") that he was in charge of the financial and accounting aspects of the Project and of other administrative services supporting the same. Along with Rodney Tan and Mr Lim, he had to work with various contractors to ensure that the redevelopment was a success, and also work on procuring bank funding to finance the redevelopment. Sebastian Wong was also in charge of managing the

various legal issues and suits faced by the Company as well as the Company's accounts and audits (although he did accept at trial that the vast majority of the legal cases he had spent time on involved MDG as a party). At trial, he added that he was responsible for gathering information from the finance department and submitting it to the bank, as well as verifying the claims made by contractors before payment to these contractors was made. He also stated that he was in the office for at least eight hours daily. As against this, I also note the plaintiff's concession at trial that he did not even know whether Sebastian Wong was providing services to the Company. As far as the work that Sebastian Wong did therefore, the balance of probabilities does not support the plaintiff's case.

107 There is, on the other hand, no evidence of what else MDG did for the Company. In regard to the plaintiff's claims that MDG's employees were kept for the purposes of ongoing legal disputes, Rodney Tan's evidence appears to be that he had acted on the advice of his then-solicitors. Even if this were true however, as a director of the Company, Rodney Tan needed to assess objectively whether these persons, apart from Sebastien Wong, really needed to be retained for such a purpose and nothing else. Also given that the majority of the legal disputes did not involve the Company except as a nominal defendant, a proper assessment had to be carried out as to how much of the costs of retention had to be borne by the Company. It was not the defendants' case that the $50,000 fee was entirely, or even substantially, for Sebastien Wong's work. No evidence was given by Rodney Tan as to the basis on which this fee was worked out, not even rough tabulations of the kind Ms Tan had produced for CGH. Given that Rodney Tan was on the boards of both the Company and MUDG when the MSSA was entered into, I would have expected a much more detailed and convincing explanation as to why it was in the Company's interests to have such a contract. I find some merit therefore in the plaintiff's position.

(2) The Company's requirement for MDG's services

108 The plaintiff next alleges that MDG's services were not required by the Company and that the MSSA was therefore not in the best interests of the Company. Two reasons are proffered in respect of this assertion. First, the plaintiff says that CGH was already providing management services to the Company pursuant to the Second MSA. Moreover, MDG's management included Mr Seeto, Rodney Tan and Mr Lim and there was no reason why they could not have provided their services as directors of the Company directly to the Company instead.

109 On behalf of the defendants, Mr Lim gave evidence that MDG and CGH played different and distinct roles. Mr Lim said that MDG's role *vis-à-vis* the Company was in performing strategic functions on looking at the bigger picture. He described MDG as doing the "brain work", whereas CGH was the "arms and legs". As for the submission concerning Mr Seeto, Rodney Tan and Mr Lim, this is inexplicable in so far as Mr Seeto and Mr Lim are concerned as they were not paid by the Company and whether they provided their services to the Company pursuant to the MSSA or as directors of the Company, they would have to be remunerated by the Company. With regard to Rodney Tan (who was paid a salary of $15,000), MDG and Rodney Tan quibble that the plaintiff has not identified any specific overlap between Rodney Tan's work *qua* director of MDG, on the one hand, and *qua* director of the Company, on the other. That might be so but it seems to me to be highly artificial for Rodney Tan to say that when he was thinking about the Company's affairs he could have had thought A as a director of the Company but that when he had thought B it was more celebral and therefore was an MDG thought albeit in relation to the Company.

110 The plaintiff's second reason is that the Company had its own employees who could perform at least some of the services supposed to be provided by MDG and that were not being provided by CGH. The plaintiff relies on evidence that the Company had taken over a number of employees from SRSPL who were dealing with housekeeping, food and beverage matters, and possibly also accounting matters. Moreover, even if the Company did not have its own employees to provide the services, either it or CGH could have recruited people to do so. I find this reason persuasive.

(3) Amount of fees charged by MDG

111 The plaintiff's final allegation regarding the Second Complaint is that the fees charged by MDG were manifestly excessive and that MDG was grossly overcharging the Company. While the monthly management fees were $50,000, the salaries paid to the four employees of MDG who were supposedly providing these services after Mr Seeto left (*ie*, Rodney Tan, Mr Lim, Sebastian Wong and his assistant) did not exceed $30,000 per month. Thus, it is said that MDG was making a 66.67% profit. The plaintiff says that this is "unacceptable" because:

(a) Rodney Tan was already being remunerated by CGH and the Company; and

(b) Sebastian Wong's description of the work done by him is "completely at odds" with the scope of management services as stated in the MSSA.

With respect to (b), the plaintiff identifies Sebastian Wong's work in dealing with lawyers, gathering information from the finance department and submitting it to the bank and verifying payments to be made to contractors. He says that these do not fall within the first and second limbs of cl 2 of the MSSA,

ie, to "[p]rovide strategic counsel and recommendation" and to "[p]rovide plan and develop research methodology". Finally, the plaintiff further submits that the work done by MDG was not commensurate with the $50,000 fee. The point here seems to be that the only individual from MDG involved in the management services provided to the Company was Sebastian Wong, whose services "typically involved an exchange of about 10 e-mails, 1 telephone call and 1 meeting per month on average". Moreover, the work done by Sebastian Wong related primarily to accounts management, with little or no work done in the other categories.

112 With respect to the alleged 66.67% profit margin, Sebastian Wong said that the management fee was for the work done by MDG's team members working on the Project *as well as* general expenses incurred in respect of the Project. This was not very helpful evidence for MDG as the Company was already paying substantial asset management and project management fees to CGH and it is difficult to see what else MDG could do for the Project. As for the point about Rodney Tan being remunerated by CGH and the Company, this has already been dealt with. Whilst the work done by Sebastian Wong fell well within the third or fourth limbs of cl 2 of the MSSA, *ie*, the provision of "management, accounting and general administrative services support" and/or "[o]ther management support services as [the Company] may from time to time require", I have already pointed out that his salary was a smallish fraction of the fee. Turning finally to the plaintiff's submission that the work done by MDG was not commensurate with the $50,000 fees, Sebastian Wong's evidence was that Rodney Tan and Mr Lim were also involved in doing work for the Company on behalf of MDG. I have dealt with Rodney Tan's work already. Even if Mr Lim has to be given credit for his work separately, such allowance still does

not bring the total expenses very much above half the fee paid to MDG. On all counts, it seems to me that the fee was excessive.

113 In my judgment, the plaintiff has established that it was not proper to make the Company enter the MSSA and bind it to paying a monthly fee of $50,000 when the main thing it could get out of that contract was the services of Sebastien Wong which when considered alone would have cost the Company very much less.

Contribution of defendants to the Second Complaint

114 Given my conclusion above, Rodney Tan and Mr Lim should not have procured/allowed the Company's entry into the MSSA and they were both in breach of fiduciary duty in allowing it. Although Rodney Tan did not sign the contract on behalf of the Company, he was fully aware of it. He was the ultimate decision-maker in the Company and no decision about substantial financial expenditure could have been made without his approval. In any case, there was evidence that he took part in a discussion on the payment of management fees by the Company to MDG. This discussion was held with Mr Lim. Indeed, Mr Seeto's evidence was that the MSSA was Rodney Tan's idea. MDG was also at fault since it must have been aware that it was party to a breach of fiduciary duty on Rodney Tan's part.

The Third Complaint: Debiting of legal fees incurred by parties other than the Company

115 The Third Complaint relates to the debiting to the Company of legal fees incurred by parties other than the Company. The plaintiff claims that the legal fees for some 16 matters were wrongly charged to the Company by MDG.

Basis of the Third Complaint

(1) Legal fees charged to the Company in 2009

116 The plaintiff's case is that a total of $2,285,469.13 in 16 payments was wrongfully debited by MDG to the Company as legal fees in 2009 in the sense that after payment of the fees, MDG debited them to the Company's account in its books as if payment had been made on the Company's behalf. Sebastian Wong's evidence is that part of this sum was mistakenly debited to the Company, while the remainder was in respect of legal work done for the Company. He also testified that steps had already been taken to rectify this mistake. Two points of dispute remain between the parties.

117 First, the plaintiff disbelieves Sebastian Wong's explanation for this mistake, *ie*, that the legal invoices did not clearly state who the parties to each litigation were and/or for which party the bulk of the work was done. The plaintiff claims that this is an afterthought: Sebastian Wong's explanation is clearly untrue as the invoices make it clear who the work was done for, and to whom the invoices were addressed. MDG and Rodney Tan claim that the decision to debit these fees to the Company, in respect of two suits (*viz*, this Suit and Suit 568), was taken upon legal advice. In this connection, they rely on a resolution by the Company's directors providing that the Company's directors would be indemnified by the Company against all costs and expenses incurred by them in defending the two suits, unless judgment was entered against them. They also claim that the decision was made on the basis that the various legal disputes had arisen because of the Company, and that the invoices, while addressed to either MDG or the Company, did not provide a breakdown stating which of the parties the work was done for.

118 Even if true, MDG's and Rodney Tan's explanations fail to satisfactorily answer one obviously critical question: regardless of whether the Company (and/or its directors) was involved in *some* of these legal matters, why was it made to bear *all* of the legal fees, and especially those involving MDG? There is simply no answer proffered for this and this warrants the drawing of an adverse inference. However, given the subsequent rectification, there is perhaps some merit in MDG and Rodney Tan's submission that the reason for this mistake is, at this stage, moot.

119 It is therefore the second point of dispute that is arguably more important, and this concerns whether the rectification was satisfactory. Sebastian Wong claims that a sum of $1,015,891.88 has been reversed as part of the rectification, and MDG and Rodney Tan claim that the remainder of $1,269,577.25 was *for legal work done for the Company*. The plaintiff says that the reversed sum of $1,015,891.88 includes a sum of $14,200 for "deposit for disbursement of out-of-pocket expenses", which the plaintiff has not complained about. The plaintiff therefore sets the reversed sum at $1,001,691.88, leaving a sum of $1,283,777.25 which he says was *wrongfully debited and should not be charged to the Company*.

