Goh Eng Wah v Daikin Industries Ltd and Others
[2008] SGHC 190

Case Number	: Suit 742/2005
Decision Date	: 31 October 2008
Tribunal/Court	: High Court
Coram	: Lai Siu Chiu J
Counsel Name(s)	: Davinder Singh SC, Hri Kumar SC, Shobna Chandran (instructed) and Johnny Cheo Chai Beng (Cheo Yeoh & Associates LLC) for the plaintiff; Anna Oei and Chen Wei Ling (Tan, Oei & Oei LLC) for the first defendant; Sean Lim Thian Siong (Hin Tat Augustine & Partners) for the second defendant; Thio Ying Ying and Tan Yeow Hiang (Kelvin Chia Partnership) for the third, fourth and fifth defendants
Parties	: Goh Eng Wah — Daikin Industries Ltd; Daikin Airconditioning (Singapore) Pte. Ltd. Formerly known as A.C.E. Daikin (Singapore) Pte Ltd; Robert Chua Teck Chew; Chua Teck Meng; Chua Tiak Seng Charlie

Contract

31 October 2008 Judgment reserved.

Lai Siu Chiu J:

Introduction

1 This claim centres on an agreement for payment ("the Incentive Scheme"), the rights it conferred as well as the obligations it imposed on the parties to this suit. However, as with most agreements, the documents did not tell the full story and the court had to sift through the evidence to determine who the true parties to the Incentive Scheme were, what was intended by them and whether there were subsequent variations to the documented terms. The claim by Goh Eng Wah ("the plaintiff") against five parties is for an alleged shortfall in the payments due to him under the Incentive Scheme.

2 The plaintiff had originally commenced proceedings in Suit No 60 of 2004 against Daikin Industries Limited and Daikin Airconditioning (Singapore) Pte Ltd ("the first and second defendants" respectively) over the same subject matter. However, that suit was discontinued by the plaintiff on 16 September 2005 following the trial judge's observation on the first day of hearing that Robert Chua Teck Chew ("the third defendant") had not been called as a witness or been made a party to the proceedings, despite his central role in the allocation of payments under the Incentive Scheme.

3 The present suit was commenced with not only the addition of the third defendant, but also Chua Teck Meng and Chua Tiak Seng Charlie ("the fourth and fifth defendants" respectively). The third, fourth and fifth defendants are siblings (in descending order of seniority) and are the sons of Chua Joon Nam ("CJN") who passed away in 1989. (Hereinafter the third, fourth and fifth defendants will be referred to collectively as "the Chua brothers".)

Factual Background

4 The plaintiff is an elderly businessman who is not conversant in English. His first and main business was/is in cinemas, which he started in the 1950s. He also had interests in other businesses

such as property investment under the name of Tai Hong Realty ("Tai Hong"). The plaintiff's main business is now Eng Wah Organization Ltd which public company is listed on the Stock Exchange of Singapore. However, it is his daughter Goh Min Yen ("Min Yen"), not the plaintiff, who is the managing-director of the listed entity. Min Yen is also the plaintiff's alternate director in the second defendant.

5 The first defendant is a Japanese company that manufactured and still manufactures the "Daikin" brand of air-conditioning units. The first defendant appointed the second defendant as its sole distributor in 1972.

6 The second defendant is a Singapore company that was established in 1968 as a partnership, between CJN and the plaintiff, to carry on the business of distributing and installing air-conditioning units, including those bearing the Daikin brand. CJN was a trusted friend of the plaintiff and they had known each other for some 10 years prior to the setting up of the second defendant together.

7 The Chua brothers all eventually became shareholders and executive directors of the second defendant – the third defendant from inception, the fourth defendant became a shareholder in 1972 and assumed the role of Executive Director in September 1974 while the fifth defendant was deemed a shareholder after his father's death (as a beneficiary of CJN's estate) and became an executive Director in July 1990.

History of the second defendant

8 When the second defendant was first set up in 1968, the plaintiff was named Chairman, CJN was the Managing-Director, and the third defendant was an Executive Director. These three were the initial subscribers and directors of the second defendant. However, the persons who ran the affairs of the second defendant were CJN and the third defendant.

9 The plaintiff was never actively involved in the management of the second defendant. Although he would receive updates from his friend (CJN) during their lunch meetings and either personally attended or sent a proxy to attend the Annual General Meetings ("AGMs") of the second defendant, the plaintiff's role was essentially that of a financier. He invested in the second defendant in his own name as well as, in later years, through his corporate vehicles Eng Wah Theatres Organization Pte Ltd (which became Eng Wah Organization Ltd in 1994 ["Eng Wah"]) and Kin Wah Co (Pte) Ltd ("Kin Wah"). The plaintiff also provided short term loans to the second defendant and stood as personal guarantor for the second defendant's bank loans. Additionally, the plaintiff was a major customer of the second defendant and procured contracts for the second defendant to install air-conditioners in his Eng Wah chain of cinemas in Singapore and Malaysia.

