Tokuhon (Private) Limited v Seow Kang Hong and Others
[2003] SGHC 65

Case Number : Suit 1499/2001

Decision Date : 25 March 2003

Tribunal/Court : High Court

Coram : MPH Rubin J

Counsel Name(s) : R E Martin and Gerald Sim (Martin & Partners) for the plaintiffs.; Wong Kah Chiew and Teh Ee-Von (Wong & M Seow) for the defendants.

Parties : Tokuhon (Private) Limited — Seow Kang Hong; Wong Kah Joo; Gamma 2000(S) Pte Ltd

Companies – Directors – Duties – Whether the loss of distributorship was caused by the acts of ex-directors.

Companies – Directors – Duties – Whether ex-directors were beneficial owners of new company that secured distributorship – Whether ex-directors were precluded from securing the distributorship on behalf of the new company.

Companies – Incorporation of companies – Lifting corporate veil – Whether the courts would lift the corporate veil to determine who the real plaintiffs were.

Equity – Fiduciary relationships – When arising – Maxims – whether the directors of the plaintiffs, having done the very acts complained of, were precluded from claiming because they did not come to court with 'clean hands'.

Introductory

1 The dispute in this suit was about the sole distributorship rights to an established brand of analgesic plasters known as Tokuhon, originating from Japan and being distributed in Singapore and Malaysia since about 1950. The contestants were originally directors and shareholders of the plaintiffs but they came unstuck some time in the middle of 2000 following festering mutual recriminations, perceived slights and sometimes open confrontations amongst themselves. The fact was that the distributorship agreement held by the plaintiffs was terminated by Tokuhon's authorized representatives, China Merchants Import and Export Co Ltd of Hong Kong ('China Merchants') on or about 15 May 2000. The present action by the plaintiffs against the first and second defendants was, in the main, for alleged breach of fiduciary duties as directors.

2 The plaintiffs' allegation was that it was by the acts of the first and second defendants that the plaintiffs had lost the Tokuhon distributorship; and further that the first and second defendants had unlawfully procured the said distributorship for themselves through the third defendants, a company incorporated by the latter without disclosure to the plaintiffs. The defendants denied that they had caused the loss. They contended that the distributorship agreement did not have any fixed duration; China Merchants terminated the distributorship because of the infighting amongst the plaintiffs' directors; China Merchants were able to perceive that the plaintiffs were a dysfunctional company and that the present directors of the plaintiffs themselves were guilty of attempting to wrest the distributorship for themselves to the exclusion of the first and second defendants. The defendants further contended that the plaintiffs did not come to court with clean hands. There was initially a claim against the third defendants on grounds of conspiracy and accessory liability but this was abandoned at the end. The only relief sought against the third defendants was for an injunction preventing them from continuing with the Tokuhon distributorship. The plaintiffs contended that the

first and second defendants were the beneficial owners of the third defendants but the defendants denied this. It was in this milieu that this case commenced and the facts which gave rise to this action could be summarised as follows.

Background facts

3 Three companies respectively known as Nan Tat & Co ('Nan Tat'), Continental Trading Co ('Continental') and Weng Seng Heng Medical Hall ('Weng Seng Heng') were since the 1950's separately importing and selling Tokuhon medical products, particularly the popular pain relieving plasters, in this region. These three companies were run by three individuals. They were: Thong Giok Sin from Continental, Chang Chiow Hee from Nan Tat and Ooi Choon Sian from Weng Seng Heng.

4 In 1962, at the suggestion and prodding of Tokuhon Corporation of Japan, the patriarchs of the three companies decided to put together a joint outfit under the name and style of Tokuhon Limited, (the description "(Private)" came about later), the present plaintiffs. One of the objects in the plaintiffs' memorandum of association was selling and distributing all kinds of drugs and medical preparations. The shares in the plaintiffs were divided amongst the three families in the following proportions: 35,000 to the Chang family from Nan Tat, 35,000 to the Thong (or Seow) family from Continental and 30,000 to the Ooi (or Ng) family from Weng Seng Heng. It was agreed amongst the three families that each family was to be represented on the plaintiffs' board by one director. Thus the first directors appointed to the board were Chang Chiow Hee from Nan Tat and Thong Giok from Continental (both have since passed away) and Ooi Choon Sian from Weng Seng Heng.

5 Following the incorporation of the plaintiffs, Tokuhon Japan appointed the plaintiffs as their Singapore distributors for Tokuhon products. This continued until 1994 when China Merchants based in Hong Kong were authorised by Tokuhon Japan to appoint distributors for them in Singapore, Malaysia and Brunei. Consequently, China Merchants appointed the plaintiffs as their Singapore distributors for Tokuhon products in 1994.

6 For the period 1989 to 1999, the directors of the plaintiffs were Dr Chang Jin Aye ('Dr Chang') from Nan Tat; Ooi Choon Sian ('Ooi'), his alternate being his brother Ng Choon Heng ('Ng') from Weng Seng Heng; and Dr Seow Kang Hong ('Dr Seow'), his alternate being Dr Seow's wife Mdm Wong Kah Joo ('Mrs Seow') from Continental, save for the following periods. On 2 April 1998, Mrs Seow was appointed a director, her alternate being her husband Dr Seow. This appointment continued until 28 May 1998 when both Dr Seow and Mrs Seow became directors in their own right without being alternate to each other. Digressing a little, it should be remarked at this stage that both Dr Seow and Mrs Seow are the first and second defendants in this action. They no longer hold any shares in the plaintiffs having sold their shares to Dr Chang and Ng on or about 21 February 2001, following settlement of a companies winding up petition No 349 of 2000 presented in relation to the plaintiffs' affairs by the Seows.

Plaintiffs' evidence

Dr Chang

7 The plaintiffs' principal witness was Dr Chang. He is a systems engineer by training and a holder of a PhD from the University of Wales. His affidavit of evidence-in-chief was somewhat lengthy; it contained 630 pages including exhibits. The material parts of his averments could be stated in the following terms.

8 After outlining the background how all the three families got together and formed the plaintiffs, he said that the relationship between the founding members had always been good and this state of affairs continued even after 1981 when his father passed away. He added that the first defendant became the director of the plaintiffs upon the death of the first defendant's father in 1989 and his wife, the second defendant, was his alternate director. From 28 May 1998 to 6 June 2000, the first and second defendants held two of the four directorships on the plaintiffs' board. None of the directors made a fuss about such over-representation of one family on the board since there was, then, a sense of give and take amongst the directors of the plaintiffs. He and other directors always gave due consideration to what the first and second defendants had to say and supported them whenever they could. He denied that the directors of the company did not respect the opinions of the second defendant who became the managing director of the company in 1999. He asserted that Tokuhon Japan was extremely pleased and happy with the performance of the plaintiffs and this was evident when the representatives of Tokuhon Japan and China Merchants visited Singapore on 22 November 1999.

9 He claimed that it was only at the beginning of the year 2000 that what used to be acceptable differences in view on sales strategy and management, which could be quite easily resolved by consensus or majority decisions, became unacceptable to the first and second defendants and were blown out of proportion by them in order to create a semblance of great strife or conflict within the plaintiffs.

10 He said that conflicts and quarrels, if any, surfaced only after 3 January 2000 when the second defendant insisted in a meeting that there should be a centralization of the plaintiffs' operations. He disagreed as he felt that it would strain the plaintiffs' financial resources. He expected the second defendant to endorse what he said about how they should go about increasing their market share but he received no support from her at all. He was, as a result of her imperviousness, utterly frustrated and the meeting ended on an angry note.

11 He said that on 15 February 2000, he received a letter from the second defendant out of the blue accusing him of being outdated in his method of marketing Tokuhon products. She wanted all Tokuhon products to be stored at the plaintiffs' premises and that Nan Tat was not allowed to draw out any goods to keep. She implied that Nan Tat was guilty of price undercutting. She further accused him of lack of transparency in having presented his advertisement plans to Tokuhon Japan when he visited them towards the end of January 2000. She even accused him of unpredictable mood swings that affected the staff morale.

12 Although he was shocked and angry by the contents of the letter, he simply did not bother to respond to it. He did not, however, at that stage realize that the second defendant had blind-copied the said letter to Tokuhon Japan and China Merchants. He claimed that he came to know of that letter being blind-copied to the said parties, only when he read the joint affidavit of the first and second defendants filed on 22 January 2001 in connection with companies winding up petition No 349 of 2000 presented by the latter. He complained that it was improper for the second defendant to

disclose confidential internal matters to outsiders, more so to their principals who could and did terminate their distributorship eventually.

13 He added that he was in for another shock when the second defendant sent yet another letter dated 17 March 2000 to China Merchants. The letter contained not only very damaging substance, but also had enclosed in it, confidential documents such as minutes of directors' meetings, notes of discussion and even an aide- memoire. The said letters dated 15 February as well as 17 March 2000 read as follows.

(a) Letter dated 15 February 2000 from the second defendant addressed to Dr Chang

Dr Chang Jin Aye

Director, Tokuhon (Pte) Ltd

c/o Nan Tat & Co Pte Ltd

Dear Dr Chang

With reference to our discussion at Tokuhon (Pte) Ltd on 3rd January 2000, I agree fully with your proposal to centralise the operations of Tokuhon (Pte) Ltd. May I bring to your attention that with the centralization, the following will be implemented:

1. Office Administration and Operations

A Secretary and an Accounting Officer should be stationed in the office to handle all the daily administration, operations and accounting aspects of the company. A full-time delivery staff should also be engaged to handle all the deliveries, collections and miscellaneous general office duties. In addition, we need a competent marketing and sales staff to handle the marketing and sales function of the company. The marketing role will include:

- Handle enquiries from our clients

- Provide prompt and good customer service

- Source and establish new accounts and maintain existing accounts

- Develop Marketing Plan and Integrated Marketing Communications Strategy

- Implement Advertisement and Promotion Plan

The successful candidate must be able to carry himself/herself well to help project a good image for the company.

2. Pricing of Tokuhon Goods

A standard pricing would be adopted for all Tokuhon products. Please note that Mr Ng, Mr Ho and our distributors had complained on several occasions about Nan Tat's pricing which was lower than that of Tokuhon (Pte) Ltd. As we know the practice of price under-cutting is bad for our company image.

3. Goods of the Company

With immediate effect, all Tokuhon products should only be stored in Tokuhon (Pte) Ltd. And Nan Tat should no longer draw out any goods to keep and we will invoice you on the goods you ordered.

Turning now to your objection during the discussion, Dr Chang, I am puzzled by the "double-standard" you practise. On the one hand you strongly advocate centralising the office operations but on the other you do not agree to the above proposed course of actions, in particular point 3. You also emphasized "transparency" in handling office matters but I was informed that you recently met and presented your Advertisement Plan to the manufacturers in Japan without the knowledge of the other directors in the company. You did not seek our consent nor inform us about this at all. I would like to point out that it is not fair to the Japan manufacturers if you approach them for their support for the advertisement plan at this stage knowing fully that our company's internal issues have not been settled. My proposal to recruit a marketing and sales staff to handle the marketing, sales as well as the Advertising & Promotion activities of the company has been turned down by you repeatedly. You went ahead to present your plans to Japan though you are aware that our company presently lack a competent marketing and sales staff to implement our Advertisement plan. Your attempt to present the advertising plan to Japan without first making provisions for our plan is not wise. Your move does not reflect positively on our Company's management ability to do proper planning and having business foresight.

In view of the above, I am agreeable to your suggestion at the same discussion to break-off the partnership of Tokuhon (Pte) Ltd. Your request to end the partnership is therefore accepted. I will proceed to inform Japan about the decision. I must mentioned that your constant unpredictable mood swings have affected the staff morale and the company's business progress.

Yours faithfully

(signed)

Seow Kah Joo (Mrs)

Director

cc: Mr Ng Choon Heng, Director

Tokuhon (Pte) Limited

bcc: Mr Michael Chien, Director

China Merchants Import & Export Co.