120 The first issue relates to the sum of $14,200. I agree with the plaintiff that this sum was never complained about and therefore should not be included in the reversed sum. The outstanding sum should therefore be $1,283,777.25. The second issue relates to whether this remainder was for legal work done for the Company or wrongfully debited. I note that the Company appears to have been a party to some of the matters for which legal fees were charged. The evidence does suggest that the decision as to the sum to be reversed was made on the basis of legal advice. However, MDG and Rodney Tan only give a

substantive rebuttal in respect of *one* out of the 16 payments that the plaintiff complains of, namely, legal fees to Drew & Napier LLC amounting to $84,270.60. Even then this is a weak rebuttal. Essentially, their point is that it is "manifest and clear" on the face of the invoices for this payment that they were issued for work done for the Company in relation to "NEGOTIATION WITH SENTOSA DEVELOPMENT CORPORATION IN RELATION TO THE GRANT OF APPROVAL FOR THE MORTGAGE IN FAVOUR OF MAYBANK BHD". Presumably, this point is made because the mortgage was over the Property. However, it is simply not possible to conclude from this that these invoices were in relation to work done for the Company. Indeed, these invoices are addressed, not to the Company, but to MDG. A final point to be highlighted here relates to what appears to be a concession by the plaintiff's counsel at trial that another one of the payments need not be reversed. This is a payment of $108,729.58 in legal fees to Stamford Law Corporation. However, parties do not appear to have taken this point up in submissions.

121 I conclude that the outstanding sum of $1,283,777.25 was wrongly debited to the Company and should be reversed.

(2) Legal fees charged to the Company in 2010

122 The plaintiff also takes issue with $2,812,572 in legal fees that were debited to the Company in 2010. Although $2,285,068 has since been reversed, this still leaves an outstanding sum of $527,504. The plaintiff submits that of this sum, "at least $80,941.47", arising from invoices for work done for Mr Seeto, was wrongfully debited and should not be charged to the Company. MDG and Rodney Tan's position, on the other hand, is that the full sum of $527,504 was for legal work done for the Company. They claim that it was reasonable for them to have relied on legal advice in arriving at the sum to be

reversed, and that these invoices were issued to the Company and therefore correctly debited to the Company. These explanations are not persuasive. The sum of $80,941.47 was wrongly debited to the Company and should be reversed. In so far as parties have repeated their submissions concerning the explanations for the mistake, I refer to the earlier observations concerning the same in [118] above.

(3) The plaintiff's other allegations

123 The plaintiff also makes several other allegations, some connected to the legal fees and some not. Their purport is not always clear, but I deal with them briefly in this section. I note MDG and Rodney Tan's submission that these allegations have not been pleaded and are also not found in the plaintiff's opening statement.

(A) RODNEY TAN'S ALLEGED ATTEMPT TO CONCEAL THE DEBITING OF LEGAL FEES BY MDG TO THE COMPANY BEYOND 2009

124 The plaintiff first claims that Rodney Tan had attempted to conceal the debiting of legal fees by MDG to the Company beyond 2009. He claims that in August 2012, he had requested information regarding the legal fees for 2009 from Rodney Tan, but Rodney Tan's solicitors replied to state that he (the plaintiff) was not entitled to this information and they would therefore not be responding to the request. It was only after some correspondence between the plaintiff's solicitors and *the Company's* solicitors that the Company's directors' report and audited financial statements for 2010 were provided to the plaintiff and the legal fees for 2010 (amounting to $2,812,572) came to light. This claim is on shaky ground because it seems obvious that Rodney Tan's position was taken on the advice of his solicitors and Rodney Tan must surely have been entitled to take the position that he did (regardless of whether this

position was right or wrong). To conclude from this that Rodney Tan was attempting to conceal information seems somewhat contrived.

125 The plaintiff's other claim here is that there remain legal invoices that were paid by the Company on behalf of other parties that have not been disclosed. It suffices to state that the evidence is too equivocal and the claim too speculative for consideration.

(B) ALLEGED FURTHER WRONGFUL PAYMENTS

126 The plaintiff then claims that a sum of $1,084,776 was charged to the Company as legal fees in 2008. He further points to Sebastian Wong's evidence at trial that it was "possible" that legal costs incurred by the Company's directors in this Suit, Suit 568 and Suit No 536 of 2008 ("Suit 536") could be included in this figure. This point is, with respect, too speculative to be of merit.

127 What is more contentious is the plaintiff's claim that the Company's general ledger shows two payments of $894,892.06 and $70,694.90 in May and August 2011 respectively to M/s Heng Leong & Srinivasan ("HLS"), who were the solicitors acting for the plaintiffs in Suit 536, in which Mr Seeto, Rodney Tan, Mr Lim and Sebastian Wong were among the defendants. The plaintiff claims that the two payments were payments of costs which Mr Seeto, Rodney Tan, Mr Lim and Sebastian Wong were ordered to pay personally in Suit 536. In my view, it is not entirely clear, on the face of the general ledger, whether these payments can conclusively be said to have been payments of costs, but there is something suspicious in the fact that substantial payments were made to HLS, whom Rodney Tan knew were the solicitors for the *opposing party* in Suit 536. MDG and Rodney Tan make two points. First, they rely on the fact that Rodney Tan had delegated tasks to various individuals in the course of the

Project. This excuse is too convenient to be accepted. Secondly, they repeat that this point has not been pleaded and that there should therefore be no reversal of these sums. But the plaintiff points out that the general ledger was only provided to him on 26 January 2016, after the first tranche of the trial. Further, the point was raised at the trial and in closing submissions. Crucially, neither of MDG and Rodney Tan's points provides a satisfactory explanation for these payments. To me, these payments, which total $965,586.96, appear improper. It is not for me to order reversal of these sums because that would be a remedy afforded to the Company, not the shareholder. I can, however, take note of MDG's and Rodney Tan's conduct in this regard as another indicator as to the way in which they ran the affairs of the Company.

(C) ALLEGED FALSE REPRESENTATIONS TO MAYBANK

128 The plaintiff next claims that Rodney Tan had authorised the sum of $894,892.06 to be drawn down from the renovation loan facility that the Company had with Maybank and paid to HLS. The drawdown notice states that the invoices were "payable by" the Company and that the drawdown would be used for the purpose of financing the construction costs. Rodney Tan admitted at trial that both these statements were not entirely true. Another claim by the plaintiff relates to three payments of $284,670.15, $182,981.83 and $43,191.36 made by the Company to the three law firms which represented Sebastian Wong, Mr Lim and Mr Seeto respectively in Suit 536. These payments were made by drawing down on the Company's construction loan facility with Maybank. The plaintiff submits that in approving these payments, Rodney Tan caused the Company to make false representations to the bank, as the invoices were clearly not payable by the Company and the legal fees not related to construction costs (contrary to what is stated in the drawdown notice).

129 It is not entirely clear what these complaints are intended to go towards. It surely is not the case that the alleged victim here (*ie*, Maybank) is complaining of any wrongdoing. I have already taken note that the Company paid some legal bills that it should not have been made to bear. The extension of the complaint which is the insinuation that the Company's bankers were lied to in order to use the Company's facilities for a wrongful purpose adds little to it.

(4) Professional and consultancy fees paid to Ernst & Young

130 Finally, the plaintiff also complains about professional and consultancy fees amounting to $370,182.30 paid by the Company, on Rodney Tan's authorisation, to Ernst & Young for valuing MDG's shares pursuant to the judgment in Suit 536. MDG and Rodney Tan do not have a satisfactory explanation for the payment of these fees, although they make the point that it was not pleaded. However, they had the opportunity to deal with it in court and in their closing submissions. As is the case with the payments to HLS, I think that these payments were improper. I note that the plaintiff, in his reply submissions, suggests that false representations to Maybank were made concerning these payments. But this suggestion has no basis because the drawdown notice the plaintiff refers to relates, by his own admission, to another payment.

(5) Conclusion on the Third Complaint

131 To summarise, I am of the view that the following payments were improperly made or debited:

(a) $1,283,777.25 for legal fees charged to the Company in 2009;

(b) $80,941.47 for legal fees charged to the Company in 2010.

(c) $965,586.96 paid by the Company to HLS; and

(d) $370,182.30 paid by the Company to Ernst & Young.

Contribution of each defendant to the Third Complaint

132 On the evidence considered above, I find that Rodney Tan was clearly involved in the wrongful charging of legal fees to the Company in 2009 and 2010 as well as in the payments to HLS and Ernst & Young. I note MDG and Rodney Tan's submission that the plaintiff has not identified the directors' duties alleged to have been breached by Rodney Tan. However, I think that these payments would constitute a breach of his duty to use reasonable diligence.

133 The plaintiff's claim against MDG relates only to the legal fees charged to the Company in 2009 and 2010. MDG, as the party which had debited these payments to the Company, must therefore also be liable for the oppressive conduct alleged by the plaintiff.

134 As for Mdm Poh, the plaintiff alleges that Mdm Poh had neglected to pay any or any sufficient attention to the affairs of the Company even though she generally knew what her role as director was. In not applying her mind to the affairs of the Company, Mdm Poh allowed the matters constituting the Third Complaint to occur. But the plaintiff has not even attempted to show *how* Mdm Poh had contributed to the Third Complaint. Indeed, Mdm Poh points out that she was not even cross-examined on any debiting of any legal fees, and that the plaintiff's allegations concerning this were never put to her. Consequently, I find no merit to the plaintiff's claim against Mdm Poh.

Fourth Complaint: Allotments of the Company's shares to MDG

135 The Fourth Complaint relates to the following allotments of shares in the Company to MDG (collectively, "the Allotments"), by way of the capitalisation of debt owed by the Company to MDG:

(a) On 17 July 2007, an allotment of 1,429,999 shares ("2007 Allotment") for $1,429,999; and

(b) On 7 April 2009, an allotment of 3,000,000 shares ("2009 Allotment") for $3,000,000.