10 In 1972, CJN was introduced to one Cheng Eng Kuan ("Cheng"), a banker from Hong Kong, and persuaded Cheng to invest in the second defendant. Cheng subscribed for 250,000 shares in the second defendant and became its largest single shareholder holding 50% of the shares. Cheng later prompted the second defendant to invest in the manufacture of window air-conditioners in Indonesia before transferring his shares to his brother Chong Kam Sai ("Chong"), who was a non-executive director in the second defendant from 1 February 1975 to 10 December 1975. Chong managed the second defendant's business in Indonesia. Unfortunately, the business failed and had to be sold off to an Indonesian party.

11 The failure of the Indonesian venture together with the oil crisis of the 1970s caused the second defendant to suffer substantial losses. It was around April 1976, that the first defendant took up 135,000 shares of $1.00 a share in the second defendant, providing much needed funds to the

second defendant. In addition, the first defendant's shareholding in the second defendant ensured that the first defendant had an interest in the success of the second defendant. The investment made it more unlikely that the first defendant would terminate the sole distributorship of the second defendant or increase the cost of Daikin air-conditioners that it supplied to the second defendant.

12 After the first defendant's acquisition of shares in the second defendant, CJN and his associates (hereinafter collectively referred to as "the Chua Group") held 42.92% of the shares in the second defendant, the plaintiff and his associates (hereinafter collectively referred to as "the Goh Group") held 13.56%, Chong held 28.25% and the first defendant held 15.25%. The chart below shows the shareholding structure:

Shareholder	**Number of shares**	**% shareholding**
Chua Joon Nam	255,000	28.81
Chuas Investment Private Limited	95,000	10.73
Third defendant	15,000	1.69
Fourth defendant	15,000	1.69
Plaintiff	90,000	10.17
Eng Wah Theatres Organization Pte Ltd	30,000	3.39
Chong Kam Sai	250,000	28.25
First defendant	135,000	15.25

13 Unfortunately, the second defendant continued to suffer losses and in May 1979, the plaintiff injected another $375,000 into the second defendant (via Kin Wah) by subscribing for 375,000 shares of $1.00 each. The first defendant also provided $340,000 in August 1980 in exchange for 340,000 shares. After this share subscription exercise, the Goh Group became the largest shareholder in the second defendant. However, despite the capital infusions, the second defendant's net liability was $523,000 in early 1981 and its contracting business continued to incur losses. In April 1981, Chong sold his 250,000 shares in the second defendant to Sim Boon Woo ("Sim"), a friend of CJN.

First defendant acquiring majority stake in the second defendant

14 In 1981, the second defendant decided to move away from its contracting business and to focus on the distribution and marketing of air-conditioning units in line with Singapore's accelerated public housing program. Once again, the second defendant required substantial fresh capital. In view of this, the first defendant was invited to become the majority shareholder of the second defendant because it could provide financial support as well as liberal trade credit terms. The first defendant took up the invitation, whereupon the second defendant issued 800,000 new shares that were taken up by the first defendant, when the other shareholders by agreement declined to take up any.

Thereafter, the shareholding in the second defendant was as follows:

Shareholder	**Number of shares**	**% shareholding**
Chua Joon Nam	255,000	10.625
Chuas Investment Private Limited	95,000	3.96
Third defendant	15,000	0.625
Fourth defendant	15,000	0.625
Plaintiff	90,000	3.75
Eng Wah Theatres Organization Pte Ltd	30,000	1.25
Kin Wah Co (Pte) Ltd	375,000	15.625
Sim Boon Woo	250,000	10.42
First defendant	1,275,000	53.125

15 After the first defendant had assumed majority control of the second defendant, it appointed nominees as Managing Director ("the nominee MD") and sales Director ("the nominee Sales Director"). The nominee MD was made a mandatory cheque signatory to the second defendant's cheques, including the payments under the subsequently agreed Incentive Scheme. The first defendant also took over the primary responsibility of procuring financing for the second defendant, especially in respect of the import of air-conditioning units from Japan. However, CJN with the third and the fourth defendants continued to manage the second defendant.

The Incentive Scheme

16 At the same time that the first defendant took up a majority stake, it also entered into a Memorandum dated 15 July 1981 ("the Memorandum") signed by the first defendant's representative and CJN. The Memorandum was subsequently varied by an undated variation recorded on the same document. As this document lay at the heart of the parties' dispute on the Incentive Scheme, it is necessary to set out its full text:

MEMORANDUM

DAIKIN KOGYO CO. Ltd. (DKC)

and

Mr. Chua Joon Nam

discussed and mutually agreed the followings on July 15, 1981.