Mr Hisato Tanakamaru, Counselor (Internationala Sales Dept)

Tokuhon Corporation, Japan

(b) Letter dated 17 March 2000 from the second defendant addressed to Michael Chien of China Merchants

17th March 2000

Mr Michael Chien

Director

China Merchants Imp & Exp. Co

67-71 Chatham Road, South

Room 104, Oriental Centre

Kowloon, Hong Kong

Dear Mr Chien

RE: TOKUHON (PTE) LTD

It is with my deepest regret that I have to inform you of my intention to withdraw from my partnership in Tokuhon (Pte) Ltd. Arising out of the many unpleasant events over all these years, indeed it is a very painful decision. To give you an insight of what has happened at Tokuhon (Pte) Ltd, I append below for your information:

1. First discussion on 23rd Feb 2000 with Ng Family, Weng Seng Heng Medical Hall

Following Dr Chang Jin Aye's disagreement over several issues on centralising the office, the Ng family called to meet me on 23rd February 2000. The Ng family expressed their unhappiness with Dr Chang, in particular, the withdrawal of goods from Tokuhon (Pte) Ltd. These goods were not settled and to-date, the outstanding sum amounts to S$104,251. The Ng family agreed that with immediate effect, Dr Chang should be stopped from withdrawing any goods till he has settled the outstanding balance of S$104, 251 (Annexe A – Discussion Notes). However, on the next day, the Ng family changed their minds and withdrew from their decision made on 23rd February 2000.

2. Second Discussion on 3rd March 2000 with the Ng Family

In March 2000, Dr Chang through an office staff, Mr Ho Chin Huat, informed us of his decision to sell off his family owned shares of Tokuhon (Pte) Ltd. At the same time, Dr Chang had also refused to sign the Company's cheques which were due for payment. Dr Chang's action had greatly affected our company's daily operations, goodwill relationships and brought much inconvenience to the staff. The Ng family then arranged to meet me on 3rd March 2000 expressing their disapproval over Dr Chang's failure to discharge his responsibilities diligently as a Director. Mr Ng Choon Heng agreed to call an urgent Director's meeting on 9th March 2000 to effect the change in our company's bank signatories. At the same time, the Ng family also persuaded me to jointly buy over Dr Chang's shares. The Ng family insisted on buying 20,000 of Dr Chang's shares and suggested that I buy over the balance of 15,000 shares. The Ng family assured me that, unlike Dr Chang, they will give their best to cooperate with me at all times. However, when I was unable to agree to their proposal, the Ng family appeared unhappy. (Annexe B – Discussion Notes).

3. Urgent Director's Meeting on 9th March 2000

At the Director's meeting of 9 March 2000, Dr Chang relented and gave assurance that he would sign all verified Company's cheques due for payment. Surprising at the meeting, Mr Ng Choon Heng strongly supported Dr Chang and also proposed that a 5% commission should be paid to Dr Chang (Nan Tat & Co) in the handling of the sale and delivery of goods on behalf of Tokuhon (Pte) Ltd. I objected strongly on these suggestions based on the following reasons:

(i) Nan Tat's past practice of price undercutting in the market

(ii) Nan Tat had always not given any priority to Tokuhon (Pte) Ltd on the delivery of goods. Operational problems and arguments would arise at a later stage over the co-ordination and timing on delivery of goods.

(iii) Often time, the number of clients serviced under Tokuhon (Pte) Ltd would be reduced after Nan Tat has delivered goods and get in touch with them.

(iv) It would be more feasible for Tokuhon to have their own marketing & sales team to provide prompt and good customer service, source, establish new accounts, and develop viable marketing and promotional plan. These will in turn help our company to grow and progress further. Constant survey or research can also be conducted to enable us to react and response quickly in the competitive market environment.

It will be more efficient and cost effective in the long run for our company to hire our own deliveryman and eventually own our delivery van. I have been questioned on numerous occasions in the past by clients and business associates on why Tokuhon (Pte) Ltd could not afford to purchase a delivery van after more than 50 years of operations.

As we were unable to reach an agreement on most issues, we have decided to meet on 15th March 2000 to finalise the decision to windup Tokuhon (Pte) Ltd. (Annexe C – Minutes of Directors' Meeting dated 9th March 2000 & Annexe D – Aide Memoire between Mr Ng Choon Heng & Dr Seow Kang Hong dated 9th March 2000)

4. Second Directors Meeting on 15th March 2000

At the meeting, Dr Chang and Mr Ng Choon Heng did not agree to windup Tokuhon (Pte) Ltd. Instead, both Dr Chang and Mr Ng Choon Heng insisted on implementing the 5% commission scheme for Dr Chang (Nan Tat & Co). With their majority shares of 65%, Mr Ng Choon Heng then demanded the immediate adoption of Dr Chang's Sales Proposal (Annexe E) which allows Nan Tat to handle the sales of products on behalf of Tokuhon (Pte) Ltd. (Annexe F – Minutes of Director's Meeting dated 15th March 2000)

5. Comments from Clients

Recently, a former client of Nan Tat & Co had confirmed with us that it is possible to buy Tokuhon products at a price lower than that quoted by Tokuhon (Pte) Ltd. Another regular client in Singapore, Yu Lian Medical Hall, was also displeased with Nan Tat's practice of price undercutting and had complained about them on several occasions. How prices could be lower than Tokuhon (Pte) Ltd seems quite clear that someone had been undercutting the official price quoted by Tokuhon (Pte) Ltd.

All these years I have been working hard to protect the interest of the company and the image of Tokuhon. These are of utmost importance to me. However, I am afraid that these events will adversely affect the image of Tokuhon and lead eventually to the loss of many business opportunities. It is evident from the above events that I am no longer able to work with Mr Ng Choon Heng and Dr Chang Jin Aye. At the meeting on 15th March 2000, I have indicated to them about my intention to withdraw from my partnership in Tokuhon (Pte) Ltd.

Yours sincerely

(signed)

Seow Kah Joo (Mrs)

Director

Enclosure: Annexe A, B, C, D, E & F

cc: Directors, Tokuhon (Pte) Ltd

14 Dr Chang asserted that the allegations contained in the foregoing letters and the intimation therein by the second defendant that there was a prospect of the plaintiffs being wound up, were the main factors that caused China Merchants to terminate the plaintiffs' Tokuhon distributorship on 15 May 2000.

15 He also dealt with some of the allegations levelled against him and Ng that both of them were endeavouring to secure the Tokuhon distributorship for themselves to the exclusion of the first and second defendants. In this regard, he first made reference to a visit made by him to Japan in late January 2000. He said that during a holiday trip by him to Japan in January 2000, he paid a courtesy call on Tokuhon Japan. The purpose of the call was also to update himself with the manufacturing and quality control aspects of plasters, to study Tokuhon Japan's distribution methods and to compare the quality of another brand of plasters in the market known as 'Salonpas'. No doubt, he then took that opportunity to present his advertisement plans for Tokuhon products to the executives of Tokuhon Japan. He denied that he attempted to get Tokuhon distributorship for himself during that trip.

16 As to the allegation that he and Ng tried to secure exclusively for themselves the Tokuhon distributorship some time in June 2000, his explanation as appeared in paras 82 to 85 of his affidavit of evidence-in-chief read as follows:

82. When the Plaintiffs received Michael Chien's letter dated 15 May 2000 terminating the Plaintiffs' distributorship ("CJA-10"), Mr Ng was in a state of shock, though I was somewhat expecting it from all that the 1st and 2nd Defendants had done. What I had not expected was for the distributorship to be awarded to the 1st and 2nd Defendants. I thought then that China Merchants knew that they contributed to only about 12% of the Plaintiffs' sale, but later I found out how wrong I was when I read Michael Chien's affidavit filed on 22 January 2001 in the companies winding-up proceedings ("CJA-16") in which he said that the 2nd Defendant was the one responsible for the Plaintiffs' sales. It must have been the 1st and 2nd Defendants who

supplied this self-serving misinformation as the other directors knew the truth.

83. Anyway, before the award to the 1st and 2nd Defendants, Mr Ng and myself decided to make a trip to Japan to persuade Tokuhon Japan to over-ride Michael Chien's termination and to carry on with the Plaintiffs. So in June 2000, Ng Choon Heng from Weng Seng Heng Medical Hall Sdn Bhd and myself went to Japan to make representations and to submit a proposal to Tokuhon Japan requesting them to continue having trust and faith in the Plaintiffs (a copy of the proposal is exhibited and marked as "CJA-26"). But we were unsuccessful as the damage done by the 1st and 2nd Defendants was irreparable.

84. The 1st and 2nd Defendants have, however, alleged that Mr Ng and I had by this trip intended to obtain the distributorship for ourselves. The allegation does not make sense because if we wanted the distributorship for ourselves, we would not have gone together, unless we intended to set up a company in which only Weng Seng Heng Medical Hall Sdn Bhd and Nan Tat were shareholders. But that was not part of the proposal and neither did we incorporate a third company like the 1st and 2nd Defendants. The 1st and 2nd Defendants forget that by the time the trip was made the Plaintiffs had already lost their distributorship. They also forget that they were no longer directors of the Plaintiffs at that time and were not in a position to represent the Plaintiffs in Japan.

85. Our thought process for the proposals we presented was this. Clearly, by China Merchants' termination of the distributorship they were unhappy, rightly or wrongly, with the Plaintiffs. What was there in the Plaintiffs we could still sell as an advantage for them to change their minds? The strength of the partners who made up the Plaintiffs was the only one. What we were therefore attempting to do by our proposals was to draw on the experience, customer network and capabilities of Weng Seng Heng Medicall Hall Sdn Bhd and Nan Tat to persuade Tokuhon Japan to continue with the Plaintiffs. It is for this reason that we had to disclose to them that Weng Seng Heng Medical Hall Sdn Bhd was handling 150 products from Hong Kong and Japan as agents, including brand names like Mopiko and Kawai Kanyu. Hopefully, we reckoned, they could see the advantage of keeping on the Plaintiffs who had Weng Seng Heng Medical Hall Sdn Bhd as one of its partners. We even backed down on my advertisement plan in that proposal and instead undertook to pay for the costs of all advertisements. Objectively speaking, how could we have drawn on the 1st and 2nd Defendants' capabilities when they had no such track record or anything close to 150 agencies? But instead of being grateful for our efforts, the 1st and 2nd Defendants have used this to make the unfounded allegation that we were trying to get the distributorship for ourselves.

17 Dr Chang's attention was drawn to his presentation (DB-58 and 59) which seemed to be on behalf of Nan Tat and Weng Seng Heng rather than on behalf of the plaintiffs and what he had averred in an earlier affidavit by him 15 April 2002, where he had said at para 25 (DB 677): 'The 2nd defendant then draws attention to the visit which Ng Choon Heng and myself made in late May (sic) 2000 to try to obtain the distributorship (para 29 of her affidavit). But that was after China Merchants had already terminated the plaintiffs' distributorship on 15 May 2000, and further, I fail to see the importance of our visit to the question as to who caused the loss. His answer was that he stood by what he had stated in paras 82 to 85 of his affidavit of evidence, referred to above.

18 He made reference to the resignation of the second defendant from the board on 6 June 2000 and said that he thought initially that the second defendant resigned out of anger because her husband the first defendant failed to get re-elected to the board at that time. He said that he subsequently

changed his understanding when he found out from his lawyers in June 2000 itself that the first and second defendants had incorporated the third defendants whose objects included distribution of all kinds of plasters. He alleged in para 75 of his affidavit of evidence-in-chief as follows:

> 75. I concluded from all this that the 1st and 2nd Defendants clearly engineered (if not grasped) the window between 6 June 2000 (when they both ceased being directors of both the Plaintiffs and the 3rd Defendants) to 30 June 2000 (when the distributorship was awarded to the 1st and 2nd Defendants using the 3rd Defendants as vehicle) to complete whatever they had set out to do in January 2000 without having to account for their actions as fiduciaries of the Plaintiffs. That is why they were quick to highlight their immunity in the statement "… when we were no longer directors of the Company (the Plaintiffs) that Michael Chien of China Merchants approached us to ask if we were keen to become their new distributors" (para 29 of "CJA-6"). What a wonderful stroke of luck, if one believes in luck. And their lucky streak did not end there, as when they were no longer directors of the 3rd Defendants as well, they were even given the opportunity to apply in August 2000 for the 1st Defendant to be restored as a director of the Plaintiffs. They are asking the Court to believe that their exits from both the Plaintiffs and the 3rd Defendants were so timely and lucky that they could do all these things without breaching any fiduciary duty. The only problem, as I was telling Ng Choon Heng, was that the coincidences were too unbelievable to be anything but planned, and anything planned has little or nothing to do with luck.