Basis of the Fourth Complaint

136 The plaintiff submits that there was insufficient debt underlying the Allotments. However, his claims as to how these underlying debts came about appears to have shifted over the course of the proceedings:

(a) In the statement of claim, the plaintiff pleads that MDG capitalised or sought to capitalise debts allegedly due to it from the Company, which had been incurred in a "running account" between the Company and MDG, when "[the Company] didn't actually owe monies to [MDG]" and that the loans that gave rise to these debts were "not genuine". The plaintiff pleads that, accordingly, there was insufficient debt to support the Allotments.

(b) In the plaintiff's closing submissions, there is no mention of a "running account" between the Company and MDG that gave rise to the debts undergirding the Allotments. In light of the findings of the court expert, Roger Tay ("the Court Expert"), that

there was sufficient debt owing for the Company to MDG at the respective dates of the 2007 Allotment and the 2009 Allotment to support the capitalisations that they entailed, the plaintiff instead takes issue with the documentary evidence relied upon by the Court Expert in reaching his conclusion.

(c) In his closing submissions, the plaintiff also appears to allege that the debts that had been capitalised in the Allotments had been (wrongfully) incurred by the Company in relation to the First Complaint, Second Complaint and Third Complaint. The plaintiff submits that these transactions should be set aside, and so too the debts that they produced. The plaintiff thus concludes that there would therefore be insufficient debt to support the Allotments. However, save for the plaintiff's allegations in relation to the debiting of legal fees to the Company (*ie*, the Third Complaint), these transactions are largely different from those that the plaintiff alleged had been incurred in the "running account" between MDG and the Company.

137 MDG and Rodney Tan assert that the debts that formed the basis of the Allotments were validly incurred by the Company, and repeat the defences that they raise in relation to the first three Complaints. In addition, they rely on the findings of the Court Expert, that there was sufficient debt owing by the Company to MDG when the Allotments were made to undergird the capitalisations that the allotments entailed.

138 The Court Expert opined that at the respective dates of the 2007 Allotment and the 2009 Allotment, the Company owed debts of at least $1,429,999 (in 2007) and $3,000,000 (in 2009) to MDG. He reported that he

had received "Supporting Documents to establish the existence and accuracy of Intercompany Transactions recorded in the [the Company] Intercompany Account aggregating to a net debt owed by [the Company] to [MDG]" of S$3,915,354.40 as at 17 July 2007 and of S$3,420,643.98 as at 7 April 2009.

139 The Court Expert noted further that the issue of shares by the Company to MDG under each of the Allotments had been made by way of a resolution of the board of directors of the Company, and an agreement by MDG to offset the relevant amount of loans owning by the Company against the consideration in respect of each allotment of shares by the Company to MDG.

140 When cross-examined, the plaintiff repeatedly accepted the findings as set out in the report of the Court Expert, and stated that he was "relying on the report in its entirety". The plaintiff did not cross-examine the Court Expert on his findings on the indebtedness of the Company to MDG at the dates of the Allotments. There is thus little reason not to accept the findings of the Court Expert in this regard.

141 The plaintiff relies on a caveat inserted by the Court Expert in relation to three transactions at or around the time of the 2007 Allotment – that the confirmations of these transactions were provided by parties to this Suit and/or were not produced contemporaneously at the time of the transactions in question – to submit that "the confirmations are not sufficient basis for the transactions to be classified as having supporting documents". The plaintiff does not point to any specific evidence why the supporting documents relied on by the Court Expert were inadequate, save for a payment of $12,853.71 in expense claims from MDG to Gary Koh, the former chief executive of the Company. Gary Koh was informed that the money was paid by MDG on behalf of the Company only

at the time when he was asked to sign the written confirmation for the purpose of the report of the Court Expert. He said that this was not the understanding that he was led to have at the time when the payment was made. Taking the plaintiff's case at its highest, even if there is insufficient confirmation to prove the indebtedness of the Company to MDG to the extent of this $12,853.71, there remains more than sufficient documented debt owing from the Company to MDG to support the 2007 Allotment.

Contribution of each defendant to the Fourth Complaint

142 Given my conclusions above, the plaintiff's claims in relation to the Fourth Complaint, which are against MDG and Rodney Tan, are baseless.

Fifth Complaint: Entry by the Company into deeds of indemnity with Rodney Tan

143 The Fifth Complaint relates to the matters set out in [17] above and the Company's entry into the Indemnities in favour of Rodney Tan. These Indemnities had been furnished by the Company in relation to a $105.3m banking facility that the Company had obtained from Maybank (the "Facility"), and that was secured by a personal guarantee executed by Rodney Tan in favour of Maybank (the "Guarantee").

144 Pursuant to the Indemnities, the Company granted to Rodney Tan the following:

(a) a cash security equivalent to 20% of the guaranteed amount under the Guarantee (rather than the actual amount drawn down under the Facility);

(b) an initial security deposit of $2m; and

(c) a fee of 1.5% per annum on the amount guaranteed under the Guarantee (*ie*, $105.3m in September 2008), regardless of the actual amount drawn down under the Facility.

Basis of the Fifth Complaint

145 The plaintiff argues that the terms of the Indemnities were unfairly advantageous to Rodney Tan and unfairly disadvantageous to the Company. The Company received no legal advice on, and the directors of the Company did not discuss, the entry by it into the Indemnities. The interest of the Company was thus "never considered".

146 The defendants submit that the entry by the Company into the Indemnities was necessary. It was commercial *quid pro quo* for the provision by Rodney Tan of the Guarantee, which exposed Rodney Tan to a potential liability of $105.3m, and without which the Company would not have obtained the Facility from Maybank. The Company would then have defaulted on its obligations in respect of Phase 2, and SDC could have terminated the Building Agreement. The hotel would not have been built.

147 At the outset, the fact that the Company entered into the Indemnities in favour of Rodney Tan raises the issue of a conflict between the interests of Rodney Tan and those of the Company. However, since the board of directors of the Company had approved the entry by the Company into the Indemnities with full knowledge of that conflict, the conflict of interest has been assuaged. Further, none of the parties referred to this conflict of interest in their submissions. The issue that therefore remains to be addressed is whether the directors of the Company could properly have decided to commit the Company to the Indemnities.

148 The principles by which a commercial decision taken by a director will be assessed are uncontroversial. As a general rule, a court should be slow to interfere with commercial decisions taken by directors, or to substitute with its own decision made with the benefit of hindsight in place of those made by directors in the honest and reasonable belief that they were for the best interests of the company (*ECRC Land* at [49]). A director "should not be coerced into exercising defensive commercial judgment, motivated largely by anxiety over legal accountability and consequences" (*Vita Health* at [17]). It is for the directors to "exercise their discretion *bona fide* in what they consider – not what a court may consider – is in the interests of the company" (*Cheong Kim Hock v Lin Securities* [1992] 1 SLR(R) 497 citing *Re Smith and Fawcett Ltd* [1942] 1 Ch 304). Nevertheless, this is subject to the caveat that the duties of a director remain to be judged objectively, on the basis of "whether an honest and intelligent man in the position of the directors, taking an objective view, could reasonably have concluded that the transactions were in the interests of the [company]" (*Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR(R) 1064 at [29]), and the director in reaching his decision must have exercised the same degree of care and diligence as a reasonable director found in his or her position (*Lim Wing Kee v Public Prosecutor* [2002] 2 SLR(R) 848 at [28]).

149 I accept, as the defendants maintain, that it is unlikely the Company could have secured the Facility without the Guarantee provided by Rodney Tan. In September 2008, the time when the Indemnities were entered into, the Company would not have been able to secure the $105.3m Facility simply on the security of the hotel as it then stood – "an old British barrack" in Sentosa. A valuation report dated 11 September 2008 that was prepared by Colliers on the instructions of Maybank assessed the value of the hotel on an *as-is* basis at $60m. This was inadequate security for the $105.3m Facility. As the plaintiff

accepted in cross-examination, "this wouldn't have been enough to secure the indebtedness to Maybank for $105.3 million" under the Facility. Moreover, as the plaintiff's closing submissions suggest, the plaintiff takes issue only with the "fortification" of the Indemnities by way of security deposits, and the "excessive[ness]" of the fee of 1.5% per annum payable to Rodney Tan.

150 The question I have to address here is whether a reasonable person in the position of the directors of the Company could have found it justified to commit the Company to the Indemnities, which entailed in particular: (a) the security deposits; and (b) the fee of 1.5% per annum on the sum guaranteed. I consider each in turn.

(1) Security deposits

151 The plaintiff complains that "[t]he amount of security deposit was a percentage of the guaranteed amount, and not of the actual amount drawn" under the Facility. The security deposit thus "bore no relation to the risk, if any, undertaken by [Rodney Tan] for the issuance of his Guarantee". The plaintiff adds that the purpose of the security deposit was simply "to allow [Rodney Tan] to extract funds from [the Company]".

152 The defendants submit that the amount of the security deposit was justified because the $105.3m Facility could at any point of time "be drawn down in full for the purposes of the Project", exposing the Company to the full extent of the liability. Further, the defendants deny that the purpose of the security deposit was simply for Rodney Tan to extract funds from the Company, because "the [parties'] understanding upon entry into the Deeds of Indemnity was that the deposits paid to [Rodney Tan] were to be made available to

[the Company] should it require a return of all or any part of the same to meet its working capital needs".