1. DKC has agreed that the amount of Fifteen (15) percent against net profit before tax shall be allocated to local Directors as remuneration including bonuses to main officers and qualified staffs so as to encourage them. DKC trusts Mr. Chua how to allocate the above resources between directors and officers.

2. The above allocation shall be limited to S$1Million of net profit before tax. In case net profit before tax will exceed S$1Million, the allocation for exceeding net profit shall be negotiated between parties.

3. All transactions related to monetary and selling matters shall be required for final approval by the President dispatched by DKC.

4. The salary for the President shall be $4,400.00 and S$3,600.00 a month to Japanese sales Director.

A.C.E. (Singapore) Pte Ltd	Daikin Kogyo Co., Ltd.
[signed]	[signed]
Mr. Chua Joon Nam	Mr. T. Morimoto
Managing Director	Deputy General Manager Overseas Division

It is mutually agreed to delete Condition 1 above and insert the following instead :-

1. DKC has agreed that the amount of fifteen (15) percent against net profit before tax shall be allocated in the form of incentives to local Directors and selected officers so as to encourage them. The allocation shall be in the following manner:-

   (a) Five (5) percent each to Mr Goh Eng Wah and Mr Chua Joon Nam; and

   (b) The remaining five (5) percent be allocated to the other three (3) local Directors and selected officers upon which DKC trusts Mr Chua to allocate the resources amongst them.

A.C.E. (Singapore) Pte Ltd	Daikin Kogyo Co., Ltd.
[signed]	[signed]
Mr. Chua Joon Nam	Mr. K. Mochizuki
Managing Director	Representative of Daikin Kogyo Co Ltd.

17 Subsequently, on 16 September 1983, a letter was sent to Mr T. Morimoto of the first defendant by the second defendant signed by the plaintiff in his capacity as Chairman. This letter referred to cl 2 of the Memorandum and proposed that the incentive scheme for net profit in excess of the first S$1m should be as follows:

Next S$2 million net profit before tax	-	12½%
Over S$3 million net profit before tax	-	10%

18 The reply to this letter was dated 14 November 1983 and was signed by Mr T. Morimoto in his capacity as Director of the first defendant. The letter confirmed that the applicable percentage to be applied to net profits in excess of the first S$1m should be 7½%.

19 It is common ground that the Memorandum and the letters dated 16 September 1983 and 14 November 1983 are the only documents evidencing the Incentive Scheme. However, the rationale for entering into the Incentive Scheme, the parties to the Incentive Scheme and the terms of the Incentive Scheme are in dispute and will be addressed in detail below.

Events occurring after the first defendant became the majority shareholder

20 Sim sold his shares to Chuas Investment Private Limited in October 1983, thus putting the ownership of the second defendant in the hands of the first defendant, the Chua Group and the Goh Group. The plaintiff testified under cross-examination that CJN had told him (the plaintiff) that Sim would be selling his shares to CJN prior to the signing of the Memorandum.

21 In 1987, CJN informed the plaintiff that the first defendant wanted to exercise greater management control. At his request, the plaintiff resigned the title of Chairman of the second defendant and became Vice-Chairman. CJN then became Executive Chairman of the second defendant. Prior to that, the plaintiff's son (Goh Keng Soon) had likewise resigned as a director of the second defendant (apparently at the first defendant's request as it felt he was not contributing enough to the second defendant). The plaintiff's son was a director for the period 1979 to 1987. In addition, the first defendant requested that the second defendant's Board of Directors be enlarged to nine directors, with five to be appointed by the first defendant. Out of the five directors, two were executive directors – the nominee MD and the nominee Sales Director.

22 CJN passed away on 17 September 1989. It is not disputed that from 1982 up to that time, both the plaintiff and CJN had each received one-third of the portion of the second defendant's profit that was set aside for distribution under the Incentive Scheme, save for a small underpayment of $167 in 1985 (probably attributable to a mathematical rounding down of the figures).

23 After 17 September 1989, the third defendant assumed the role as Chairman of the second defendant in place of his late father and the fourth defendant continued his role as executive Director. The fifth defendant became an executive Director in 1990 and at the same time joined the Incentive Scheme. Prior to that, the fifth defendant was on the Senior Managers' Scheme, which awarded an incentive to each senior manager based on 0.9% of the balance of the second defendant's gross profit less two-thirds of the adjusted operating expenses.