19 He asserted that there was no question of the first defendant not being involved with the actions of the second defendant for, first of all they were husband and wife; they made several overseas trips together on the plaintiffs' business; and they had filed joint affidavits in the winding up proceedings against the plaintiffs.

20 He further said that the first and second defendants did not seek the plaintiffs' approval or consent to incorporate the third defendants; nor did they seek the consent and approval of the plaintiffs to accept the distributorship awarded to them subsequently by China Merchants through the third defendants which they owned beneficially. According to him, the subsequent transfer of their shares in the third defendants to one Koh and Chong was a sham.

Ng

21 Ng was the next significant witness for the plaintiffs. By and large, he adopted what was stated by Dr Chang in his evidence as to the background of the plaintiffs. He claimed that there was nothing eventful in the relationship between the directors of the plaintiffs until early 2000 when he noticed that the attitude and approach of the first and second defendants took a turn for the worse which he did not quite comprehend at that time. He said that he agreed with the view expressed by Dr Chang as to the non-viability of the second defendant's centralization plans.

22 He added that he too was shocked by the contents of the letter dated 15 February 2000 from the second defendant addressed to Dr Chang and copied to him. The letter was unnecessarily offensive in its tone; it was critical and provocative. He did not know then that the second defendant was setting the stage for proposals which had no merits in them and would obviously be objected to and fought over. Like Dr Chang, he also did not know at that time that it was copied to Tokuhon Japan and China

Merchants.

23 Then came another shocker. This was the second defendant's letter dated 17 March 2000 addressed to China Merchants. Not only did this letter contain damaging disclosures but also enclosed in it were confidential documents, such as minutes of directors' meetings, notes of discussions and even an aide-memoire. The letter portrayed him and Dr Chang in a bad light. It showed China Merchants that the directors were quarrelling amongst themselves. He thought initially that it was a stupid move on the part of the second defendant but only to realize later that in fact she was setting the stage for big fights to occur and to make those fights known to Tokuhon Japan as well as China Merchants. He said (see paras 18 and 19 of his affidavit):

> 18. Of all the things disclosed in this letter, I was most worried about the 2nd Defendant having disclosed the prospect of winding up the Plaintiffs to China Merchants. First, it was the 2nd Defendant and me who decided that the Plaintiffs should be wound up if either one did not pick up Chang's shares (Annex B to "NCY-4"). That eventuality did occur (though we did not wind up the Plaintiffs) because the 2nd Defendant refused to pick up Chang's shares if they did not give her family majority control. Then, in the meeting of all directors, which resolved nothing, the Board decided to "consider" the next best thing, the winding up of the Plaintiffs (Annex C to "NCY-4"). Chang and I later decided otherwise (Annex F to "NCY-4"), which led to the 1st and 2nd Defendants offering their shares for sale to us. That also fell through because the 1st and 2nd Defendant wanted $7.00 per share when, just a few weeks earlier, they and I were going to pay $3.96 per share to Chang, a figure obtained from Mr Ho Chin Huat.
>
> 19. The truth of the matter is that what I feared most from that time on was whether Tokuhon Japan or China Merchants would want nothing to do with us and appoint someone else to take over the Tokuhon distributorship in Singapore. I thought all three (3) groups in the Plaintiffs ran that risk. Never did I suspect, at that point of time, that the 1st and 2nd Defendants intended the distributorship for themselves. Now, on hindsight, reading the 2nd Defendant's letter dated 17 March 2000 again, I have noticed that the disclosures showed Chang and I in a very bad light in comparison to the 1st and 2nd Defendants who were seen as the ones pushing for changes.

24 He asserted that whatever internal conflicts they had in the company prior to 2000 were all stale or spent issues. Even the issue relating to Nan Tat owing $104,251 to the plaintiffs which sum he and the second defendant wanted settled soon, was nothing extraordinary. As to the alleged attempts by Dr Chang to switch distributorship to Nan Tat during his trip to Japan in January 2000, he said that he was not with Dr Chang during that trip and had nothing to say about it except that he agreed with Dr Chang that this still did not give the second defendant the right to send the 15 February and 17 March 2000 letters to China Merchants.

25 Dealing with the trip he and Dr Chang made in June 2000, he said that there was absolutely no truth in the allegation that he and Dr Chang had gone to Japan to secure the distributorship for themselves. He said: (see para 42 of his AEIC): 'Chang is absolutely right on why we had to sell the capabilities of Weng Seng Heng and Nan Tat, which had nothing to do with us wanting the distributorship for ourselves'.

26 He was particularly questioned about a letter dated 14 October 1996 written by Weng Seng Heng to Mr Michael Chien Man Lung ('Michael Chien') of China Merchants. The said letter (DB-93, translated

from Chinese) reads:

> Weng Seng Heng Medical Hall Sdn. Bhd.
>
> To: Mr. Chien Wen-Long
>
> Chinese Merchant Import & Export Pte Ltd
>
> Dear Sir,
>
> We are glad to have you and your wife in Singapore and Malaysia and we welcomed your visit. Please forgive us for the simple reception that was extended to you.
>
> As regards the shareholders of Singapore Tokuhon (Private) Limited not being able to co-operate, and so frequently having diverse views during meetings and hindering business progress, we are afraid that these may have an adverse effect on sales if this situation were to persist.
>
> Taking into consideration that my company has been in the medical business in Singaopre and Malaysia for some 10 years while enjoying good reputation and having many customers, I would like to propose that you appoint my company to be the sole agent [of your product]. Not only will there be a definite increase in sales volume, but the markets in both Singapore and Malaysia can also be controlled easily. My company has been handling 20 cartons each from Singapore and Malaysia for 3500 boxes (i.e. 70000 [packets]) of Tokuhon plasters monthly, twelve times a year. We hope that the sales volume will increase year by year.
>
> As regards advertisement, [my company] intends to promote [the product] using practical and effective means through radio, newspapers and redifussion. In Singapore, much effort will also be put into the promotion such as through radio, newspapers and buses. In this way, the market will be expanded followed by an increase in sales daily. We shall await the good news from you.
>
> Regards.
>
> From: Malaysia Weng Seng Heng Medical Hall Sdn. Bhd.
>
> Singapore Weng Seng Heng Medical Hall Sdn. Bhd.
>
> …

27 Whilst agreeing that the foregoing letter was of equal seriousness as that of the second defendant's letter dated 17 March 2000, he said (page 1235, lines 1 to 3 of NE) that the letter was written because 'they [the other directors] kept accusing me of the dumping problem which we were not responsible for. We could not control the exchange rate and the selling price fixed….'. When asked whether it justified Weng Seng Heng asking for the Tokuhon distributorship for themselves thereby depriving the other shareholders, he replied: (page 1235 lines 6 to 10 of NE) 'Because Tokuhon Japan, Dr Chang and Mrs Seow could not resolve the problem. Since they could not resolve it, then Weng Seng Heng will resolve it'.

28 He was also asked about a trip he made to Japan in May 2000 together with his brother Ooi to

meet those who mattered in Tokuhon Japan which he did not disclose in his affidavit of evidence in chief (pages 1096 to 1099). He agreed that he did not mention it in his affidavit. He claimed that it was his brother's idea and denied that his family had taken the opportunity to get the distributorship rights for their own company Weng Seng Heng.

Ooi

29 Ooi, one of the founding members of the plaintiffs, also testified for the plaintiffs. Insofar as was material, his evidence was that the main purpose of the objects of the plaintiffs was to be only an importer of the Tokuhon products. When the goods were imported into Singapore by the plaintiffs, they were distributed among the three family companies. The actual marketing and sale of the products was carried out by the said three companies. The plaintiffs were never intended to replace the family companies marketing the products, although the plaintiffs also did some sales of their own. He claimed that all along the relationship between the directors of the plaintiffs had been friendly and cordial and there was no problem. He further said that his family even supported the incorporation of a company in Malaysia in 1999 known as Tokuhon (M) Sdn Bhd which was to take over the marketing of Tokuhon products from Weng Seng Heng.

30 He added that his trip in May 2000 to Japan with his brother Ng was to persuade Tokuhon Japan to withdraw the termination of the plaintiffs' distributorship and at no time did they seek to take over the distributorship for Weng Seng Heng.

31 He was asked (pages 822 to 825 of NE) why then on 14 October 1996 was a letter written to China Merchants asking them to appoint Weng Seng Heng as the sole distributor in place of the plaintiffs. It was put to him: (page 822, lines 5 to 9): 'But isn't there a contradiction from what you have told us earlier that friendship is more important; money is not important?' His reply was: 'The reason why this letter was being written was this. You see, every time there was a meeting, my brother was being accused of selling the plasters from Malaysia in Singapore'. When asked whether he saw anything wrong in going behind the backs of his other directors in asking China Merchants to give Weng Seng Heng the distributorship, his replies were as follows (page 823 lines 8 to 23 of NE):

> Interpreter: He says, "Whatever money that we make, out of the one hundred percent, we only get thirty percent; the rest we have to distribute to them. And the business that we do was more than fifty per cent, fifty odd per cent, and yet we are being accused of such things. The manufacturer could not solve this problem; China Merchant couldn't solve it; Dr Seow and Mrs Seow also could not resolve it; so is Dr Chang. So, I was sad and also angry. So, I wrote this letter."
>
> Q: Mr Ooi, you are not answering my question. I asked you whether do you see it as anything wrong to have done that.
>
> Interpreter: He says, "Whether it's wrong or not, but in 1999, they have incorporated the Malaysian company. So, this problem was actually resolved because the Plaintiff has set up a branch in Malaysia."

32 Before dealing with the evidence proffered on behalf of the defendants, reference ought to be

made to the marketing presentation made by Dr Chang and Ng in Japan to the Tokuhon executives in June 2000 and referred to in para 17 of this grounds. A segment of their presentation (DB-58 and 59) reads as follows:

1 …

2 Marketing Strategies for

Tokuhon Products to

Malaysia & Singapore

Submitted By

Weng Seng Heng Chinese Medical Hall Sdn Bhd

& Nan Tat & Co Pte Ltd.

June 2000

3 Monthly Sales Target

70 cartons of Tokuhon Plasters for Malaysia

180 cartons of Tokuhon Plasters for Singapore

4 Our Undertakings

Costs of Advertisements

- TV

- Newspaper

- Posters at bus terminals or bus panels

Promotional Expenses

Marketing Expenses

LC for shipment of Goods

5 Our Experiences

Nan Tat & Co has 40 years of experience or more on sales of Tokuhon Plasters in Singapore.

6 Weng Seng Heng Chinese Medical Hall Sdn Bhd

- Company History

- Activities

- Experience

7 Company History

Established 50 years ago in Penang Malaysia

Selling Off the counter household medicine

8 Activities

Handling more than 12 agency products from Hong Kong and 2 agency products from Japan.

Distributing more than 130 items to over 1000 medical halls throughout Malaysia & Singapore.

9 Experience

As a manufacturer for customer requirements

As a distributor for promotion of sales to every outlets.

10 For efficiency & Without disruption of Tokuhon Supply In Market

Do give us a chance to prove our performance for a period of 3 years.