153 While the plaintiff did not adduce direct evidence of this, the provision by a company of a security deposit to a director cum shareholder who guarantees banking facilities extended to the company is not a usual occurrence in Singapore. Usually the bank requires a personal guarantee from a company director for two reasons: the first is, of course, for the extra security but the second reason is equally important and that is to encourage the director concerned to ensure the facilities are used wisely since the director's own fortune will be at risk as well. It is not usually expected that the director will secure himself at the company's expense. Arrangements of this kind should be carefully scrutinised and the directors must ensure that the company is not unduly burdened by the need to secure the guaranteeing director. The fact that the amount of the security deposit, as here, is unrelated to the actual amount drawn down under the Facility may be indicative of an arrangement that is not in the Company's best interests because the amount of the deposit cannot be correlated with the amount of the borrowing and therefore Rodney Tan's actual risk. Mr Gn testified the arrangement was appropriate because about $44m of the Facility could "be drawn down at one shot". This, however, was not a real risk since Rodney Tan was running the Company and, acting in the Company's interests, would surely not allow the borrowing of $44m "at one shot" unless the Company really needed the money and would receive a corresponding benefit from its use.

154 I also note that from the time the Company first obtained bank facilities from Maybank, these facilities had been secured by, among other things, a personal guarantee from Rodney Tan. At that stage, Rodney Tan had not

required the Company to provide a security deposit or a guarantee even though the amount guaranteed was substantial. It was also Rodney Tan who procured the increased banking facilities for the Company and he did so to enable the Project to be completed. I think it unlikely that in August 2008 Rodney Tan would have refused to furnish his personal guarantee for the $105.3m Facility had the other directors of the Company turned down his request for the security deposit and guarantee fee.

155 Rodney Tan's evidence was that he requested the security deposit on the advice of his lawyer, Ng Joo Khin ("Mr Ng"), in order to mitigate his personal financial exposure under the Guarantee, particularly in the event that he became a minority shareholder in the Company. It is true that when the Guarantee was provided in 2008, there were various on-going shareholder disputes in relation to the Company, particularly Suit 568, and the status of Rodney Tan's indirect shareholding in the Company was, to an extent, uncertain. This uncertainty was limited, however, and there was no real possibility (as Rodney Tan conceded in court) that his interest would be reduced to below 60% of the issued capital. So, whatever the outcome of the lawsuits, he would have retained voting control of the Company. In the event, he increased his shareholding and by the time this action started his indirect interest amounted to more than 90% of the Company's share-capital. He did not, however, reconsider whether in those circumstances the security deposit was still necessary. While Maybank had required Rodney Tan to undertake, *inter alia*, not to divest his indirect shareholding in the Company, this did not mean that had Rodney Tan actually wanted to sell his stake in the Company, Maybank would not have consented to his doing so to a reputable and financially stable buyer. In these circumstances, I do not accept the defendants' position that the security deposit was required to ensure that Rodney Tan would have control over some excess cash that was surplus to the

working capital and/or cash flow needs of the Company, which cash could be used to meet any repayment obligations under the Guarantee in light of the exposure.

156 To me there is force in the plaintiff's view that the cash security deposit was more of a way of enabling Rodney Tan to obtain cash from the Company than for him to retain control over the use of the $105.3m Facility. Mr Ng deposed that the parties' understanding upon entry into the Indemnities was that the cash deposits paid to Rodney Tan were to be made available to the Company should it require a return of all or any part of the same to meet its working capital needs. There is no evidence that this actually occurred: though the Company did need money over the years, its books show borrowings from MDG and CGH, not Rodney Tan much less return of deposit by the latter. Indeed by the time of the trial Rodney Tan had received $40m as security deposit and the Company owed MDG and CGH over $21m, money it may not have needed to borrow had it not been obliged to provide the security deposit.

(2) Fee of 1.5% per annum

157 The plaintiff complains that the fee of 1.5% per annum is grossly excessive, and makes two arguments in support of his contention:

(a) First, that "it is not common for a fee to be charged in situations where a director of a company gives a personal guarantee for facilities extended to the company"; and

(b) Second, that "the fees was to be charged on the amount of the facility granted and not on the amount of the facility used, and thus bore no relation to the actual risk borne by [Rodney Tan]".

158 The defendants submit that the 1.5% per annum fee was reasonable. The directors of the Company including Mr Lim and Mr Gn had considered the cash flow of the Company in deciding to have the fee paid only upon discharge of the Facility, and Rodney Tan had even been prepared to waive the fee when it became due. Further, the fee was reasonable in the circumstances, and formed part of the overall commercial *quid pro quo*.

159 The fact that it is uncommon for a fee to be charged by a director who gives a personal guarantee in relation to a banking facility granted to the company does not mean that such an arrangement is improper. It does however mean that it should be carefully scrutinised and consideration given to whether the director should be asked to forego or reduce it. There was no evidence of such scrutiny or that the directors of the Company asked for legal advice on the propriety of the fee or the suitability of the rate. However, such omission is, perhaps, evidence of breach of duty rather than of oppression.

Responsibility for the Fifth Complaint

160 Given my conclusions above, Mr Seeto, Rodney Tan, Mdm Poh, Mr Lim and Mr Gn, acted wrongly in signing the resolutions authorising the grant of the Indemnities.

The Sixth Complaint: Payment of security deposit pursuant to the Indemnities

161 The sixth complaint, in the words of the plaintiff, concerns the conduct of Mr Seeto, Rodney Tan, Mdm Poh, Mr Lim and Mr Gn in "[p]rocuring/allowing payments totalling to $40m to be made to [Rodney Tan] by [the Company] as security deposit pursuant to the [D]eeds of [I]ndemnity". It is really an extension of the Fifth Complaint.

Basis of the Sixth Complaint

162 The plaintiff submits that the payment by the Company of the $40m to Rodney Tan by way of security deposit pursuant to the Indemnities was wrongful because "[n]o discussions were held between the directors [of the Company] in relation to the individual payments, nor were the individual payments authorised by board resolutions". Rather, "[m]ost of the individual payments were approved by [Rodney Tan] himself, and were made to [Rodney Tan] based on his instructions given to the chief financial officer at the material time to make payments as and when [the Company] had funds". Clause 6.1.2 of the Second Indemnity provided that the 20% cash security was to be provided in accordance with milestones agreed or to be agreed between the Company and Rodney Tan. The plaintiff notes that Rodney Tan conceded in court that no such milestones were ever agreed. Further, dates put in a letter dated 10 September 2008 should be construed as deadlines and not milestones related to the Company's cash flow need and financial position.

Contribution of each defendant to the Sixth Complaint

163 There was a great deal of evidence showing that Rodney Tan himself controlled the payment out of the sums making up the security deposit. He used funds from various facilities provided by Maybank, and it was clear that on many occasions such drawdowns were not in keeping with the purpose for which the facilities used were granted. None of the other directors was regularly involved in approving these payments. Most of the vouchers were signed by Rodney Tan himself and the payments were made based on his instructions. Given this, Rodney Tan was the main mover of the funds which he was able to take as and when there were available facilities but Mr Seeto, Mdm Poh,

Mr Lim and Mr Gn were all in breach of duty in not monitoring payment of the same.

The Seventh Complaint: Allotment of shares in the Company to MDG pursuant to order of court procured by fraud

164 The Seventh Complaint concerns an order of court dated 12 February 2009 that granted the Company leave to issue 40 million shares to raise funds (the "2009 Order"). This 2009 Order followed an earlier order dated 18 June 2008 that restrained the Company from issuing shares.

165 At the outset, I note that the plaintiff submits in relation to the seventh complaint that the "outstanding SUM 2014/2015 should be resolved in the Plaintiff's favour". This submission is misplaced. I heard the summons in question and having heard counsel for the plaintiff, MDG, and the defendant-directors, I specifically noted that no order was being made on the application. That was the end of the application and no order can now be made on it.

Basis of the Seventh Complaint

166 The plaintiff submits that the 2009 Order should be set aside on the ground of fraud because Rodney Tan "actively concealed material facts from the Court and deliberately misled the Court into granting the Order". He argues that Rodney Tan "had a premeditated dishonest intention to wilfully mislead the Court into granting the order for the issuance of shares" by deposing that the issue of shares was needed for the Company to meet its contractual and/or financing obligations while "wilfully conceal[ing] the payments of the security deposits that had been made to him by [the Company] in these affidavits". He adds that "the issuance of [the Company's] shares following the entry into the Deeds of Indemnity were not bona fide in the interests of [the Company] but

for the purpose of allowing [the Company] to make the payment of the security deposit to [Rodney Tan]".

167 An allegation of fraud must be pleaded with the utmost particularity, and will not be countenanced unless properly taken in a party's pleadings supported by full particulars with evidence led to prove the pleaded case. Accordingly, simply alleging fraud is, without more, useless (*Singapore Civil Procedure 2017* vol I (Foo Chee Hock JC gen ed) (Sweet & Maxwell, 2017) at para 18/8/15).

168 There is no mention of fraud anywhere in the plaintiff's statement of claim. The statement of claim is also silent on the notion of a "premeditated dishonest intention" on the part of Rodney Tan, and on any efforts by Rodney Tan to conceal the Indemnities, the amounts paid thereunder, and the sources of the payments. The plaintiff in his reply submissions simply makes a bare assertion, without reference to any of his pleadings, that "the material facts in relation to the allegation of fraud have been sufficiently pleaded". Given the failure of the plaintiff to plead such a grave allegation, this complaint must be disregarded.

169 In any event, as accepted by the plaintiff in his closing submissions (on the authority of *Ching Chew Weng Paul, deceased, and others v Ching Pui Sim and others* [2011] 3 SLR 869 ("*Paul Ching*")), a mere suspicion of fraud raised by fresh facts later discovered is not sufficient to justify the setting aside of a judgment. The claimant must establish that the new facts are so evidenced and so material that it is reasonably probable that the action will succeed. Suspicions, surmise, and conjecture are not permissible substitutes for facts or inferences.