24 The amounts distributed under the Incentive Scheme after the passing of CJN are summarised in the table below:

Year	Plaintiff		CJN		Third defendant		Fourth defendant		Fifth defendant	
	S$	%	S$	%	S$	%	S$	%	S%	%
1990	132,000	33.33	66,000	16.67	108,900	27.50	89,100	22.50	-	-
1991	163,000	33.33	-	-	147,000	30.06	120,000	24.54	59,000	12.07
1992	83,000	31.80	-	-	76,000	29.12	62,000	23.75	40,000	15.33
1993	83,000	31.09	-	-	77,000	28.84	64,000	23.97	43,000	16.10
1994	90,180	27.00	-	-	103,540	31.00	83,500	25.00	56,780	17.00
1995	24,000	15.00	-	-	57,600	36.00	46,400	29.00	32,000	20.00
1996	45,000	9.91	-	-	174,000	38.33	130,000	28.63	105,000	23.13
1997	50,000	7.75	-	-	260,000	40.31	180,000	27.91	155,000	24.03
1998	50,000	5.91	-	-	350,000	41.37	236,000	27.90	210,000	24.82
1999	38,000	5.29	-	-	300,000	41.78	200,000	27.86	180,000	25.07
2000	28,000	5.31	-	-	220,000	41.75	147,000	27.89	132,000	25.05
2001	35,000	5.31	-	-	275,000	41.73	184,000	27.92	165,000	25.04
2002	96,667	33.33	-	-	-	-	-	-	-	-

The table shows that after the passing of CJN, the plaintiff's share in the Incentive Scheme gradually fell, with the exception of 2002 where the plaintiff demanded full payment (this was after the Chua brothers had resigned from the second defendant), whereas that of the Chua brothers gradually increased.

Events leading to discovery of the shortfall in payment

25 Sometime in 2002, disagreements over how the second defendant ought to be managed and whether the Incentive Scheme should be replaced caused relations between the first defendant and the Chua brothers to break down. Consequently, the first defendant required the resignation of the Chua brothers as directors. The Chua brothers then instituted Originating Summons No 792 of 2002 ("the OS") against the first and second defendants for, *inter alia*, compensation for loss of office. However, after negotiations between the parties, the first defendant agreed to buy out the Chua Group's shares in the second defendant for $7m. The OS was then discontinued. Although the third defendant had approached the plaintiff to join in the negotiations with the first defendant for a buy-out, the plaintiff decided to maintain a neutral stance at the time and declined.

26 Subsequently, the first defendant conducted separate negotiations with the Goh Group to purchase their shares in the second defendant. In the course of negotiations, the plaintiff through his daughter Min Yen ([4] above) requested for information and documents concerning payments made to him under the Incentive Scheme. A table of payments was duly given to the plaintiff and it was his case that it was then that he realised the discrepancy between the payments he received and those received by the Chua brothers. The plaintiff subsequently obtained an order of court for access to and inspection of the accounting records of the second defendant. The inspection of records was completed in September 2003 and the plaintiff alleged that it was then that he discovered a shortfall in the payments made to him under the Incentive Scheme in 1985 and 1992 to 2001 totalling $1,097,653.00. He claimed the amount in his writ of summons filed on 14 October 2005.

The pleadings

27 The pleadings of the parties had undergone numerous amendments by the time the trial commenced. Indeed, amendments to the pleadings were still being made in the course of the trial (by the plaintiff), after the trial and even after the close of submissions (by the first defendant).

28 In his statement of claim (first filed on 17 October 2005), the plaintiff alleged that the Incentive Scheme was an inducement to him, CJN and the other local shareholders of the second defendant to agree to the first defendant acquiring a majority interest in the second defendant in 1981. The plaintiff averred that the Incentive Scheme was partly oral and partly written. Insofar as it was written, it was evidenced in the Memorandum, the undated variation in the Memorandum, the letter from the plaintiff to the first defendant dated 15 September 1983 and the first defendant's reply dated 14 November 1983. Insofar as it was oral, the plaintiff alleged it was the result of negotiations between the first defendant and CJN who conducted the negotiations on his own behalf and on behalf of other local shareholders including the plaintiff.

29 The plaintiff contended that at all material times, the second defendant and its shareholders conducted themselves on the basis of mutual trust and confidence and treated their relationship as a joint venture/partnership. He alleged he reposed trust and confidence in the defendants to act in good faith to ensure that the second defendant paid him his dues under the Incentive Scheme. The plaintiff contended that CJN had assumed the fiduciary obligation of looking after the plaintiff's interest in the second defendant which role the third defendant took over. The plaintiff claimed that the third defendant was his constructive trustee in respect of the sums wrongfully diverted from him.

30 The plaintiff further alleged that the shortfall in payments to him were fraudulently concealed from him and he could not have discovered the same until after the inspection referred to in [26] above.

31 In the defence that it filed, the first defendant averred that at all material times, in matters concerning the local shareholders including the plaintiff, it only dealt with CJN and after CJN's death, with the third defendant. The first defendant contended that the Incentive Scheme was agreed between the first defendant and CJN acting as agent for the local shareholders (including the plaintiff). It averred that the second defendant was not a party to the agreement for the Incentive Scheme which was an arrangement between the first defendant and the local shareholders.