Do have trust in Weng Seng Heng Chinese Medical Hall & Nan Tat & Co Pte Ltd for the promotion of Tokuhon Products to Malaysia, Brunei & Singapore.

11 Thank you

For your kind attention

We do hope that you would consider our proposal.

Defence evidence

Second defendant – Wong Kah Joo (Mrs Seow)

33 The evidence of the second defendant, the wife of the first defendant, insofar as is material, was as follows.

34 The plaintiffs were incorporated in February 1962 with the purpose of distributing Tokuhon plasters from Tokuhon Japan. The plaintiffs were a merger of three family businesses and each family owned about one-third of the Plaintiffs' shares. Then in 1994, Tokuhon Japan appointed China Merchants as the agents in charge of the Plaintiffs. Thereafter, the Plaintiff's distributorship rights were obtained directly from China Merchants. The Plaintiffs never signed any written distributorship agreement with China Merchants.

35 After the demise of the father of the first defendant in 1989, the first defendant inherited the shares and became a director of the plaintiffs with the second defendant as the first defendant's alternate director. Some years later, the first defendant's mother gave her shares to the second defendant and on 2 April 1998, the second defendant was also appointed a director of the plaintiffs.

36 She soon realized that the plaintiffs did not operate like a typical private limited company but rather like a partnership between three businesses. The plaintiffs would import Tokuhon products from Japan and when the goods arrived Nan Tat would take up to 80% of the goods for sale by Nan Tat. Weng Seng Heng also took some goods for sale in Singapore in addition to goods it ordered direct from Japan for the Malaysian market. The parties were all paid a mix of commissions.

37 She also found out that not only were the plaintiffs disadvantaged by the fact that commission was being paid to the shareholders, Nan Tat and Weng Seng Heng were also taking a long time to settle their outstandings to the plaintiffs. As of 24 October 1996 Nan Tat had an outstanding of S$81,275 and as of 23 February 2000 the amount due was over S$104,000.

38 In December 1994 Dr Chang proposed that the plaintiffs move their operation to Nan Tat's office and pay the latter a fee of S$3,000 per month therefor. The second defendant did not accede to the proposal. She also came to learn later from China Merchants that Dr Chang had written a letter to China Merchants on 20 December 1994 (DB-89/90) requesting that the plaintiffs' distributorship be channelled to Nan Tat. The said letter, signed by Dr Chang on behalf of Nan Tat, insofar is material contained the following statements:

> …
>
> Nan Tat is in a position to undertake this responsibility with staff and delivery van system. But we are unable to offer such service without recovering the basic costs and we are unable to function under management by consensus. Management staff will listen to one boss not many bosses. Nan Tat is still responsible to Board of Directors (3 Partners) and they will still collect their dividends according to agreed shareholding of the company.
>
> …
>
> I am very sorry that I have to raise these unpleasant issues with you. Should you and Tokuhon Corporation think that I should adopt a passive role, I shall promptly obey. After all you believe that it will not be easy to change the system or policy, which as been carried out for many years past.
>
> …

39 She claimed that Nan Tat had over the years published advertisements and printed calendars stating that they were the sole distributors of Tokuhon products in Singapore, Malaysia and Brunei, thereby attracting business to Nan Tat and not to the plaintiffs. In this connection, she produced advertisements and calendars published by Nan Tat (DB-52 to 54). She said that it was Ng who happened to discover that Nan Tat had secretly registered the Tokuhon trade mark as their own and was in the event later forced by Tokuhon Japan to relinquish ownership of the trade mark.

40 She said that the plaintiffs also encountered a problem of dumping of Tokuhon plasters into Singapore from Malaysia. For this reason the plaintiffs eventually set up Tokuhon Malaysia (Sdn) Bhd. She said Weng Seng Heng were also found selling a competing brand of plasters from Germany known as 'Chilli' in direct competition with the plaintiffs. Whenever she raised such unpalatable issues with the other directors, she usually received rough treatment from them. In short, their working relationship had often been tension-filled and troubled. As it happened, sometimes, Ng sided with her to confront Dr Chang over a particular issue and at other times, Dr Chang sided with her if the issue concerned Ng.

41 According to her, China Merchants as well as Tokuhon Japan were well aware of the internal conflicts amongst the plaintiffs' directors. She said that Dr Chang and Ng had also written letters to China Merchants and Tokuhon Japan including the forwarding of the plaintiffs' minutes of meetings to them. In this connection, she produced a letter of acknowledgement by Tokuhon Japan addressed to Dr Chang dated 3 July 2000.

42 She claimed that in the course of 1996 Michael Chien of China Merchants paid a visit to the plaintiffs and intimated to them that he wanted to terminate the plaintiff's distributorship rights and offer it to one amongst them exclusively. However, following representations, he relented and set a time frame of three years for the directors of the plaintiffs to sort out their internal problems.

43 In early January 2000, Dr Chang called her asked her for a meeting on 3 January 2000. He told her in the meeting that he wanted to centralize the office operations. The second defendant readily agreed with the proposal and suggested to him that the marketing of the goods should also be centralized. Her view was that the plaintiffs should do all the marketing of Tokuhon products in Singapore rather than have Nan Tat and Weng Seng Heng carry out the marketing separately. Dr Chang did not agree. But when she tried to persuade him to see the logic behind her suggestion, he shouted, flew into a rage and threw his coffee cup down on the table in anger. He said that he did not want to operate this way and wanted to break off the partnership.

44 Some time in February 2000, she was told by Michael Chien that Dr Chang had gone to Japan and presented an advertising and promotion plan to Tokuhon Japan. She was surprised she had not been consulted on this beforehand. Consequently, she wrote to Dr Chang on 15 February 2000 (DB-74/75) setting out her views and informing him of her disapproval of his move to present such promotion plans without her approval. She also confirmed her agreement to end their relationship.

45 A few days later, when Michael Chien telephoned to find out about the developments, she narrated to him what had transpired. Upon his request, she also sent him a copy of the letter which she had sent to Dr Chang. She added that the said copy was sent, upon her instructions, by her staff simply by adding 'bcc' (blind copies) to Mr Michael Chien and the rest.

46 Later, she also came to learn from Qian Sen Sen, Manager of China Merchant's Tokyo Branch that the presentation of promotion and advertisement plans in January 2000 in Japan was not for the benefit of the plaintiffs but for Nan Tat. Some time in the beginning of March 2000 there was an offer from Dr Chang to sell his shares in the plaintiffs. A discussion ensued between Ng and herself but it came to nought when Ng did not want her to have a majority stake. She did not wish to be locked in conflict with a fifty-fifty equity. Seeing no way out and being beset with discord and frustration, she

decided to withdraw from the partnership. Therefore, she wrote to Michael Chien on 17 March 2000 to inform him of her decision. On 4 April 2000, she wrote to Dr Chang and Ng offering her as well as her husband's shares at the price of $7.00 per share. There was no agreement on price and the sale fell through.

47 On 4 April 2000, the plaintiffs received a letter from Qian Sen Sen conveying Tokuhon Japan's unhappiness over the less than the expected amount of orders for Tokuhon plasters. Having checked the inventory, she found that they had an over-stock situation. She communicated this to China Merchants adding further in her letter dated 14 April 2000, that the directors were still unable to resolve their internal problems and as a result the marketing and promotional plans for the plaintiffs had to be put on hold.

48 Then on 15 May 2000, the plaintiffs received a blunt, one- sentence, four-line notice of termination of the distributorship agreement (PB-107) with immediate effect. The letter did not give any reason for the termination.

49 She came to know later that Dr Chang and Ng made a trip to Japan in June 2000 to present sale and marketing strategies for Tokuhon products on behalf of Nan Tat and Weng Seng Heng. They did this whilst Dr Chang & Ng were still directors of the plaintiffs. According to her the reason for the termination had been fully set out in the affidavit filed by Michael Chien in these proceedings. She attributed the loss to the acts of Dr Chang and Ng. She maintained that China Merchants were well aware of the internal conflicts that plagued the plaintiffs and hindered their performance. She asserted that neither she nor her husband had contributed to the termination of the distributorship.

50 After the termination of the distributorship, the plaintiffs held their Annual General Meeting of 6 June 2000. The first defendant was not elected to the board. As a result of her husband's non-election, the second defendant tendered her resignation from the board as she did not want to have anything more to do with Dr Chang and Ng.

51 Sometime in the middle of June 2000, she received a telephone call from Michael Chien inviting her to Japan to be considered for appointment as distributors for Tokuhon products in this region. She was reluctant initially. All the same, upon the urging of Michael Chien, she flew to Tokyo on 23 June 2000. In the event, she was offered the distributorship. She claimed that at that time, she did not have a suitable vehicle to market Tokuhon products. She had a company known as Fashion Flair but that outfit was not appropriate for Tokuhon in her view. The third defendants in which she and her husband had shares were incorporated on 4 February 2000 for the purpose of selling cosmetics and other beauty products but that company had already been disposed of by them to her sister-in-law, Chong Hui Chee and her friend Koh Yang Lee on 6 June 2000. After some thought, she sought the permission of the present owners of the third defendants to make use of their company as a distributor of the Tokuhon products. Her sister-in-law and her friend duly obliged.

52 She then telephoned Michael Chien to accept his offer of the distributorship and told him that the third defendants would be the distributors. She also told him that she was only a manager of the third defendants and not a director or shareholder of the third defendants. She mentioned that she did not inform the board of the plaintiffs about the third defendants' incorporation because she felt that she was not acting in breach of any of her duties as a director of the plaintiffs. She added that the

objects of the third defendants included dealing with plasters but the plasters referred to meant first-aid plasters as she was then in negotiations with a Japanese company dealing with a brand called 'Silk-Pad First-Aid Bandage'. In her view, dealing with such a product would not in any way conflict with the business interests of the plaintiffs.

53 She said that she had arranged to transfer her and her husband's equity in the third defendants to her sister-in-law as well as to her friend Koh because of the many personal and professional services rendered by them to her. At any rate, the dividend declared by the plaintiffs each year was only about $20,000 and that whilst Tokuhon distributorship rights would enable one to make a comfortable living, it would not make any one rich. She was therefore content to let her sister-in-law and Koh to have the distributorship whilst she worked for the company for a salary.

54 She denied that she had plotted to cause the plaintiffs to lose the distributorship. She claimed that Michael Chien might have his reasons for terminating the plaintiffs' distributorship and as far as she was concerned, she did not influence him in any way to bring about the termination of the distributorship.

First defendant – Dr Seow Kang Hong

55 The first defendant, currently the Senior Orthopaedic Consultant and the Deputy Head of the Department of Orthopaedic Surgery with The Singapore General Hospital, practising medicine since 1974 and the husband of the second defendant, testified on his behalf. His evidence, insofar as was material, could be summarized as follows.

56 He said that his shares in the plaintiffs were a legacy from his late father. His grandfather was one of the founding members of the plaintiffs. Prior to the setting up of the plaintiffs, his grandfather owned Continental which sold Tokuhon plasters amongst other medical products. The first defendant made his wife, the second defendant his alternate director on the plaintiffs' board as he had little time to attend to the plaintiffs' business. His involvement with the plaintiffs was minimal, save for attending annual general meetings and standing as guarantor for the plaintiffs' bank loans.

57 He was aware that his wife had a difficult time with Dr Chang and Ng in the running of the plaintiffs' business. He would sometimes attend the plaintiffs' board meetings merely to ensure that Dr Chang would think twice before shouting or hurling vulgarities at his wife. He did accompany his wife, the second defendant, on her trips to Malaysia to give her support. He confirmed his wife's account in relation to a short-lived offer of Dr Chang's shares in the plaintiff company to the other shareholders in early 2000.