170 The plaintiff alleges that Rodney Tan "selectively" ignored an allegation made in an affidavit by Mr Chiang that he had been "planning to siphon moneys from [the Company]", and refused to articulate his position that he was entitled to the security deposit payments pursuant to the Indemnities. However, as MDG and Rodney Tan point out, Mr Chiang had made numerous allegations as part of the background to the application. Rodney Tan took the position in his affidavit in reply that he would reply only to the allegations that were relevant at that time. Mr Chiang in his affidavit questioned only payments of $782,900 and $395,555.55 to MDG, and a payment of up to $3,265,800 to CGH in respect of project management fees. No mention was made of the security deposit payments with which the plaintiff now takes issue. That Rodney Tan did not address the issue of the security deposit payments is therefore not unreasonable.

171 I note too that the plaintiff conceded in cross-examination that he was in no position to give evidence on or to assist the court in relation to his allegations of "active concealment of material facts" and "deliberate misleading [of] the court" by Rodney Tan. In his closing submissions, the plaintiff attempts to surmount this evidentiary hurdle by relying on the silence in Rodney Tan's affidavits on the payments made pursuant to the security deposit to establish his allegation that Rodney Tan was actively misleading the court. Beyond the reference to the allegations made in Mr Chiang's affidavit, however, the plaintiff does not show, first, how Rodney Tan was even obliged to disclose the payments; and, second, that such disclosure would have been so material that it would be reasonably probable that a different result would have been reached in Suit 568. These omissions place the plaintiff's case in relation to the Seventh Complaint in the realm of conjecture. Such conjecture cannot ground an application to set aside a judgment (*Paul Ching* at [47]).

172 In any event, as Mr Chiang acknowledged in his affidavit, the Company was in need of funds at the material time, and the rights issue, for which leave was granted by the 2009 Order, went towards meeting this need. The fact that the plaintiff takes the position that the entirety of the rights issue should be set aside reinforces the notion that the plaintiff's case in relation to the Seventh Complaint is one of bare conjecture.

173 The Seventh Complaint does not, therefore, support the plaintiff's case in any way.

The Eighth Complaint: Disposal of Sijori Memberships to subsidiary of MDG

174 The Eighth Complaint concerns the transfer by the Company of the Sijori Memberships to Colony Members Service Club Pte Ltd ("Colony") on or about 5 March 2008. The Company had previously taken over the management of the memberships from Sijori RPL and had become entitled to collect the monthly subscription fees from the members (the "Members") while discharging the responsibilities of Sijori RPL to the Members.

175 On 30 January 2008, Colony was incorporated as a wholly-owned subsidiary of MDG. On 4 February 2008, the Members were informed that Colony would be offering them a new contract of membership on the following terms:

(a) If they accepted the offer from Colony, they were to pay all future monthly subscription payments directly to Colony, upon which they would become members of Colony.

(b) If they did not accept the offer from Colony, the obligation of the Company to manage the Sijori Memberships would nevertheless cease with the offer of the new membership through Colony.

176 Under the new membership package with Colony, the monthly fees were increased by five and a half times, from S$30 to S$165 for individual membership and from S$50 to S$275 for family membership. However, the Members would continue to enjoy substantially the same benefits as they had previously enjoyed with Sijori RPL. This was confirmed by Lie Kok Keong ("Mr Lie"), a professional valuer who provided an expert opinion on the value of the Sijori Memberships on behalf of MDG and Rodney Tan.

177 A total of 44 Members took up the offer.

178 It is undisputed that Colony did not provide any financial consideration to the Company in respect of the Sijori Memberships.

Basis of the Eighth Complaint

179 The plaintiff submits that Rodney Tan caused the Company to dispose of the Sijori Memberships to Colony (in effect, MDG) in February 2008 for no consideration, in breach of his fiduciary duties in respect of the assets of the Company.

180 The defendants submit that the Sijori Memberships had not been "disposed of" to Colony because the Members had a clear choice whether to take up the offer made by Colony, and only 44 Members did in fact take up the offer. They add that the Sijori Memberships were not an asset but a liability to the Company, given the disruption caused by the Members to the attempts by

the Company to re-brand the hotel as a five-star hotel. Finally, relying on the evidence of Mr Lie, they submit that the value of the Sijori Memberships was, at best, $55,691, and that figure had to be viewed holistically in the context of the qualitative disruption caused by the Members to the business of the Company.

181 Even if the Sijori Memberships were not disposed of *to* Colony, there is clear evidence that the Sijori Memberships were disposed of by the Company. Moreover, it is difficult to see how the disposition was in the interests of the Company. No reasonable director could have ignored the risk that disgruntled Members would challenge the change in the identity of their membership counterparty from the Company to Colony, especially given the five and a half times increase in the membership dues payable in order to continue enjoy substantially the same benefits as they had previously enjoyed. This is particularly given the history of complaints from the Members about their Sijori Memberships, as relied upon by the defendants in their submissions with respect to this complaint. This risk eventually materialised when the disgruntled Members brought Suit No 849 of 2009 ("Suit 849") against the Company for breach of contract. The Company eventually settled Suit 849 for $1.8m and had to pay its lawyers $374,332.28 in legal fees. For completeness, I note that this $1.8m settlement and the legal fees were not pleaded by the plaintiff. Nor was Rodney Tan cross-examined on it. Even so, there is no reason why the facts of Suit 849 and its settlement should be disregarded, in so far as they show the effect on the Company of the disposition of the Sijori Memberships.

182 The defendants' contention that the Sijori Memberships were a liability rather than an asset should be rejected. The evidence of Mr Lie is that the Sijori Memberships had, at minimum, a value of $55,691 as of 3 February 2008, just

before the offer to join Colony was conveyed to the Members. This figure of $55,691, in the words of Mr Lie, was calculated on a "fair value" basis that "take[s] into consideration the forecast revenue from Members and forecast costs associated with servicing the Sijori Memberships".

183 The defendants submit that the qualitative deficiencies in the asset meant that the true value of the Sijori Memberships was lower than the $55,691 calculated by Mr Lie. Considerable and disproportionate costs, time and effort required to manage and administer the Sijori Memberships on account of the need to provide Members with rooms at discounted rates, to allow Members to use the hotel and its facilities, and manage the complaints of the Members. However, Mr Lie had in reaching his valuation of $55,691 "considered the revenue/subscriptions derived from Members and the necessary full costs/expenses incurred arising from providing the benefits to those Members". The defendants' assertion that the "S$55,691 figure must nonetheless be viewed holistically in the context of the qualitative (as opposed to quantitative) aspects of the [Sijori] [M]emberships" cannot therefore be accepted.

184 It was also Mr Seeto's evidence that the income from the monthly subscription fee charged to the Members was "good".

185 In addition, the Court Expert had found that the Sijori Memberships had, as of 31 January 2008, a far higher value than that ascribed to them by Mr Lie:

(a) $691,160.00 for the period from 16 November 2006 to 31 January 2008; and

(b) $758,401.00 for the period from 1 February 2008 until the hotel was closed for renovation on 30 May 2009 if Colony had continued to manage the Sijori Memberships in the same way

> that the Company did, or nil for the same period if Colony had increased the subscription fee as it had in fact done.

The Court Expert added that if the Members were allowed to continue as members and enjoy the facilities of the hotel, there would be an additional value from the Sijori Memberships after the hotel re-opened in March 2011.

186 The main difference between the evidence of Mr Lie and the Court Expert was the inclusion of the fixed costs of running the hotel in the calculation of the expenses associated with the revenue from the Sijori Memberships. Mr Lie included all these fixed costs. The Court Expert did not. The notable items of fixed costs included "Rental of premise" (nil in 2006, $393,607 in 2007, and $1,000,000 in 2008), "Salaries, wages, bonuses and other costs" ($102,192 in 2006, $1,158,773 in 2007, and $1,209,655 in 2008), and "Legal fee" ($48,451 in 2006, $165,285 in 2007, and $1,084,776 in 2008). However, many of the fixed costs, particularly "Rental of premise" and "Legal fee" would likely have been incurred whether or not the Sijori Memberships were administered by the Company. In other words, the disposal of the Sijori Memberships did not spare the Company from incurring these costs. These costs should therefore have been excluded from the calculation of the expenses associated with administering the same. On the other hand, the Court Expert excluded entirely costs such as the costs of the staff from his calculations, on the ground that these costs were always being incurred and they were not increased by reason of the free stays consumed by the Members.

187 On balance, I prefer the evidence of the Court Expert. On Mr Lie's own calculations, the occupancy rate of the Members as a ratio of the room nights available at the hotel was a mere 3.9% in 2008, of which 2.0% were free stays

and 1.9% were discounted (*ie*, revenue-generating) stays. It was not unreasonable for the Court Expert to have taken the view that there was no need to attribute some amount of fixed costs to the provision of these free stays and discounted stays. Further, the defendants do not dispute the plaintiff's submission that Mr Lie proceeded on the erroneous assumption that the Members could insist that they continue to be offered the existing memberships (with the Company) on the existing terms. This led Mr Lie to compute the value of the Sijori Memberships disposed of on the basis of only 44 Members, rather than the 1,200 that actually held Sijori Memberships.

188 In any event, Mr Lie accepted that the Sijori Memberships had a value of at least $55,691, which was given to MDG via its subsidiary, Colony.

Contribution of each defendant to the Eighth Complaint

189 Accordingly, the transfer of the Sijori Memberships to Colony without consideration was a wrongful dealing with a valuable asset of the Company. Those directors who proposed and/or implemented the disposal of this asset were in breach of their duties to the Company. This action was, additionally, oppressive because it benefited the majority shareholder MDG at the expense of the minority shareholder, the plaintiff. MDG and Rodney Tan were the main drivers behind the disposal of this asset. Mr Seeto, who knew of the plan to dispose of the Sijori Memberships for no consideration but nevertheless acquiesced in the decision must also be liable for the same. In respect of Mdm Poh, however, the plaintiff did not even attempt to show *how* she had contributed to the disposal. Indeed, Mdm Poh points out that she was not even meaningfully cross-examined on the plaintiff's allegations in relation to the disposal of the Sijori Memberships. Consequently, there is no basis on which to hold her accountable.