32 The first defendant denied that it and/or the second defendant, with CJN and subsequently with the third defendant, had determined the total amount to be paid under the Incentive Scheme or participated in the distribution of the total amount to be paid under the Incentive Scheme. The total amount to be paid under the Incentive Scheme was agreed between the parties and the distribution was decided by CJN and subsequently by the third defendant. The first defendant denied that it had

expressly agreed that the third defendant would recommend the amount to be allocated to each local director. It pointed out that all payments made under the Incentive Scheme were approved by the shareholders (including the plaintiff) of the second defendant at each year's AGM and payments were subsequently made by the second defendant directly to the recipients of the incentive payments including the plaintiff. The first defendant denied that the third defendant's recommendations of payments were approved by the nominee MD appointed by the first defendant.

33 The first defendant alleged that the plaintiff's claims for incentive payments for the period from 31 March 1992 to 31 March 1999 were time-barred as his cause of action accrued more than 6 years prior to the commencement of these proceedings.

34 In its defence, the second defendant (who was represented in court by its executive director and general manager Michael Goh Siew Siong ["Goh"]) denied it was a party to the Incentive Scheme or to the agreement to implement the Incentive Scheme. It averred that the Incentive Scheme was a scheme relating to remuneration of the directors of the second defendant and CJN had no authority to enter into such a scheme or agreement on behalf of the second defendant without the approval of the general meeting of the second defendant. No resolution was ever passed by the second defendant approving the Incentive Scheme for its directors. It adopted the first defendant's pleading that it was CJN, and subsequently the third defendant, who determined the allocation of payments to be made amongst the local directors under the Incentive Scheme. The second defendant denied it was liable to the plaintiff for the shortfall in payment of his entitlement. It contended that the plaintiff was estopped from saying he had not received his full entitlement as the plaintiff left it to CJN and later the third defendant to allocate the profits under the Incentive Scheme and had acquiesced in such allocation. The plaintiff was also furnished with the financial statements of the second defendant at the end of each financial year and from such information, he could have, with reasonable diligence, discovered any alleged underpayment. The second defendant raised the same defence of time-bar as the first defendant.

35 The Chua brothers filed a common defence in which they *inter alia*:

(a) contended that the Incentive Scheme formed part of the Memorandum entered into between the first and the second defendants;

(b) denied that the plaintiff was a party to the Memorandum or that CJN conducted negotiations on behalf of himself and other local shareholders including the plaintiff;

(c) denied that CJN had assumed any fiduciary obligation vis a vis the plaintiff as alleged and that the third defendant had taken over the role after CJN's passing;

(d) averred that the plaintiff did not at any time tell the third defendant (with whom he did not have a close relationship) that he reposed complete trust and confidence in the third defendant to administer the affairs of the second defendant properly and to ensure that the plaintiff was paid one-third of the profits under the Incentive Scheme;

(e) contended that if, which was denied, the third defendant owed a fiduciary obligation to the plaintiff, the third defendant was unaware that his allocations to the fourth, fifth defendants and to himself were made wrongfully;

(f) alleged that the first defendant had complained against the plaintiff's continued participation in the Incentive Scheme as he made little or no contribution since the early 1990s;

(g) claimed the first defendant had agreed that the third defendant would recommend the amount to be allocated to each local director under the Incentive Scheme subject to the approval of the nominee MD appointed by the first defendant;

(h) claimed the significant growth of the second defendant and the increase in its turnover and profits over the years was due to the efforts of the Chua brothers whose contributions were recognised in the third defendant's allocation of profits under the Incentive Scheme; and

(i) averred that in tandem with the increased contribution of the Chua brothers and the plaintiff's increasing lack of contribution to the second defendant, the Chua brothers' share of profits under the Incentive Scheme increased since 1992 while the plaintiff's share was gradually reduced.

36 The issue of estoppel was also pleaded by the Chua brothers together with the defence of time-bar for part of the plaintiff's claim amounting to $765,319/- for the years 1982 to 1999.

The issues

37 The issues that arose for determination in this case were as follows:

(1) Was the plaintiff a party to the agreement for the Incentive Scheme and entitled to enforce it against the defendants?

(2) Did the Incentive Scheme provide for a fixed proportion of the second defendant's profits to be paid out to the plaintiff annually or was it subsequently varied in 1990 or 1991 to confer on the third defendant the sole discretion to distribute the allocated amount of the second defendant's profits based on the recipients' contributions to the second defendant?

(3) Did any of the defendants owe a fiduciary duty to the plaintiff to ensure he received his entitlement under the Incentive Scheme?

(4) Did the plaintiff waive any of his rights to payment under the Incentive Scheme?

(5) Was the plaintiff estopped from claiming any shortfall in payment under the Incentive Scheme?