58 On 15 May 2000, the plaintiffs received a notice of termination of the Tokuhon distributorship from China Merchants. On 6 June 2000, at the plaintiffs' 39th annual general meeting, he was not elected to the board for no apparent reason, although it had been the plaintiffs' practice over the years that all directors would resign each year and get re-elected at the meetings as a matter of course. Out of frustration, the second defendant tendered her resignation. Thereafter, a series of events led to the filing of a winding up petition of the plaintiffs by him and his wife on the ground that the plaintiffs had lost their sub-stratum. In the event, Dr Chang and Ng bought over his and his wife's shares. He

denied having committed any actionable wrongs or acts which might be considered as breach of his fiduciary duties to the plaintiffs.

59 He said that he and his wife incorporated the third defendants in February 2000. The third defendants were incorporated for the purposes of his wife going into some skin care and soap business. He resigned as a director of the third defendants on 6 June 2000 along with the second defendant. He said that the allegations by Dr Chang and Ng had no foundation as he had no role in bringing about the termination of the plaintiffs' Tokuhon distributorship. He averred that it was Dr Chang and Ng who had committed breaches of their duties to the plaintiffs by placing their personal interests over and above the interests of the plaintiffs and it was their conduct that brought about the ending of the distributorship. He asserted that he had been wrongly dragged into this action.

Michael Chien

60 The evidence of Michael Chien, the managing director of China Merchants, was to the following effect.

61 China Merchants had been the agents and distributors of Tokuhon products since about the 1950's. The company was started by his grandfather who passed the directorship to his father and then to him. The headquarters of China Merchants were situated in Hong Kong . However, they had a branch office in Tokyo from where they liaised with Tokuhon Corporation Japan. Prior to May 1994, Tokuhon Japan was in a periodic distribution agreement with the plaintiffs directly. But, on 16 May 1994, Tokuhon Japan wrote to the plaintiffs stating that the agreement between the parties which expired on 7 March 1994 would no longer be dealt with by Tokuhon Japan and thenceforth the plaintiffs would have to deal and negotiate with China Merchants. This position was accepted and acknowledged by the plaintiffs and since then, the distributorship rights in relation to the plaintiffs were officially vested in China Merchants. Although a draft distribution agreement was prepared between China Merchants and the plaintiffs, it was never signed. Thus no written agreement governed the obligations between China Merchants and the plaintiffs.

62 He learnt in November 1994 that there was a complaint from Dr Chang that Tokuhon products from Malaysia were being dumped into Singapore and that Ng who was suspected of being behind it, was not doing enough to contain the problem. The tension that characterized the relationship among the three individual groups operating the plaintiffs was palpable even as early as 1994. This was evident from the letter of Mdm Fukumuro of China Merchants dated 9 December 1994, addressed to Dr Chang, (DB-749-750) where it was stated: 'Tokuhon Corp. is well aware of the difficulties in handling the Tokuhon business by three individual partners on (sic) the above markets, as your interest in the Tokuhon business is not always the same'. Ironically, the response from Dr Chang in his letter dated 20 December 1994 (DB-89/90) contained a suggestion that the distributorship of Tokuhon products be given to Nan Tat because: 'Management by consensus will not work… and we are unable to function under management by consensus. Management staff will listen to one boss (sic) not to many bosses'.

63 According to Michael Chien, the three families never really integrated their businesses. This would not have mattered to him much if the plaintiffs were doing a brisk business of Tokuhon products but it was not the case and therefore he had to monitor the situation closely.

64 Sometime in 1995, Dr Chang paid him a visit in Hong Kong. Initially, Michael Chien thought that it was a courtesy call. However, as it turned out, Dr Chang had come there to complain about the problems in the plaintiffs. Dr Chang told him about his difficulties in getting a consensus amongst the partners of the plaintiffs and of his differences with Ng over the dumping of the plasters from Malaysia into Singapore. Dr Chang's visit alerted him to the potential problems within the plaintiffs' board of directors. As it turned out, the sales figures fell in 1995. In 1996, after discussing the matter with Tokuhon Japan, he came to the conclusion that China Merchants should terminate the plaintiffs' distributorship and award the business to one amongst the three contending directors. He consequently flew to Singapore sometime in August 1996 to conduct an interview. He told the plaintiffs' directors of his thinking but in the end he was persuaded not to go ahead with his plan. The result was that he agreed not to terminate the plaintiffs' distributorship agreement and give them another chance. He told them that he would give them three years to show improvement and sort out their internal problems quickly.

65 Between 1996 and 1999 the performance of the plaintiffs' had not improved and the internal conflict did not seem to have abated. On 14 October 1996, he received a fax from Weng Seng Heng. In the fax, Weng Seng Heng complained that the directors of the plaintiffs were unable to co-operate among themselves; there were irreconcilable differences in the opinions of the directors on how the plaintiffs should be run; and as a result the plaintiffs' business was being affected. Weng Seng Heng then made bold to request their appointment as sole distributors in the place of the plaintiffs.

66 To solve the dumping problem once and for all, Michael Chien advised the parties to set up a branch in Malaysia and as a consequence Tokuhon Malaysian (Sdn) Bhd was set up in April 1999. Ng was most unhappy with the opening of the new company. He did not want to provide the directors of the new company with the list of customers who bought Tokuhon plasters from Weng Seng Heng. Though Ng eventually reluctantly agreed to provide the list, he did not do so in the end.

67 An incident which particularly upset him was the visit by Ooi to Japan in May 2000 when Ooi reportedly disclosed to the executives of Tokuhon Japan about Michael Chien's earlier confidential communication to Ooi that the termination of the plaintiffs' distributorship agreement was being seriously considered by Tokyo. Michael Chien regarded this as a breach of faith. He was also infuriated by the visit of Dr Chang and Ng to Tokyo in June 2000 to make a joint marketing presentation on behalf of Nan Tat and Weng Seng Heng without his knowledge and consent. He was upset by the apparent disrespect shown to him by Dr Chang and Ng. Following this incident, Michael Chien made a number of telephone calls to the second defendant to find out what was really going on in the plaintiffs. He did not initially tell her of the visit made to Japan by Dr Chang and Ng.

68 He again called the second defendant sometime in late February 2000 and asked her for an update of what was in fact happening in the plaintiffs. She then narrated to him about Dr Chang losing his temper and scolding her during their discussion over their respective centralization proposals. The second defendant also mentioned to him that Dr Chang had told her that he wanted to break off his partnership with the plaintiffs and that she had written a letter to Dr Chang in this regard. Michael Chien then asked her to forward him a copy of that letter and other documents for his information. She obliged and forwarded to him a copy of her letter dated 15 February 2000 addressed to Dr Chang.

69 In the event, Michael Chien decided to terminate the plaintiffs' distributorship. The termination, according to him, was inevitable. It was brought about as a result of the way in which the plaintiffs' directors had been conducting themselves which had an impact on the sales of Tokuhon plasters and

the scant respect shown to him by Dr Chang and Ng in going behind his back to extract the distributorship rights away from the plaintiffs for their own outfits. He was convinced that there was no way that the plaintiffs could continue to function effectively.

70 Sometime about 17 March 2000, after a telephone conversation with the second defendant, he received a letter from her telling him of her intention to withdraw from the plaintiffs because she could no longer work with Dr Chang and Ng. Presently, Michael Chien discussed the matter at length with Tokuhon Japan who agreed with him that if some of the plaintiffs' directors were attempting to steal the distributorship from the plaintiffs for themselves, there was no way the plaintiffs could perform and market Tokuhon products properly. It was then left to him to decide as to whom the distributorship should be awarded. In the event, he made a trip to Japan sometime at the end of April 2000 to discuss the termination of the plaintiffs' distributorship and once he had obtained their blessings, he decided to go ahead with the termination process

71 The reasons why he finally terminated the distributorship of the plaintiffs should best be stated in Michael Chien's own words. In this regard, paras 35 to 45 of his affidavit of evidence-in-chief read as follows:

> 35. My decision to terminate the Plaintiffs' distributorship rights was essentially because it was obvious to me that the instability of the internal structure of the Plaintiffs caused the Plaintiffs not to perform well. The directors had been quarelling amongst themselves since 1994, Chang and Ng had informed me about the conflicts and were trying to obtain the Plaintiffs' distributorships for themselves. This was despite the chance I had given to the Plaintiffs in 1996. It finally dawned on me that there was no way the Plaintiffs' directors could work together.
>
> 36. I knew that Chang and Ng did not have the interests of the Plaintiff Company at heart. They were more interested in their own company and business. Chang was constantly trying to "sell" Nan Tat & Co as being highly capable of selling Tokuhon plasters. This was evident as early as 1994 when Chang put down his co-directors in his letter to Fukumuro dated 20 December 1994 and suggested that the business be given to Nan Tat & Co.
>
> 37. Ng also wanted the business for Weng Seng Heng as can be seen from Weng Seng Heng's fax to me on 14 October 1996. Further Weng Seng Heng had also been selling other medicated plasters and goods which were in competition with Tokuhon plasters. During one of my visits to Singapore, I confronted Ng with this information and told him very firmly that as a director of the Plaintiffs, Ng should not sell Tokuhon's competitor's goods through Weng Seng Heng. Ng kept quiet but I believe that despite my warning, Weng Seng Heng continued to sell other medicated plasters and products.
>
> 38. For these reasons, I felt that it was unwise to continue with the Plaintiffs as sole distributors of Tokuhon products and decided that it would be better to terminate the Plaintiffs' distributorship rights and to look for another distributor which was more stable. My decision was supported and approved by Tokuhon Japan. In May 2000, I sent a notice to terminate the Company's distributorship rights. Annexed hereto on page 51 and marked "MC-1" is a copy of my letter dated 15 May 2000 terminating the Plaintiffs' distributorship. [see PB-107]
>
> 39. I wish to state that I had decided to terminate the Plaintiffs' distributorship not because of the 2nd Defendant's letters dated 15 February 2000 and 17 March 2000 or any letter written by the 2nd Defendant. I had known about the discord within the Plaintiffs way before in 1994 and when Chang visited me in 1995, he also told me about the conflicts within the Plaintiffs' board of

directors. Weng Seng Heng's letter to me in 1996 again confirmed that the Plaintiffs' directors could not work together. Those incidents together with what Chang and Ng did subsequently firmed up my resolve to terminate the Plaintiffs' distributorship rights. I was convinced that the Plaintiff Company was totally dysfunctional.

40. It is indeed therefore mischievous for Chang and Ng to now accuse the 2nd Defendant of harming the Plaintiffs when it was really they themselves who were the culprits.

41. After terminating the Plaintiffs, I took steps to look for an alternative distributor to replace the Plaintiffs in Singapore by letting friends and acquaintances know that I was interested in finding a suitable distributor. I received a few telephone calls and enquiries however no one was suitable.

42. Almost immediately after the termination, Chang and Ng, representing Nan Tat & Co and Weng Seng Heng respectively, went to Japan together to present a joint business proposal and sales strategy. This reconfirms my contention that they only have their own interest at heart. Never for a moment did they ask for the business to be given back to the Plaintiffs. Maybe they also think that the Plaintiff Company could not function anymore and that was why they were marketing themselves as an alternative. Anyway Tokuhon Japan told them to speak and deal with me as regards the award of the Tokuhon distributorship but they did not. At no point in time did Chang and Ng ask me to reconsider my termination or to persuade me to give the Plaintiffs another chance even though both Chang and Ng were then still directors of the Plaintiff Company.

43. In any case, even if Chang and Ng had approached me for the distributorship themselves, I would not have considered them at all. The past behaviour of Chang & Ng caused me to dislike them because they showed me no respect. I do not trust them and I did not feel that they were capable of working together. I did not bring up all their past "misdeeds" previously in the Affidavit I had filed earlier because I saw no need to wash their dirty linen in public. I feel compelled to do so now because they had forced me to say things I do not want to say by calling me a liar and a conspirator.

44. What angered me more was when sometime in early April 2002, Chang sent me his Affidavit on 2 April 2002. Chang had no reason to send this Affidavit to me as I was not involved in the relevant interlocutory proceeding. I believe that he had sent it to me perhaps to intimidate me or to harass me for in paragraph 29 of his Affidavit, he states:

> "I am delighted to note from the Defendants' list of witnesses that Michael Chien is going to be a witness and can be cross examined. The Plaintiffs are waiting to see if he changes his stand taken in his affidavit filed on 22 January 2001 … I have also given instructions to my solicitors to impeach him and to cite him for perjury if he changes any of his earlier statements on oath."