The Ninth Complaint: Appointment of Glo Fabrics to effect supplies to the Company

190 The Ninth Complaint concerns the appointment of Glo Fabrics to supply fabrics for the Heritage Wing in or around June 2007.

Basis of the Ninth Complaint

191 The entirety of the plaintiff's submissions on the Ninth Complaint is found in one paragraph in his closing submissions, which I set out in full:

> In or around early July 2006, Gary Koh communicated to [Rodney Tan] that [the Company] needed to get three quotations before appointing Glo Fabrics House Pte Ltd ("Glo Fabrics") to supply fabrics for the Heritage Wing. However, [Rodney Tan] refused and instructed Gary Koh to proceed in relation to the mock-up room first. The Plaintiff submits that in refusing to obtain competitive quotes, [Rodney Tan] acted in breach of his fiduciary duties. This is especially so since Glo Fabrics is the company of [Mdm Poh], his then wife.

192 The defendants submit that the decision to appoint Glo Fabrics (even without obtaining competitive quotes) was made honestly and in the Company's interests. First, Glo Fabrics had already (in December 2006) been invited by the previous management of the Company, *viz*, Mr Seeto and Gary Koh, to give proposals for fabric designs to the Company. This was before Rodney Tan's appointment as director of the Company. Second, the decision to appoint Glo Fabrics was taken upon the professional recommendation of the design consultants of the project, Expression Galleries Pte Ltd. Third, in light of the time pressures to complete Phase 1 at the time when Glo Fabrics was appointed, there was no time to obtain competitive quotes. Finally, the appointment of Glo Fabrics was in the Company's interests given the reasonable prices and good quality of the fabric supplied by Glo Fabrics, and the experience of Glo Fabrics in the industry at the material time.

193 The defendants' submissions are borne out by the evidence. Even before Rodney Tan and Mdm Poh were appointed as directors of the Company, its management had approached Glo Fabrics for the supply of fabric. Gary Koh testified in cross-examination that he "went to see Glo Fabric with some of [his] staff to pick some of the fabrics … prior to [Rodney Tan]'s coming into [the Company]". Moreover, the plaintiff accepted that the Company was facing "serious time pressures" to complete Phase 1 at the time when Glo Fabrics was appointed. Gary Koh gave evidence that various milestones to be met under the Company's agreements with SDC, including that the rooms (and the fabric therein) had to be completed within a very "short timeframe", by June 2007. Finally, the plaintiff does not dispute the defendants' submission that the prices charged by Glo Fabrics were reasonable and the quality of the fabric that it supplied was good.

194 Accordingly, the plaintiff has not been able to substantiate the Ninth Complaint.

195 Separately, Rodney Tan was not in breach of duty in relation to the appointment of Glo Fabrics. When the appointment was made in or around June 2007, Gary Koh and all the other directors of the Company (*ie*, Mr Seeto and Mr Chiang) knew that Mdm Poh owned Glo Fabrics and was Rodney Tan's wife. Notably, the plaintiff did not pursue an allegation of conflict of interest in his submissions even though it was contained in his statement of claim and opening statement.

The Tenth Complaint: Allotment of four million shares in the Company to MDG on 13 October 2006

196 The Tenth Complaint concerns the allotment of four million shares in the Company to MDG on 13 October 2006. The background to this complaint which arises from the VTB Facility is set out in [7] to [10] above.

Basis of the Tenth Complaint

197 The plaintiff submits that the Company and not MDG should have been the borrower under the VTB Facility because the Company provided all the security for the loan. Further, the $4m debt that formed the basis of the allotment of four million shares to MDG was not owing from the Company to MDG at the time of the capitalisation, but arose only subsequently. Finally, a rights issue extended to all shareholders (including the plaintiff) should have been the mode by which the Company raised funds. An allotment of four million shares to MDG without a corresponding right of participation on the part of the plaintiff in the allotment was oppressive because it diluted the shareholding of the plaintiff.

198 The defendants submit that the participation of MDG in the VTB Loan Facility was necessary because the Company at the material time "was only recently incorporated, had no financial credentials and was an unknown entity". Moreover, at the time of the allotment of the shares to MDG on 13 October 2006, MDG was already under a $4m liability incurred on behalf of the Company, and this sum was owing by the Company to MDG in the books of the Company. Finally, the choice of an allotment of shares to MDG rather than a rights issue open to all shareholders was commercially justified given the urgency of the situation; there was little time between the notification from SDC

of the need for a $4.5m paid-up capital and the deadline for securing the Property by the completion of the novation of the Building Agreement.

Analysis

199 I deal first with the contention that the loan should have been made directly to the Company. I note that Sebastian Wong gave evidence that VTB Bank was not willing to deal with the Company as a standalone counterparty, and that the plaintiff conceded at trial that the lack of financial credentials on the part of the Company was a valid reason why a financier might not want to provide a loan to the Company. I am also aware that MDG was an older entity than the Company with some track record due to its previous business undertakings. It is, however, clear to me from VTB Bank's requirement that security for the VTB Facility be provided by way of charge or mortgage of the Company's assets and a gurarantee from the Company, that MDG's record and Mr Seeto's personal guarantee were considered inadequate support for the VTB Loan Facility. If more proof of this were needed, it can be found in the fact that the Cashier's orders which represented the advance of the VTB Facility were not released by VTB Bank until completion when the Company acquired the Property and was able to execute the various security documents listed in [8] above. In court, Mr Seeto conceded that if the Company had been the borrower he would likely have been asked to provide a personal guarantee as well. I am satisfied that, on a balance of probabilities, if the Company rather than MDG had applied for the VTB Facility on the basis of the same security as given for the facilities to MDG, it would have been granted the same.

200 Why then was the VTB Facility taken out by MDG? In my judgement, the most probable reason for this was that MDG needed funds to invest in the

Company both because the Company needed the money for the Project and because MDG wanted to maintain its majority interest in the Company and satisfy the paid-up capital requirement imposed by SDC. At that time the paid-up capital of the Company was only $820,000. If MDG had not been able to invest the $4m in the Company, it may not have retained a controlling interest. MDG did not produce any evidence that it had funds of $4m, apart from those borrowed from VTB Bank, to invest in the Company. To obtain the VTB Facility, MDG had to provide security over the Company's assets. It duly did so and, in my judgment, that was an act more in its own interests than those of the Company notwithstanding that the money was intended for and found its way to the Company to enable it to acquire the Property and pay off the Bank of China. Mr Seeto and the other directors of MDG who controlled the Company misused their power over the Company for MDG's benefit.

201 However, all the then shareholders of the Company, including the plaintiff, considered, approved and adopted the security documents to be given to VTB Bank (in so far as they related to the Company) and this was recorded in a shareholders' resolution dated 18 July 2006. The shareholders' resolution indicated that the security documents were to support a loan of up to $8m to MDG. A directors' resolution approving these documents was also passed on or around the same day. That being the case, the plaintiff for one would appear to have acquiesced in the arrangement for the borrowing to be by MDG rather than the Company. His complaint about it was belated (it was not made till 2009) and this affects the force of the complaint.

202 The plaintiff's complaint about the timing of the capitalisation of the $4m debt owing from the Company to MDG has more substance. MDG relies on the fact that all the shareholders of the Company had at an extraordinary

general meeting ("EGM") on 12 October 2006 authorised the directors of the Company to allot shares "to such persons at such times and for such considerations as the Directors in their discretion shall determine in the best interest of the company". At the time the shareholders of the Company were the plaintiff, MDG and one Mr Chiang Sing Jeong who was also a director. The plaintiff's signature appears clearly on the resolution. That resolution, however, was in a standard form for advance authorisation of issue and allotment of shares and I do not think much can be made of it regarding the plaintiff's knowledge of how such authorisation would subsequently be utilised.

203 I must in this analysis also take account of the fact that the very next day, 13 October 2006, a directors' resolution was passed to allot the four million shares to MDG and to resolve that the payment of the allotment moneys would be satisfied by the Company crediting the amount standing in favour of MDG in the "Amount Due to [MDG]" account appearing in the Company's books. This resolution was signed by Mr Seeto and Mr Chiang. The plaintiff was not a party to it. While, strictly speaking, the Company was not indebted to MDG at the time the capitalisation was effected because no money had been paid out on its behalf, everyone was aware that completion of the acquisition of the Property would take place shortly and, contemporaneously with completion, the money borrowed by MDG would be released to make the necessary payments to SDC and Bank of China on behalf of the Company. And indeed, that duly occurred. If it had not, the situation would be different and the ground for setting aside the allotment that much stronger. If, therefore, all the shareholders had at the time agreed to this advance capitalisation of the Company's debt, I do not think much could be made of it now. Indeed, Mr Seeto's evidence was that he had explained to Mr Chiang and the plaintiff that the Company had to fulfil the $4.5m paid-up

capital requirement before completion and that the only way to do this was by capitalising the $4m debt to MDG.

204 The plaintiff denied that he had received any such explanation from Mr Seeto. In his first AEIC which was made in 2011, long before Mr Seeto's assertion, he said that he had known about the allotment of the four million shares to MDG shortly after it was made. What he did not know, however, was that this allotment had been based on a capitalisation of the debt arising from the VTB Facility. If he had known this was to happen, the plaintiff says, he would not have agreed to the pledging of the Company's assets to secure MDG's loan from VTB. He only discovered the true state of affairs in the last quarter of 2008 when he learnt of the existence of this action and the complaints made therein.