(6) Was the plaintiff's claim or any part thereof time-barred?

38 I shall proceed to deal with each of the above issues in turn.

(1) Was the plaintiff a party to the Incentive Scheme?

39 The significance of determining the parties to the Incentive Scheme lay in the common law doctrine of privity of contract where, as a general rule, a contract cannot confer rights or impose obligations arising under it on any person except the parties to it [*Chitty on Contracts*, vol 1, 29th ed (Sweet & Maxwell, 2004) at para 18-003 ("*Chitty on Contracts*")]. The plaintiff had mounted his claim on the basis that he was a party to the Incentive Scheme. Should he be found not to be a party to the Incentive Scheme, his claim would fail *in limine*. Additionally, if any of the defendants were found to be non-parties to the Incentive Scheme, the plaintiff's claim against them would similarly fail.

(i) The parties' arguments

40 The plaintiff's position was that the Incentive Scheme was partly oral, partly written and the parties to it were the first defendant, the second defendant, the Chua Group and the Goh Group, which was equivalent to the plaintiff. This was because (according to the plaintiff) the Incentive Scheme was an inducement for the Chua Group and the Goh Group to agree to the first defendant acquiring a majority shareholding in the second defendant, which was itself part of a larger arrangement governing the different aspects of the first defendant taking majority ownership of the second defendant including board composition, management, directors' remuneration, and control over monetary and sales matters. The plaintiff claimed that CJN acted on behalf of the second defendant, the Chua Group and the Goh Group when he negotiated the Incentive Scheme and signed the Memorandum evidencing the Incentive Scheme.

41 Although the first and second defendants also took the position that the Incentive Scheme was an agreement between the shareholders of the second defendant, they denied that the second defendant was a party to the Incentive Scheme. This was because CJN did not have the authority to bind the second defendant in this respect, there being no approval in general meeting as required by Article 72 of the Articles of Association of the second defendant. The first defendant also denied that the Incentive Scheme was an inducement for the local shareholders of the second defendant, but took the stance that the Incentive Scheme was part of the agreement for its acquisition of majority shares in the second defendant.

42 The Chua brothers on the other hand alleged that the purpose of the Incentive Scheme was to encourage the local directors, main officers and other qualified staff of the second defendant to work towards higher profits, not as an inducement to the local shareholders. Consequently, their case was that the plaintiff was not a party to the Incentive Scheme. Rather, it was contended that the Incentive Scheme was entered into between the first and second defendants and was contained in the Memorandum before being subsequently modified by a course of conduct. The Chua brothers denied there was any oral agreement in respect of the Incentive Scheme.

43 Looking at the evidence in its entirety, I was more persuaded by the argument that the Incentive Scheme was an agreement between the first defendant and the local shareholders of the second defendant, in particular the Goh Group represented by the plaintiff and the Chua Group, in order to induce or compensate them for allowing the first defendant to become the majority shareholder in the second defendant. This was the arrangement that made the most commercial sense and it was largely consistent with the undisputed facts and the evidence of all the witnesses. I also find that the second defendant was not a party to the Incentive Scheme. Even though CJN had signed the Memorandum in his capacity as Managing Director of the second defendant, this was not conclusive evidence that the second defendant was a party to the Incentive Scheme. I shall set out the relevant legal principles before going into the evidence.

(ii) Legal principles

44 The parties to an agreement will normally be the persons from whose communications with each other the agreement has resulted (see Edwin Peel, *Treitel: Law of Contract*, 12th ed (Sweet & Maxwell, 2007) at para 14-004; *Chitty on Contracts* at para 18-004). However, this was a case where there was clearly an agreement despite uncertainties as to the parties to it. In such a situation, the question that arises is whether CJN, in negotiating for and entering into the Incentive Scheme with the first defendant, acted as agent for the second defendant, as agent for the local shareholders of the second defendant, or as agent for the second defendant and its shareholders. This is a mixed question of fact and law and not simply one of contractual interpretation. The parties' arguments concerning whether subsequent conduct may be admissible to aid in the interpretation of a contract are therefore only of tangential relevance.

45 Nevertheless, to the extent that I need to examine the Incentive Scheme document in order to determine the parties to the contract, I am mindful of the following established principles of contractual interpretation:

(a) the aim of construing a contract is to ascertain the meaning which it would convey to a reasonable business person;

(b) the court will do so based on an objective approach and from the standpoint of a reasonable reader;

(c) the court will examine the contract as a whole;

(d) the construction of a contract is determined by the surrounding circumstances, including the legal, regulatory and factual matrix constituting the background in which the contract was drafted or the utterance made;

(e) the court will give due consideration to the commercial purpose of the transaction or provision; and

(f) a construction which entails that the contract and its performance are lawful and effective is to be preferred: see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 at [125], [131] ("*Zurich Insurance*").