45. I am truly an outsider in this case and I have no interest in the outcome of this suit. I am not related to the Defendants. My key concern throughout is who is capable of running the business of selling Tokuhon plasters. I have no problems speaking out for the truth. Hence when the 2nd Defendant approached me to assist in clarifying the matter, I affirmed the Affidavit filed on 22 January 2001 and as mentioned above, I did not want to mention Chang and Ng's underhanded methods and misdeeds earlier because I really did not want to bad-mouth them if given a choice. But now that I am forced to by them, I will state everything that I know.

72 Sometime in June 2000, he decided to telephone the second defendant to ask her whether she would be interested in being appointed the distributor of Tokuhon products. He was of the view that she was capable and able to do the job efficiently. She was not keen at the outset. However, when he telephoned her again the next day, she accepted his invitation to go to Tokyo to meet him and the other directors of Tokuhon Japan and did make a trip to Japan at the end of June 2000. In the event, the distributorship was awarded to the third defendants as suggested by the second defendant.

73 Michael Chien said that he did not terminate the plaintiffs' distributorship because of the letters of 15 February and 17 March 2000, as was being suggested by the plaintiffs. He terminated the distributorship because the plaintiffs were found by him to be dysfunctional; he could not see how in the long run the plaintiffs could generate profits for China Merchants; and furthermore both Dr Chang and Ng had undermined him time and again.

Qian Sen Sen

74 Qian Sen Sen, Manager, Tokyo branch office of China Merchants testified that he was familiar with all the directors of the plaintiffs and that they were having problems amongst themselves as early as 1994. His evidence was to the following effect.

75 In or around 1994, he received a number of telephone calls from the directors of the plaintiffs, one accusing the other of flooding the Singapore market with plasters meant for the Malaysian market. The bickering and the clashes between them invariably affected the performance of the plaintiffs. In the result, sometime in 1996, he accompanied Michael Chien to Singapore to warn the plaintiffs' directors that their distributorship would be terminated, if they were unable to sort out their problems.

76 During his subsequent visits to Singapore, he had witnessed the plaintiffs' directors quarrel openly, on more than one occasion. He had seen Dr Chang quarrel with Ng over the dumping issue, even in the presence of a senior figure, Mr Tanakamaru, from Tokuhon Japan in 1997. Tanakamaru was shocked by the behaviour of Dr Chang and had to ask the latter to tone down. On another occasion, he witnessed Dr Chang raising his voice against the second defendant over a suggestion made by her. He and two other executives of Tokuhon Japan were stunned by Dr Chang's outburst. He reported these incidents to Michael Chein later.

77 He also confirmed that Dr Chang made a trip to Japan on or about 24 January 2000 and made a marketing presentation on behalf of Nan Tat to the executives of Tokuhon Japan. He duly communicated this presentation to Michael Chien. The upshot was that Michael Chien was angry.

78 He further mentioned that sometime after Chinese New Year in the year 2000, he received a call from Dr Chang telling him that the directors of the plaintiffs had quarrelled and that Dr Chang was intending to sell his shares in the plaintiffs. He conveyed this to Michael Chien. He added that he too, like Michael Chien, felt that the constant tension between the directors of the plaintiffs had adversely affected their sales performance. Subsequently, on or about 15 May 2000, he was informed by Michael Chien that he had terminated the plaintiffs' distributorship.

79 In June 2000, upon the request of Tanakamaru, he was present in a meeting in the offices of

Tokuhon Japan, when Dr Chang and Ng made a joint marketing presentation on behalf of Nan Tat and Weng Seng Heng. At no point in time did they endeavour to persuade the representatives of Japan to give the plaintiffs another chance to continue as distributors for Tokuhon products. He learnt sometime after late June 2000 that the third defendants had been appointed as the new distributors for Tokuhon products.

Ho Chin Huat

80 The evidence of Ho Chin Huat a former employee of the plaintiffs can be summed up as follows.

81 He joined the plaintiffs as a general clerk sometime in 1962 and retired in July 2001. According to him, the plaintiffs did not operate like a private limited company but more like a partnership between three family businesses. The directors of the plaintiffs quarrelled at various times over various matters for a variety of reasons. He added that Dr Chang had the tendency to raise his voice at the other directors and he became less abusive only after the second defendant started tape-recording the proceedings of the meetings. The relationship between the directors was a complex one and there were no fixed alliances. He confirmed and re-visited the problems between the partners over the dumping of goods from Malaysia into Singapore and the incident where Dr Chang, after scolding the second defendant over a matter raised by her in a meeting, was seen throwing a coffee cup and threatening to 'pecah' (break up) the plaintiffs. He said that in May 2000, the distributorship rights of the plaintiffs were terminated and following that in August 2001, his services were terminated by Dr Chang and Ng.

Mdm Chong Hui Chee

82 Insofar as is material, the evidence of Mdm Chong Hui Chee, the sister-in-law of the second defendant and one of the directors of the third defendants, was to the following effect.

83 A personal assistant by occupation, she had been helping the second defendant in her business, Fashion Flair, for a number of years. Since 1999, she had been worrying about her impending retirement from her regular employment, as she had become a sole bread-winner of her family since the death of her husband. When she lamented this to the second defendant, the latter had been most encouraging by saying that she could join her in her business. In the result, when the second defendant incorporated the third defendants, a company dealing with hand-made soaps and skin creams, Chong continued to assist the second defendant whenever she could. Then on 6 June 2000, the second defendant who sounded very depressed over her difficulties with the other members of the plaintiffs, told Chong that she was no longer interested in doing business and wanted a break from work. She asked Chong whether she was interested in taking over the third defendants, for otherwise the third defendants would have to be wound up. After being assured by the second defendant that she would help Chong in the day to day running of the third defendants, she accepted the second defendant's offer and took over the shares of the third defendants together with one Koh Yang Lee, a mutual friend.

84 She added that about three weeks after she became the director of the third defendants, the second defendant telephoned her to say that China Merchants had offered the second defendant the

distributorship of the Tokuhon products and enquired whether she would agree to the distributorship to be given to the third defendants and for the third defendants to employ the second defendant as the manager to oversee the marketing of Tokuhon products. She readily agreed and in the event, the distributorship was awarded to the third defendants by China Merchants on 30 June 2000. She confirmed that since then the second defendant had been taking care of the third defendants' Tokuhon business and Koh and herself continued with the distribution of the other products of the company. Chong maintained that there was no pre-planned or pre-arranged agreement on the part of the third defendants with the first and second defendants to cause the loss of the plaintiffs' distributorship. According to her, the plaintiffs had no valid claim against the third defendants.

Issues, arguments and conclusion

85 In their respective submissions each, counsel posed three issues for determination by the court. The plaintiffs' counsel formulated the issues as follows:

(i) Did the first and/or the second defendants cause the loss of the plaintiffs' distributorship?

(ii) Were the first and second defendants incapacitated by their directorships in the plaintiffs to accept the Tokuhon distributorship?

(iii) Are the first and second defendants the beneficial owners of the third defendants?

86 Dealing with the issues thus stated, plaintiffs' counsel submitted that the first two issues arose from two different sets of duty. The first was predicated on the duty that a director should always act in what he and she honestly considered to be the company's interests. The second was predicated on the fiduciary duty that a director could not obtain for himself any business that properly belonged to the company, a duty that tended to continue even after cessation of office as director. He added that this duty would subsist even if the company could not itself have succeeded in getting that business. In other words, proof of breach of any one of these duties would attract liability for breach of directors' fiduciary duties.

87 The defendants' counsel posed the questions slightly differently. I need not repeat them here since they were substantially no different from that of the plaintiffs' counsel.

88 Rid of excess, the central question in this case was whether the loss of the plaintiffs' distributorship rights to Tokuhon products and the subsequent grant of the distributorship to the third defendants were due to the wrongful acts of the first and second defendants in breach of their fiduciary duties to the plaintiffs?

89 Before proceeding further, it would be instructive to make reference to some first principles that govern the duties and the fiduciary position of company directors. In Singapore, section 157 of the Companies Act (Cap 50) states that a director should, at all times, act honestly and use reasonable diligence in the discharge of the duties of his office. Another settled principle is that directors in exercise of their powers are fiduciary agents for the company (see paras 585 and 1115, Vol 7(1) and (2) Halsbury's Laws of England (4th Edn, 1996, reissue)). Case law makes it clear that the fiduciary duties of the directors are to act in good faith for the benefit of the company; to exercise their powers for legitimate and proper purpose; and not to allow any conflict between their duties as

directors and their private interests.

90 In Aberdeen Rail Co v Blaikie Brothers (1854) 1 Macq. 461, 471 (reproduced in [1843-60] All ER 249) (HL) Lord Cranworth LC said at 252H-I: 'A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect'.

91 What was stated by Lord Cranworth was reaffirmed by the House of Lords in Regal (Hastings), Ltd v Gulliver and Others [1942] 1 All ER 378 at 382 and later elaborated by the House of Lords inBoardman v Phipps [1967] 2 AC 46. In Boardman v Phipps, Lord Upjohn said at page 123:

> "Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case. The relevant rule for the decision of this case is the fundamental rule of equity that a person in a fiduciary capacity must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict. I believe the rule is best stated in Bray v. Ford [1896] A.C. 44, 51 by Lord Herschell, who plainly recognised its limitations: 'It is an inflexible rule of a court of equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing. Indeed, it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger, even though the trustee were paid for his services.' It is perhaps stated most highly against trustees or directors in the celebrated speech of Lord Cranworth L.C. in Aberdeen Railway v. Blaikie (1854) 1 Macq. 461, 471, …

92 Having outlined the general principles, let me now return to the issues at hand. Counsel for the plaintiffs contended that the averments in the affidavit of Michael Chien constituted an admission that it was the second defendant's letter dated 17 March 2000 that led to the decision by Michael Chien to terminate the distributorship on 15 May 2000 and that the causal connection between the second defendant's said letter and termination was clearly disclosed there. After inviting the court to dismiss Michael Chien's assertion that the termination was due also to the sales performance of the plaintiffs, counsel for the plaintiffs submitted that the true intention of the second defendant in writing the letter was to show China Merchants that the plaintiffs were truly a dysfunctional company.

93 The argument by the defendants' counsel was that the purpose of the second defendant in writing the said letter was to inform Michael Chien that that the former was leaving the company and that she did not write that letter with a view to procuring the distributorship for herself. He added that if

the second defendant had been contriving to obtain the distributorship for herself, she would not have copied the letters to her fellow directors and would not have openly alerted Dr Chang and Ng in those letters that she was going to complain to Tokuhon Japan about the happenings in the plaintiffs. He suggested that Dr Chang and Ng were the architects of the plaintiffs' dysfunctional profile and their attempts to secure for themselves the distributorship rights could not have been missed by China Merchants and Tokuhon Japan.

94 Revisiting the evidence, the inference that the directors of the plaintiffs were for most part, not acting in unison was inescapable. The available evidence clearly lent itself to the conclusion that the plaintiffs were being managed, as though they were three disparate groups of individuals brought together, not out of choice but by force of circumstances and pure commercial expediency. From the manner in which these individuals were seen to be reacting to each other since the incorporation of the plaintiffs and the way in which the business of the plaintiffs was being carried out over the years, it was apparent that the plaintiffs were being operated, not like any traditional private limited company but more like three self-seeking groups plying their wares, sheltering nominally under a single corporate tent, but with scant regard for any corporate discipline or mutual regard.

Did the first and/or second defendants cause the loss of the distributorship?