205 When Mr Shen was the plaintiff in this action, one of the allegations in his statement of claim was that the whole capitalisation arrangement was contrary to s76 of the Act in that it enabled MDG to obtain financial assistance from the Company for its acquisition of shares in the Company. To me, on the face of it, there is force in this allegation. However, the present plaintiff, for reasons best known to himself, did not repeat the allegation when he made his claim. Therefore the parties have not explored it in their evidence or their submissions and it is not open to me to deal with it as such. However, it is worth noting that had MDG followed the procedure set out in s76 for the approval of the financial assistance to acquire shares, the full details of what was to be done would have been brought home to the plaintiff and he would not have been able to claim ignorance later. The fact that this procedure was not followed is some corroboration of the plaintiff's story that he was never told what was being done. Afterall, even if things had to be done in a hurry, if full explanations had been

made to the plaintiff and Mr Chiang and they were in favour of the capitalisation because of the urgent need to increase the Company's paid up capital, ratifying shareholders' resolutions could have been passed later. No such resolutions have been produced. On a balance of probabilities therefore, I accept that the plaintiff was ignorant of the fact that the shares were acquired on the basis of a loan derived from the VTB Facility.

206 In my judgement, it was commercially unfair to the plaintiff for MDG to acquire more shares in the Company on the basis of a loan that was secured by the Company's assets. When it is remembered that some years later, after Rodney Tan procured new facilities from Maybank for the Company itself, part of the Company's credit line from Maybank was drawn down to repay the VTB Facility, the point becomes even clearer. In effect, MDG had acquired the four million shares for nothing.

Responsible defendants

207 On the analysis above, the defendants responsible for this act of oppression are MDG and Mr Seeto. At the time of the wrongful acts, Mr Seeto was a major shareholder of MDG. He no longer holds any shares in MDG which is owned by Rodney Tan. I accept that Rodney Tan was not a party to this oppressive action but I cannot accept his counsel's submission that because the shareholding of MDG has changed since the acts in question, MDG should no longer be held responsible for them. MDG has its own legal identity separate from that of Rodney Tan and cannot escape responsibility for its actions simply because its management and shareholders have changed since those actions took place.

Summary of findings

208 The plaintiff made many complaints and allegations. Not all of them were justified or substantiated. I have, however, come to a number of conclusions which support the plaintiff's claim to have been oppressed. For convenience and ease of remembrance, I summarise below the main findings that I have made in favour of the plaintiff:

(a) The project management fees charged by CGH ought to have been adjusted to take into account the departure of Lawrence Chia and the appointment of OMPS (at [68]).

(b) Clause 4 of the Second MSA was unreasonably wide and allowed CGH to recover very large amounts as "out-of-pocket expenses" (at [70]).

(c) The management fees charged by CGH should have been reduced during the period between June 2009 and March 2011 when the hotel was closed (at [74]).

(d) The pre-opening support fee should have been reduced under the Third, Fourth and Fifth SAs (at [75] and [77]).

(e) The mode of paying management fees under the Second SA preferred the interests of CGH over those of the Company (at [86]).

(f) It was not in the interests of the Company to make it enter the MSSA with MDG and bind it to paying the latter a monthly fee of $50,000 (at [113]).

(g) Legal fees were wrongly charged to the Company in 2009 (at [121]) and 2010 (at [122]).

(h) The Company was wrongly made to pay legal fees to HLS (at [127]).

(i) The Company was wrongly made to pay valuation fees to Ernst & Young (at [130]).

(j) The cash security deposit provided for under the Indemnities was a way of enabling Rodney Tan to obtain cash from the Company (at [156]).

(k) It was wrong for the directors of the Company to sign resolutions authorising the grant of the Indemnities (at [160]).

(l) Rodney Tan controlled the withdrawal of payments towards the security deposit and did so without regard to the source of funds and the other directors did not monitor such payments regularly to ensure that the Company had spare funds (at [163]).

(m) The transfer of the Sijori Memberships to Colony without consideration was a wrongful dealing with a valuable asset of the Company (at [189]).

(n) The capitalisation of the loan of $4m from MDG to the Company, which loan was ultimately secured by the Company's assets, was an act of oppression (at [206]).

209 When my findings are considered on an overall basis, it is clear that MDG made use of its position as the majority shareholder whose representatives controlled the board of the Company, to take certain actions which unfairly

benefited it at the expense of the other shareholders, particularly the plaintiff who, for the last several years, has been the only minority shareholder in the Company. In the first place, MDG received four million more shares than it should have. Secondly, it received management fees to which it was not entitled and the payment of these fees pursuant to the MSSA showed an intention to prefer the interests of the majority shareholder to those of the minority. Thirdly, it wrongly charged the Company with legal fees in 2009 and 2010. Although Rodney Tan's drive, connections and ideas have assisted the Company in its growth from an empty shell to the owner of a five-star resort hotel, at the same time he has used his control of the Company to benefit himself, MDG and CGH in various ways which affected the value of the Company and showed that he preferred those interests over the interests of the Company and the minority shareholder. Mr Seeto, particularly when he controlled MDG, also conducted the affairs of the Company in a manner that was prejudicial to the minority shareholder. The other defendant-directors have been more passive, content to do as Rodney Tan desired rather than chart their own course based on the interests of the Company. They did not act diligently and thoughtfully in the best interests of the Company.

The buyout offers

210 MDG and Rodney Tan submit that the plaintiff's action for oppression is unsustainable in the face of two reasonable buyout offers that they had made to him. First, on 24 December 2010, by letter sent on their behalf, these defendants made an open offer to buy out the plaintiff's then shareholding of 93,085 shares in the Company on the terms set out in the Annex to that letter ("the First Offer"). Subsequently, on 29 October 2015, these defendants provided the plaintiff with a revised buyout offer ("the Second Offer").

The Second Offer referred to the plaintiff's shareholding in the Company pursuant to the Judgment in Suit 898 of 2008 and took into account various amendments to the plaintiff's pleadings made after the date of the First Offer.

211 MDG and Rodney Tan submit that both Offers were reasonable and substantially satisfy the guidelines set out in [97] of *Lim Swee Khiang v Borden Co (Pte) Ltd* [2005] 4 SLR(R) 141. These guidelines which are derived from Lord Hoffmann's judgment in *O'Neill v Phillips* [1999] 1 WLR 1092 ("*O'Neill*") are as follows:

(a) The offer must be to purchase the shares at a fair value.

(b) The value, if not agreed, should be determined by a competent expert.

(c) The offer should be to have the value determined by the expert as an expert.

(d) The offer should provide for equality of arms between the parties.

(e) The offer should take into account the plaintiff's costs, though these need not always be payable by the defendants.

212 The submission made was that the Offers substantially satisfied the guidelines above because:

(a) Both Offers provided that Rodney Tan and/or MDG would purchase the plaintiff's shares in the Company at a fair value.

(b) They provided that the valuation be done by a professional valuer to be mutually agreed by the parties, failing which the valuer shall be appointed by the Court.

(c) They provided that the professional valuer would act as an expert whose decision shall be final and binding, save in the case of manifest error.

(d) They provided that:

(i) if the valuer had any reason to think that there had been misapplication of the Company's funds which may have had the effect of depreciating the value of the plaintiff's shares in the Company, he was to write to both parties to highlight his findings and seek their written input, and the parties would then submit their written responses to him for his consideration; and

(ii) upon completion of his valuation, the valuer was to circulate a draft report to the parties who would then be able to submit their arguments on any aspect of the report for the valuer's consideration.

(e) The Offers also provided that the appropriate order for costs would be an issue to be determined at the trial of this action.

213 MDG and Rodney Tan also assert that the Offers made provision for the damages claimed by the plaintiff because they provided that in the event that any of the issues to be determined at trial were resolved in the plaintiff's favour, the appropriate directions from the court should be made as to how the relevant

findings should be factored by the valuer in valuing the plaintiff's shares. Further, the terms of the Offers covered all the entities involved in the action.

214 The plaintiff does not accept that the Offers were reasonable offers which would have dealt with his complaints and afforded him the remedies he seeks by this action. As far as the First Offer is concerned, I agree with the plaintiff's submission that this was not reasonable because it related only to a smaller parcel of 93,085 shares. At the time the plaintiff's claim for the balance of the shares was pending and since the First Offer did not address the pending claim, it was proposing only a partial buy out which the plaintiff was not obliged to accept.

215 Turning to the Second Offer, I accept the plaintiff's submission that it does not satisfy the requirement to purchase the shares at "fair value". In a minority oppression case, Lord Hoffmann was at pains to state that the fair value "will ordinarily be a value representing an equivalent proportion of the total issue share capital, that is, without a discount for its being a minority holding" (see *O'Neill* at p 1107). Therefore, as the plaintiff submits, it has to be expressly stated in the offer that no minority discount is to be applied to the plaintiff's shares. This is because in an oppression situation where the plaintiff is forced to exit the company due to the unfair behaviour of the majority shareholder, it would be doubly unfair to impose a discount on the plaintiff's share price because the shares represent a very small portion of the paid-up capital. Instead, the fair value should be determined on a pro-rated basis. The Second Offer did not specify that the fair value would be ascertained without applying the minority discount.

216 Secondly, I accept the point that the Second Offer is deficient in that it does not contain any offer to pay the plaintiff's legal costs. The offer was made only one day before the commencement of the trial on 30 October 2015 and by that time the action had proceeded for some six years (counting from the plaintiff's entry into the action in January 2009) and substantial costs had been incurred by him. All that the Second Offer says about costs is that it is to be determined at trial. That is not sufficient. The purpose of any offer in such circumstances is to make the trial unnecessary by giving the plaintiff the remedy he desires without having to go through the trial. In this case, the Second Offer (and indeed the First as well) would still have required the plaintiff to go through the process of the trial to determine his right to costs.

217 I am also not satisfied that the procedure for valuation set out in the Offers would be sufficient to determine the fair value of the plaintiff's shares. This is because the value of the shares would be affected by the value of the Company and the number of validly issued shares held by MDG. I have had to determine the validity of the allotment of four million shares to MDG in October 2006 as well as other matters which could affect the value of the Company, like overcharging by CGH, the wrongful payment of legal fees, and the payment of $40m as security deposit to Rodney Tan. A trial was needed to determine these issues and I doubt that any appointed valuer would have been able to decide on them without the assistance of a trial.