(iii) The Incentive Scheme as documented

46 It is undisputed that the only documents relating to the Incentive Scheme are the Memorandum and the correspondence referring to it dated 16 September 1983 and 14 November 1983. Looking solely at the Memorandum and the ensuing correspondence, it is possible to come to the conclusion that the Incentive Scheme was entered into between the second defendant and the first defendant because the documents relating to the Incentive Scheme were signed by their respective representatives, namely Mr Morimoto and Mr Mochizuki for the first defendant, and CJN (as Managing Director) and the plaintiff (as Chairman) for the second defendant. However, this would be taking too narrow a view of the documents and does not consider the factual situation at hand.

47 I start by examining the preamble of the Memorandum, which states:

DAIKIN KOGYO CO. Ltd. (DKC)

and

Mr. Chua Joon Nam

discussed and mutually agreed the followings on July 15, 1981.

[emphasis added]

The preamble was significant because it was alleged in this case that CJN was acting as agent when he negotiated and signed the Memorandum. The plaintiff gave evidence that he had told CJN to act on his behalf in negotiating with the first defendant to take a majority stake in the second defendant, including implementation of the Incentive Scheme. Even though it was not expressly stated in the contract that the signatory was acting as agent, the factual matrix surrounding the contract may

suggest otherwise (and, as will later become clearer, does suggest otherwise in this particular case): see *Thai Kenaf Co Ltd v Keck Seng (S) Pte Ltd* [1993] 2 SLR 92.

48 It was further pointed out by the second defendant that the preamble in the Memorandum differed from that of previous agreements between the first defendant and second defendant, such as the 1972 sole-distributorship agreement[note: 1] and the 1976 agreement for the first defendant to take up shares in the second defendant,[note: 2] which stated in their respective preambles that they were agreements made between "Daikin Kogyo Co. Ltd" and "A.C.E. (Singapore) Pte Ltd".

49 Second, in respect of how the documents were signed, as a matter of principle, it was not correct to say that when a director of a company signs a contract he necessarily does so on behalf of the company of whom he is a director. The Chua brothers' reliance on *Smith v Anderson* (1880) 15 Ch D 247 was misplaced because the statement made in that case, that a director who signs an agreement as director "never enters into a contract for himself, but he enters into contracts for his principal, that is for the company…", was concerned solely with differentiating between a trustee and director and not the effect of a director's signature. In any case, they conceded that extrinsic evidence may be admissible to identify a contracting party whose identity is unclear on the face of the documents, which I find to be the case here. Consequently, the case of *Koh Kia Hiong v Guo Enterprises Pte Ltd* [1989] SLR 1166, which was cited by the Chua brothers for the proposition that when a managing-director signs a document he does so on behalf of his company, is distinguishable because it dealt with a situation where the capacity in which a managing-director had signed a contract was clear. In that case, the contract was signed "acting as Managing Director". Here, the signature portions of the Memorandum and the following correspondence did not clearly state that the signatories were acting on behalf of their company. The earlier agreements between the first and second defendants provided a good reference point.

50 In the 1972 sole-distributorship agreement, the parties signed off as follows:

> *IN WITNESS WHEREOF, the parties hereto have executed these presents as of the day and year first above written.*
>
> *CONTRACTED* [emphasis added]
>
> A.C.E. (SINGAPORE) PTE. LTD. DAIKIN KOGYO CO., LTD.
>
> [signed] [signed]
>
> ____________________ ____________________
>
> Chua Joon Nam. Takehiko Ohta
>
> Managing Director. Managing Director.

The 1976 agreement for the first defendant to take up shares in the second defendant contained the following:

> IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written.

Signed by MR. CHUA JOON NAM the Managing Director of A.C.E. (SINGAPORE) PTE. LTD. For and on behalf of A.C.E. (SINGAPORE) PTE. LTD. In the presence of	[signed by Chua Joon Nam] [signed by the third defendant]
Signed by MR. MINORY YAMADA the President of DAIKIN KOGYO CO. LTD. For and on behalf of DAIKIN KOGYO Co. Ltd. In the presence of	[signed by Mr Yamada] [signed by Mr Morimoto]

This comparison suggests that the Memorandum was ambiguous as to whether the signatories thereto were the only intended parties.

51 Third, in respect of the ensuing correspondence referring to the Memorandum, it was revealed in cross-examination of the plaintiff that the letter dated 16 September 1983 was prepared by CJN who had asked the plaintiff to sign it.[note: 3] The plaintiff did not read English and did not know on whose behalf he was writing the letter.[note: 4] This was not rebutted by any contradictory evidence from the defendants. I therefore think little weight should be attached to how the plaintiff signed the letter dated 16 September 1983.