95 The first issue to be decided was whether the first and second defendants caused the loss of the distributorship?

96 In relation to this issue, it would be appropriate to deal first with the claims made against the first defendant. In paras 13 and 14 of the statement of claim, the plaintiffs alleged that the first and second defendants acted in concert in all matters pertaining to the plaintiffs and that the first defendant did take active part in the affairs of the plaintiffs by virtue of the fact that: (a) he was the husband of the second defendant, (b) second defendant's shares came from the first defendant's family, (c) he and his wife travelled together frequently on plaintiffs' business, (d) both of them called for an extraordinary general meeting to wind up the plaintiffs and did subsequently present a joint petition, (e) both of them filed joint affidavits in relation to the said winding up petition and related proceedings, (f) the first defendant filed a claim against the plaintiffs for arrears in relation to his services and (g) both of them incorporated the third defendants.

97 In my determination, although it had been alleged that the first defendant had taken an active part in the affairs of the plaintiffs, there was very little material placed before the court to conclude that it was indeed the case. In fact, after reviewing all the evidence, my conclusion was that he was not actively involved with the business aspects of the plaintiffs. There was nothing of substance to discredit his account that his directorial role was confined to his attending annual general meetings and lending support to his wife whenever she travelled in relation to the plaintiffs' business. It was not shown that he did anything to bring about the termination of the distributorship. It would appear to me that he was joined as a defendant merely because he was married to the second defendant, purportedly the chief adversary in these proceedings.

98 In my view, the action against the first defendant seemed entirely misconceived. He did not write the letters adverted to; neither did he partake in the controversy that sprang in relation to the

centralization plan between the second defendant and Dr Chang. His role was, at worst, one of passive support to his wife. It might well be that his wife had revealed to him about the goings on in the plaintiffs and her intended and actual actions in relation to their joint interests. But, in the absence of any direct evidence of any meaningful wrong the plaintiffs' claim that he was a concert party to the breaches attributed to the second defendant, was found by me to be seriously flawed.

99 Returning to the second defendant's role, I noted that it was not denied that she wrote the letters of 15 February and 17 March 2000. It was contended that the said letters should not have been copied or written to China Merchants. It was suggested that these letters were written with a poison tip to bring about the demise of the plaintiffs' Tokuhon distributorship and did so. The second defendant contended that the first letter was copied to Michael Chien at the latter's request and not of her own volition. She explained that it was not written stealthily; what she did was no more than to convey to her fellow director Ng, and their principals, of Dr Chang's declared desire to part company with the plaintiffs; there was nothing sinister to it; and in any event neither Dr Chang nor Ng took issue with the 15 February 2000 letter, immediately or any time soon thereafter despite her explicit statement in that letter that she would proceed to inform Japan of Dr Chang's intentions and that his unpredictable mood swings were affecting the performance of the plaintiffs adversely. As to the 17 March 2000 letter, her explanation was that she had by then, come to the end of her tether and wanted to have nothing to do with Dr Chang and Ng. Hence her communication to Michael Chien informing him of her decision to end her 'partnership' with the plaintiffs.

100 The question was whether she was justified in writing or in forwarding those letters to China Merchants. In my analysis, as mentioned by me earlier, the plaintiffs were no more than an association of simple expediency. They were operating as though they were three separate partnerships and this unconventional feature did not seem to have missed the attention of their principals. So much so, Mdm Fukumuro of China Merchants said in her letter dated 9 December 1994 (DB-3) that 'Tokuhon …. [was] well aware of the difficulties in handling the Tokuhon business by three individual partners as their interest in the Tokuhon business [was] not always the same'. Again, in her letter dated 26 July 1996 (DB-749), addressed to the plaintiffs, she deemed fit to repeat a similar observation, made this time, by Morimoto, a director of Tokuhon Japan, in a meeting held on 22 July 1996 where Dr Chang, Ng and the second defendant were present.

101 Their operating styles aside, Dr Chang and Ng did not appear to have any misgivings in attempting to seduce their principals, albeit in vain, not for promoting the interests of the plaintiffs but for their own individual outfits: Dr Chang plumbing for Nan Tat and Ng advancing Weng Seng Heng. It was clear from the letter written by Dr Chang on 20 December 1994, by the Ngs on 14 October 1996 and the trips made by both of them to Japan, that their theme was not: `one for all and all for one' but 'each unto himself.' Reference to some of the letters and presentations made by Dr Chang and Ng would be relevant presently.

102 First on the list was Dr Chang's letter to China Merchants on 20 December 1994 (DB-89). In his attempt to persuade China Merchants to give pre-eminence to Nan Tat, Dr Chang had little qualm in running down the management of the plaintiffs with his emphasis that 'management by consent will not work'. He knew that the contents of his letter would have been viewed with disfavour by his fellow directors, yet he felt fit to write that letter, clearly in an attempt to undermine the very structure of the management of the plaintiffs. It was ironic that he concluded the letter with the comment that he was very sorry to have to raise some 'unpleasant issues'. But the purport was

unmistakable: it was deliberate and written only to propel Nan Tat over the plaintiffs and indeed the other two. That was not all. Michael Chien testified that Dr Chang also paid a visit to him in the course of 1995, complaining to him about management problems in the plaintiffs. Although I was invited by the plaintiffs' counsel not to attach much weight to the evidence of Michael Chien on grounds that he was partial to the first and second defendants, I found his evidence in this respect to be cogent.

103 Next was the attempt by Weng Seng Heng to spirit the distributorship away from the plaintiffs for themselves in the course of 1996. In their letter dated 14 October 1996 (DB-93), the Ng family minced no words in pointing out to China Merchants that the plaintiffs were indeed crisis-ridden and that Weng Seng Heng should be appointed by China Merchants as the sole agents for Tokuhon products in Singapore and Malaysia. Ng's explanation that Weng Seng Heng chose to write the said letter because it was being unfairly accused by the others of dumping Malaysian goods into Singapore and since no one could solve the problem, Weng Seng Heng would resolve it, was found by me to be not in consonance with the very stand he and Dr Chang were taking at this trial.

104 Then, there was this private trip by Dr Chang to Japan in January 2000, when he admittedly made a marketing presentation to the Tokuhon executives there. He endeavoured to explain this as a holiday as well as study trip. But the fact remained that he had not disclosed the purport of his trip to any of his fellow directors before. Worse still, he did not even disclose this in his affidavit. In my evaluation, Dr Chang's explanation that his marketing presentation was a mere 'by the way' offering and his declaration that he did not during that trip attempt to swing the distributorship to Nan Tat was less than genuine.

105 Then came the developments in May and June 2000. The distributorship was terminated on 15 May 2000. In the annual general meeting held on 6 June 2000, the first defendant was not elected to the board. Upset by her husband's non-election, the second defendant tendered her resignation as a director. There followed what appeared to be a free for all. In May 2000, Ng and Ooi made a trip to Japan. The defendants alleged that it was to sway Japan to offer the distributorship to Weng Seng Heng. But according to Ng and Ooi, it was to persuade Japan not to terminate the plaintiffs' distributorship. Whose version was probable? Here the court was confronted with conflicting claims. However, the joint trip made by Dr Chang and Ng in June 2000 clearly evinced to the court that their travel to Japan was not to make a pitch for the plaintiffs but for Nan Tat and Weng Seng and Heng. The extensive power-point presentation (DB-56 to DB-72) undertaken by both of them inexorably led the court to conclude that Dr Chang and Ng were plying their wares and resources not on behalf of the plaintiffs but for themselves. Ng's assertion that neither he nor Dr Chang had ever tried to obtain the distributorship for themselves was plainly unsustainable. It was false. Dr Chang's answers that his visit was, at any rate, after the termination of the distributorship were found by me to be feeble as well as disingenuous, for at the time they undertook the trip, both Dr Chang and Ng were still the directors of the plaintiffs and the shareholdings of all the contestants remained as before.

106 Leaving aside for the time-being the mutual diatribes of the disputants, the testimony of Michael Chien was extremely significant. In my view, although he might have grown to like the Seows, his evidence was not contrived and appeared to possess a degree of cogency. I accepted his evidence that he terminated the distributorship not because of the letters of 15 February and 17 March 2000 that emanated from the second defendant but owing to the dysfunctional syndrome manifest in the plaintiffs brought about by the constant discord and infighting amongst the directors of the plaintiffs,

compounded by his perception that Dr Chang and Ng were trying to undermine him time and again. Another aspect which was highlighted during his testimony was that there was no written agreement which governed the Tokuhon distributorship and that it could be terminated at will.

107 Returning to the issue at hand, my finding was that the second defendant could not be blamed for writing the letters adverted to, in the manner she did. I accepted her claim that she wrote them as she could take no more and wanted China Merchants to be kept informed of Dr Chang's earlier desire to part company from the plaintiffs and later her intention to leave the plaintiffs. In my view, Dr Chang shouting at her in open and throwing coffee cups in general meetings, were personally witnessed by executives from China Merchants and Tokuhon Japan. Similarly, the perennial friction that characterized their relationship was clearly known to China Merchants and justified their exercising their discretion to terminate the distributorship. In my finding, the termination was not as a result of the letters written by the second defendant. The blame, if any, lay principally on Dr Chang who appeared to be the principal elocutionist for the plaintiffs and to some extent Ng, who had seen fit to side him.

Beneficial ownership of the third defendants

108 The foregoing conclusion should effectively dispose of the plaintiffs' claim here. Nonetheless, for the sake of completeness, I must deal with the other issues raised by the plaintiffs' counsel and in this connection, it would be appropriate to deal with the third issue first. The issue was: Were the first and second defendants the beneficial owners of the third defendants?

109 The claim by the second defendant was that the third defendants were incorporated by her and her husband on 4 February 2000 with a view to using that company as a vehicle to sell cosmetics and other beauty products. The inclusion of the object, sale of plasters, in the third defendants' memorandum of association was in relation to first aid plasters and not Tokuhon type of plasters. She claimed that she transferred her and husband's shares in the third defendants to her sister-in-law and Koh, out of her care and concern for her sister-in-law following the trauma she experienced on 6 June 2000 when there was a board flare-up in the plaintiffs. She added that even after the grant of the distributorship to the third defendants by Michael Chien, her role was only that of the manager of the third defendants and nothing more.

110 In my determination, the story narrated by the second defendant did not appear to have any ring of authenticity. In this regard, her claim that she executed the transfer of shares documents on 6 June 2000 – although the transfer was dated 3 July 2000 (PB-389) - as if there was no tomorrow, her substantial interest-free advances to the third defendants amounting to about $300,000, her giving away her and husband's shares in the third defendants almost for nothing, her signing cheques for the third defendants and the fact she was the one still actively managing the third defendants, all these lent little credence to her claim that neither she nor her husband was the beneficial owners of the third defendants (see pages 1922, 1930 to 1932, 1935 to 1936, 1945, 2067 to 2069, 2127, 2144, 2145, 2147, and 2165 to 2166 of NE for answers given by the second defendant and Mdm Chong). Having reviewed all the evidence, I found that the inference that the first and second defendants were still the beneficial owners of the third defendants was inescapable.

Were the first and second defendants incapacitated by their directorships in the plaintiffs to accept the distributorship?

111 Having concluded that the first and second defendants were the beneficial owners of the third defendants, the next issue for resolution was whether the first and second defendants were incapacitated by their directorships in the plaintiffs to accept the Tokuhon distributorship.

112 It was submitted on behalf of the plaintiffs that a director's fiduciary duties to the company did not cease upon cessation of his office as a director. In this regard, counsel for the plaintiffs invited the court to the principles articulated by the Supreme Court of Canada in Canadian Aero Service Ltd v O'Malley et al (1974) 40 DLR (3d) 371, a decision on appeal from the judgment of the Ontario Court of Appeal. The facts set out in the report showed that this appeal arose out of a claim by the plaintiffs-appellants ('Canadian Aero') that the defendants, particularly O'Malley and one Zarzycki had improperly taken the fruits of a corporate opportunity in which the plaintiffs had a prior and continuing interest. The allegation by the plaintiffs against the said particular two defendants was that while being senior officers or directors of the plaintiffs, they, as representatives of the plaintiffs, had devoted effort and planning in respect of a large project in connection with the topographical mapping and aerial photographing of British Guyana, a project to be financed through an external grant or loan from the Government of Canada. The plaintiffs were pursuing the said project for themselves through the said two defendants and others. However, when at last the time came for tender, the said two defendants resigned their positions with the plaintiffs, formed a new company to carry on a similar business, tendered for and won the contract at exactly the same price as had been proposed earlier by the plaintiffs, at the stage when it was almost certain that the plaintiffs would be awarded the project.