218 Finally, I observe that the Second Offer was made very late in the day and the plaintiff could hardly be expected to give up six years of litigation on the eve of trial on the basis of such an offer.

219 I therefore hold that the Offers made by MDG and Rodney Tan to buy over the plaintiff's shares do not afford them a defence to this action.

Remedies

220 The plaintiff has asked for a whole slew of remedies. The plaintiff's claims in this regard can be broadly categorised into: (a) claims for remedies specific to the ten complaints; and (b) a claim for a buyout. In relation to the specific remedies, many of these are for sums to be returned to the Company and for cancellation of share allotments. In my judgment, since the main remedy that the plaintiff wants is an order for his shares to be purchased by the defendants, it would be appropriate to consider that order first before considering the specific remedies. After all, once the plaintiff is no longer a shareholder, he will have no interest in the Company's accounts or the number of shares held by MDG.

221 In relation to the buyout, the plaintiff seeks orders that:

(a) Rodney Tan and MDG, on a joint and several basis, purchase his shares in the Company following the valuation of the same which shall take into account the adjustment of the plaintiff's shares in the Company required by reason of the unauthorised allotment of shares to MDG.

(b) A valuer be appointed to value the shares and to conduct a special audit of the Company to investigate whether there are any matters which are required to be taken into account in valuing the plaintiff's shares.

(c) That Mr Seeto, Mdm Poh, Mr Lim and Mr Gn be jointly and severally liable to purchase the plaintiff's shares in the Company on the aforesaid basis in the event that Rodney Tan and MDG default in their obligation to purchase the same.

222 I agree that the plaintiff must be allowed to exit the Company and that the best way to achieve this is to order a buyout of his shares by the majority shareholder MDG and/or its beneficial owner Rodney Tan. This is not a case where the Company should be wound up since it is a going concern and since the plaintiff's shareholding represents only a fraction of the paid-up capital. I do not agree that a special audit should be conducted as that would only involve more expense and delay. Further, from the time the plaintiff made his complaints up to the first tranche of the trial, more than six years elapsed during which the plaintiff had many opportunities to ask for discovery and re-formulate his pleadings. All the complaints he made have been investigated and it would not correct to allow a special audit now. As for the other defendant-directors, apart from Rodney Tan, none of them is a shareholder of the Company and, while they assisted MDG and Rodney Tan in managing the Company's affairs in ways that were unfair to the plaintiff, they did not initiate the same or receive any direct benefit from such management. Accordingly, it would not be right to order them to purchase the plaintiff's shares if there is a default by MDG and Rodney Tan. If such default occurred, the plaintiff would have to consider whether a winding up order would be an appropriate relief to pursue.

223 For the reasons given above, MDG and Rodney Tan shall be jointly and severally liable to purchase the plaintiff's shares at their fair value which value shall be determined by an independent valuer acceptable to them and the

plaintiff or, alternatively, appointed by the court. The valuation shall be conducted on the following basis:

(a) No minority discount shall be applied despite the plaintiff's holding being a minority holding.

(b) In assessing the plaintiff's percentage shareholding, the valuer shall disregard the four million shares allotted to MDG in October 2006 and any subsequent shares acquired by way of rights issue that can be attributed to MDG's holding of those four million shares.

(c) In assessing the value of the Company, the valuer shall treat:

(i) the $40m received by Rodney Tan as security deposit as part of the assets of the Company;

(ii) the sum of $1,283,777.25, referred to in [121] above, as part of the assets of the Company;

(iii) the sum of $80,941.47, referred to in [122] above, as part of the assets of the Company;

(iv) the monthly management fee of $50,000 paid to MDG, referred to in [113] above, as part of the assets of the Company;

(v) the fees of $965,586.96 paid to HLS, referred to in [127] above, as part of the assets of the Company;

(vi) the fee of $370,182.30 paid by the Company to Ernst & Young for valuing MDG shares, referred to in [130] above, as part of the assets of the Company; and

(vii) the valuation of $758,401 given by the Court Expert to the Sijori Memberships, for the period 1 February 2008 until 30 May 2009 (see [185] above), as part of the assets of the Company.

224 The valuation exercise shall be completed within six months of the date of the appointment of the valuer and the costs of the valuation shall be paid by MDG and Rodney Tan. MDG and Rodney Tan shall complete the purchase of the plaintiff's shares within two months of the issue of the valuation report.

225 The parties shall have liberty to apply with respect to the appointment of the valuer, any clarification required regarding the parameters of the valuation and the time period within which it is to be completed.

226 The specific remedies sought by the plaintiff and my holdings thereon are as follows:

(a) Cancellation of shares: The plaintiff asks that various allotment of shares to MDG be cancelled. The only allotment which I have found to be improper is the one that took place on 13 October 2006 and I decline to reverse that or the rights issue shares flowing from it because the plaintiff can be compensated by an adjustment of his percentage shareholding as provided for in [223(b)] above.

(b) CGH management fees: The plaintiff asks for various management fees to be reversed but this is the remedy for the Company and the plaintiff has no independent loss so I do not allow it.

(c) MDG management fees: I have found that these were improperly incurred and charged, and have provided for them to be disregarded in the valuation of the Company and therefore there is no need to make an order for MDG to repay them to the Company as the plaintiff requires;

(d) Legal fees: I have already dealt with these in connection with the valuation and no other order needs to be made;

(e) Transfer of Sijori Memberships: The various reliefs asked for by the plaintiff are either not based on pleadings or the wrong done has been addressed by my order on valuation;

(f) The Indemnities: I have provided for the moneys paid to Rodney Tan under the Indemnities to be taken account of in the valuation and there is therefore no need to order him to repay the same to the Company.

227 I have not given the plaintiff any specific remedies against the defendant-directors, apart from Rodney Tan. As they have participated in the oppressive conduct of the Company's affairs, however, they have some liability, at least, for costs. So do MDG and Rodney Tan. On the other hand, the plaintiff has not succeeded in all his claims and some adjustment may have to be made for that. I will hear all the parties on costs on a date to be fixed by the Registry.

The indemnity claim between Mdm Poh and Rodney Tan

228 As stated in [30] above, Mdm Poh filed a claim against Rodney Tan for an indemnity in the event that she was found to be liable to the plaintiff. This indemnity was to cover "all sums [that she was] adjudged liable to pay to the

Plaintiff, whether by way of damages, interests [*sic*], expenses and/or costs, alternatively, such contribution thereto as may be pursuant to the Civil Liability (Contribution) Act 1978".

229 In December 2016, Mdm Poh's solicitors advised the court that on 2 November 2016 a settlement had been reached between Mdm Poh and Rodney Tan whereunder he had consented to fully indemnify her should she be adjudged liable to the plaintiff. This settlement was reached with both parties having the benefit of legal advice and with their counsel present. The parties had agreed to each bear his/her own legal costs. The terms of the settlement are contained in a Settlement Agreement dated 2 November 2016. It should be noted that the Settlement Agreement provides for various matters arising out of the parties' divorce and is not restricted to the indemnity claim in this action.

230 Mdm Poh takes the position that the Settlement Agreement constitutes an admission of liability on the part of Rodney Tan in respect of her indemnity claim against him. She submits that if she is found liable to the plaintiff, judgment should be entered against Rodney Tan in her favour in respect of her indemnity claim.

231 Rodney Tan, however, submits that the settlement does not constitute an admission of liability on his part in respect of Mdm Poh's indemnity claim against him. Clause 9 of the Settlement Agreement provides:

> 9. In respect of Suit 581 of 2007, the Defendant (i.e. the 4th Defendant in Suit 581 of 2007) in these proceedings shall indemnify the Plaintiff (i.e. the 5th Defendant in Suit 581 of 2007) in these proceedings for any loss, damage, costs, interests [*sic*], expenses ordered against her, if any. Parties shall bear their own costs in the indemnity proceedings.

232 The above submission is based on the following grounds:

(a) There was nothing in the facts to show that the agreement to settle was motivated by or constituted an admission of Rodney Tan's legal liability and in cl 9 he did not make any admission with regard to the issue of liability.

(b) No liability has been found or determined by the court in relation to the indemnity claim.

(c) A settlement agreement on its face is not an admission of liability. It is merely an agreement stating the terms agreed between the parties for the purpose of settling a dispute.

233 I accept Rodney Tan's argument in this regard. As was stated in the case of *Ng Chee Weng v Lim Jit Ming Bryan* [2010] SGHC 35 at [15], an offer to settle a dispute without more cannot amount to an admission of legal liability in respect of that dispute because a person may wish to settle the dispute for various reasons that do not relate to his views on his liability in law. I further agree that the Settlement Agreement does not disclose any admission of liability on the part of Rodney Tan. All it does is record the parties' arrangement in the event that Mdm Poh was found to be liable in this action. Thus, there is no basis on which I can order that judgment should be entered against Rodney Tan in favour of Mdm Poh. If Rodney Tan does not comply with his obligations under the Settlement Agreement, Mdm Poh will be able to institute action against him.

Judith Prakash
Judge of Appeal

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for the plaintiff;
Gregory Vijayendran, Benjamin Smith, Dhiviya Mohan,
Ronald Wong and Evelyn Chua (Rajah & Tann Singapore LLP)
for the first and fourth defendants;
Kenneth Pereira and Eugenia Chan (Aldgate Chambers LLC)
for the second defendant;
Third defendant in person;
Suresh s/o Damodara and Clement Ong (Damodara Hazra LLP)
for the fifth defendant in the main action and in the indemnity action;
Thrumurgan s/o Ramapiram and A Sangeetha
(Trident Law Corporation) for the eighth defendant;
Ashok Kumar Balakrishnan, Darius Tay and Cephas Yee Xiang
(BlackOak LLC) for the ninth defendant;
Philip Fong, Lynn Wong, Kevin Lim and Sui Yi Siong
(Harry Elias Partnership LLP) for the fourth defendant
in the third party indemnity action.