113 The claim by Canadian Aero against the defendants was unsuccessful at the first instance and at the court of appeal. They appealed to the Supreme Court. In allowing the appeal of the plaintiffs against all the defendants save for one, the Supreme Court, held that damages were payable by the defendants to the plaintiffs on the basis that the defendants should not be allowed to profit from their own wrong.

114 Laskin J who delivered the opinion of the court said (at page 382):

> An examination of the case law in this Court and in the Courts of other like jurisdictions on the fiduciary duties of directors and senior officers shows the pervasiveness of a strict ethic in this area of the law. In my opinion, this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.

115 Later, after reviewing some leading cases on the subject of fiduciary duty of directors (Zwicker v Stanbury et al, [1954] 1 DLR 257; Regal (Hastings) Ltd v Gulliver et al (supra); Boardman v Phipps (supra); and Industrial Development Consultants Ltd v Cooley [1972] 2 All ER 162), Laskin J went on to comment at page 384:

> What these decisions indicate is an updating of the equitable principle whose roots lie in the general standards that I have already mentioned, namely, loyalty, good faith and avoidance of a conflict of duty and self-interest. Strict application against directors and senior management officials is simply recognition of the degree of control which their positions give them in corporate operations, a control which rises above day accountability to owning shareholders and which comes under some scrutiny only at annual general or at special meetings. It is a necessary supplement, in the public interest, of statutory regulation and accountability which themselves are, at one and the same time, an acknowledgement of the importance of the corporation in the life of the community and of the need to compel obedience by it and by its promoters, directors and managers to norms of exemplary behaviour.

116 Laski J later, at page 391, added a qualification:

> In holding that on the facts found by the trial Judge, there was a breach of fiduciary duty by O'Malley and Zarzycki which survived their resignations I am not to be taken as laying down any rule of liability to be read as if it were a statute. The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.

117 Relying on the Canadian Aero case, plaintiffs' counsel argued (para 63 of plaintiffs' closing submissions) that the time lapse between the resignation of the second defendant and when Michael Chien allegedly told her that she had been awarded the distributorship, was 'far too short for her to rid herself of her fiduciary duties as former director of the plaintiffs or to suggest that Michael Chien's overtures to her were fresh initiatives which had nothing to with her past duties in the plaintiffs'. He further submitted that the second defendant's resignation from the plaintiffs was prompted by her desire to acquire for herself the Tokuhon distributorship. He then urged the court to view with skepticism, the explanations of the second defendant as to why she bought Tokuhon products to the tune of $35,402.50 in the month of June 2000 (pages 1886 to 1991 of NE). In this connection, paras 65 to 67 of plaintiffs' counsel's submission were as follows:

> 65. Alternatively, the Plaintiffs submit within the statement of law pronounced by the Court in the Canadian Aero case, that Mrs Seow's resignation was prompted by a wish to acquire for herself the Tokuhon distributorship.
>
> 66. The basis of this submission is that Mrs Seow actually resigned closer to 15 June 2000 (see, NE pages 1905 lines 7 to 26, 1906 lines 1 to 26, 1907 lines 1 to 26, 1908 lines 1 to 7) when she knew of her impending appointment and which led her to purchase a total of $35,402.50 worth of Tokuhon products between 5 June 2000 to 28 June 2000 (see, NE pages 1883 lines 21 to 26, 1885 lines 1 to 25, 1886 lines 1 to 8).
>
> 67. This submission starts with her lie that "when I resigned as director on 6 June 2000, I was

prepared not to have any dealings with Tokuhon products anymore" (see, paragraph 49 of her AEIC). Yet in Court she has admitted to buying a total of $35,402.50 of Tokuhon products for that same month (June 2000). Her explanation is hardly convincing because she says in her testimony that "these are all our continental clients order through me" (see, NE page 1886 line 12). This did not make sense because Continental clients only bought 18% of the goods imported by the Plaintiffs. In other words, 18% of any given shipment. As each shipment costs about $55,000.00, $35,402.50 represents close to 70% of a shipment. Obviously, Mrs Seow was servicing more than Continental's customers. Anyway, Continental's customers became the Plaintiffs' customer and there was no need to go through Mrs Seow (see, NE pages 1894 lines 19 to 26, 1895 lines 1 to 24). And as if forgetting again what she had said in paragraph 49 of her AEIC, she gives an utmost noble reason as to why she bought those goods in June 2000, "It's just that I'm trying to set an example by putting all our Continental client back to the Plaintiff. I'm hoping that Dr Chang and Mr Ng will see what I'm trying to do; I'm trying to save the company but in the end I'm not able to do it." (see, NE page 1887 lines 11 to 14). It is her evidence in her AEIC that she wanted nothing to do with Dr Chang and Mr Ng after 6 June 2000; yet she says here that she wanted Dr Chang and Mr Ng to see what she was doing.

118 In reply, counsel for the defendants contended that the plaintiffs' claim for relief suffered from the fact that the persons behind the plaintiffs at present were themselves flagrantly guilty of the same breaches which they were alleging against the first and the second defendants. He relied on the maxim: 'He who comes to equity must come with clean hands'. In this connection, defendants' counsel also placed reliance on section 391(1) of the Companies Act which reads:

391.-(1) If in any proceedings for negligence, default, breach of duty or breach of trust against a person to whom this section applies it appears to the court before which the proceedings are taken that he is or may be liable in respect thereof but that he has acted honestly and reasonably and that, having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused for the negligence, default or breach the court may relieve him either wholly or partly from his liability on such terms as the court thinks fit.

119 Plaintiffs' counsel countered the defendants' submissions by arguing that in the case at hand the plaintiffs, as distinct from their directors, were the victims.

120 On an overall review of the facts of the case, it was patent that the real plaintiffs in this action were Dr Chang and Ng. They were indeed the flesh and blood actors behind the present action. In my opinion, the court in exercising its powers to grant discretionary relief, would be well justified to lift the veil of incorporation and scrutinize the real motives of those who might be hiding behind the corporate veil. (see Mayson, French & Ryan on Company Law (17th Ed, 2000-2001, para 5.2.2.7, referred to in Polybuilding (S) Pte Ltd v Lim Heng Lee & Ors [2001] 3 SLR at 184). Further, it was also not lost on me that Dr Chang and Ng commenced this action on 28 November 2001, only after they had managed to purchase the shares of the first and second defendants to stop them from proceeding with their petition to wind up the plaintiffs, in companies winding-up petition No 349 of 2000 presented to the court on 29 November 2000.

121 What was being alleged against the first and second defendants was that they had acted in breach of their of fiduciary duties to the plaintiffs, first causing the termination of the distributorship and second, in taking over the distributorship for themselves, through their vehicle, the third

defendants. As to who was responsible for the termination of the Tokuhon distributorship, my conclusion, as I have stated earlier, was that the blame for loss should not be placed at the door-steps of the first and second defendants; the loss was due to the aggressive display of self interest and lapses on the part of Dr Chang and Ng, causing China Merchants to step in and end the in-fighting.

122 It should be remarked presently that the case at hand bore no comparison to the factual matrices of Canadian Aero. The three groups in the case before me, had been, consistently over the years, conducting themselves as though they were three separate units and the incorporation of the plaintiffs was nothing but a vehicle of convenience. In my view, the issue concerning the breach or otherwise of any fiduciary duty, both in respect of the period before 6 June 2000 when the first and second defendants left the plaintiffs' board of directors and after the said date, would have to be approached in reference to what should be considered fair between the contending factions of directors. This approach was not a novel one; it was formulated by the by the High Court of Australia in Mills v Mills (1937-38) 60 CLR 150, (quoted with approval by Lord Wilberforce in Howard Smith Ltd v Ampol Petroleum Ltd and others [1974] 1 All ER 1126 at 1134C) where Latham CJ observed at 164, that : '[t]he question which arises is sometimes not a question of the interests of the company at all, but a question of what is fair as between different classes of shareholders. Where such a case arises some other test than that of the "interests of the company" must be applied….'

123 In my determination, the plaintiffs' claim, inasmuch as it was being prosecuted by Dr Chang and Ng, clearly for their own benefit, was redolent of double-standards. They did not come to court with clean hands and were guilty of the very charges which they were so unhesitatingly seen to be hurling at the first and second defendants. The actions of the Ng family to secure the distributorship for them in 1996 and Dr Chang's repeated attempts to foist Nan Tat above the other two groups and the joint effort by Dr Chang and Ng in June 2000 to secure the distributorship for themselves despite the fact first and second defendants were at that time still the shareholders of the plaintiffs, lent support to the defendants' contention that the court should decline to exercise its equitable jurisdiction in favour of the claimants.

124 Although I did not accept the evidence of the second defendant in relation to the issue concerning the beneficial ownership of the third defendants as well as her explanation that she bought Tokuhon products to the tune of $35,402.50 in June 2000 in order to set an example to Dr Chang and Ng, these factors alone in my view, did not materially advance the present claims of the plaintiffs.

125 As was mentioned by me earlier, the allegations against the first defendant were no more than mere conjectures and were unproven by any standard. As for the third defendants, it was conceded by counsel for the plaintiffs that the averment of conspiracy against them had been abandoned. As respects the second defendant, my conclusion was that she should not be held responsible for the termination of the Tokuhon distributorship. It came about more due to the ill-conceived steps and measures adopted and pursued by Dr Chang and Ng than anything else. As for the award of the distributorship to the third defendants, this was a matter entirely in the discretion of China Merchants. The loose and unorthodox manner in which the directors of the plaintiffs had been going about the plaintiffs' business operations, their frequent stand-offs, and their constant efforts to steal a march on the others, made it inevitable for China Merchants to step in and appoint one amongst the protagonists as their preferred sole distributors.

126 The present endeavours by Dr Chang and Ng to lay the blame particularly on the second defendant were in vain and unjustified. In my finding, Dr Chang and Ng were the persons instrumental in bringing about the termination of the plaintiffs' distributorship and they could not now be heard to

say that they were being done in by the machinations of the second defendant, for after all, they were the persons demonstrably on the path of self-destruct and were brazenly bent on securing the distributorship for themselves to the exclusion of the first and second defendants, at least since about 1994. Suffice it, in this regard, if I made references to the letter dated 20 December 1994 (DB-89-90) by Dr Chang to China Merchants, projecting Nan Tat over others; the letter by Weng Seng Heng dated 14 October 1996 to China Merchants requesting that Weng Seng Heng be appointed sole distributors in the place of the other two (DB-92 to 94); and the joint presentation by Dr Chang and Ng in June 2000 in Japan to appoint only Nan Tat and Weng Seng Heng (DB-55 to 72).

127 Having reviewed all the evidence and considered the arguments presented, I was inevitably led to the conclusion that the plaintiffs' claim that the first and second defendants were in breach of their directors' as well as their fiduciary duties to the plaintiffs and caused loss to the plaintiffs of their distributorship rights to Tokuhon products, was unjustified and on balance not made out. In my view, the cause of the loss could not be attributed to the acts of the first and second defendants. China Merchants were justified in terminating the plaintiffs' distributorship because of the dysfunctional persona as well as the ever present strife in the management apparatus, brought about in the main by Dr Chang and his present ally, Ng.

128 In the result, I dismissed the plaintiffs' claims against all the three defendants and awarded the defendants 80% of the costs, to be taxed or agreed upon. The reduction was on account of my unfavourable finding against the second defendant on the issue relating to the beneficial ownership of the third defendants.