52 Finally, looking at the Memorandum as a whole, it was evident that it recorded agreements on a variety of topics and was not an entire agreement in itself. This contrasted with previous contracts concerning only the first and second defendants like the agreement for sole-distributorship in 1972 and the agreement to take up shares in the second defendant in 1976, which appeared to be comprehensive and drafted with legal advice. The topics canvassed by the Memorandum also included the remuneration of directors, which was a matter for the shareholders of the second defendant to decide, based on Article 72 of the second defendant's Articles of Association. This suggested that in order for the agreement to have efficacy, it was more likely than not that the shareholders were parties to the Memorandum and consequently the Incentive Scheme. Conversely, all the issues dealt with in the Memorandum did not require the assent of the second defendant. I observe at this stage that this coheres with the plaintiff's theory of an all-encompassing arrangement of shareholders covering different aspects of the first defendant taking up a majority stake in the second defendant, rather than the Chua brothers' theory of the Incentive Scheme being an agreement between the first and second defendant and there being separate agreements for all the different issues amongst different parties.

53 It was not disputed that the Memorandum that described the Incentive Scheme was entered into on the same day that the 800,000 new shares were issued to the first defendant. At the same time, the issues relating to the management of the second defendant, who had the final say in financial matters, and the remuneration of the first defendant's nominees in the second defendant were discussed and resolved. This could not have been a coincidence. Rather, these series of events pointed to the Incentive Scheme being related to the agreement between the local shareholders to give up their share entitlement. I do not believe the third defendant's testimony that although the above-mentioned issues were discussed at the same time, they were resolved via separate agreements amongst different parties. First, this would be inconsistent with the evidence because the Affidavits of Evidence-in-Chief ("the AEIC") of the Chua brothers described a holistic approach to all the issues where the first defendant would be allowed to take a majority stake in the second defendant but that the management of the second defendant would remain with the existing directors and the directors would receive a percentage of the profits made by the second defendant.[note: 5] Second, from a commercial and practical perspective, this would not have been likely and the third

defendant made this abundantly clear during cross-examination when he described the different parties to each of the agreements arrived at on all the issues mentioned earlier.

54 Furthermore, the third defendant conceded that at the time when the first defendant was being invited to take a majority stake in the second defendant, neither the second defendant nor the two Chua directors had much bargaining power because of the second defendant's poor financial position under the management of the Chuas. This made a holistic approach towards negotiation more sensible than taking each issue separately. Nevertheless, the third defendant's explanation of why the first defendant offered and agreed to the Incentive Scheme was as follows:

> You see, Mr Morimoto, who was a signatory to that memo, was representing the first defendant at that time, as far as our business was concerned, and when my father and I approached him, he was keen for the company to change direction. In fact, he was the one who helped the company in its darkest moments when we suffered losses in Indonesia and also in the contracting business. He liked the new model and he said he would persuade his top management to put in more money and help us, because there were opportunities for them to sell more products than under the contracting business.
>
> It was at such a meeting that Mr Morimoto said to me, "The company has been losing money. If you can turn it around, we would like to share some of the profit with you" and, based on that, he agreed to take up a majority, because he believed in my father, despite the troubles we had. In fact, he saw that the business from 1966 until 1981, my father and the family, the children laboured for Daikin.[note: 6]

55 Unfortunately, Mr Morimoto was not called to testify in court. Even so, on the third defendant's evidence, I was prepared to accept that Mr Morimoto had a close relationship with CJN. However, it seems highly improbable that Mr Morimoto who represented the interests of the first defendant would readily give up the bargaining advantage of the first defendant solely because of his personal belief in CJN and, in doing so, bind the first defendant to agree indefinitely to a fixed proportion of the second defendant's profit before tax being distributed annually to the plaintiff and CJN.

56 It was common ground that there was no board resolution authorising the second defendant to enter into any agreement with the first defendant concerning the Incentive Scheme or any board meeting to discuss the matter. This was another factor pointing to the second defendant not being a party to the Incentive Scheme and that it concerned only the local shareholders of the second defendant (including the Goh Group and the Chua Group). Although the plaintiff argued that because the second defendant was run informally and a board resolution was not required so long as a majority of the directors of the second defendant assented, I do not think this argument was supported on the evidence. First, there was evidence that there were numerous directors' resolutions in respect of share transfers, the appointment of directors, the acceptance of banking facilities and other banking matters. These were all matters to which the second defendant was party. There was also a directors' resolution before the second defendant entered into the 1976 share purchase agreement with the first defendant. The third defendant (who was the second defendant's Company Secretary at the material time) further conceded in cross-examination that where a company undertakes liability its decision must be documented, and that a directors' resolution would have made it clear that the second defendant was a party to the Incentive Scheme.[note: 7] In the light of this and the absence of a directors' resolution in respect of or any meeting to discuss the Incentive Scheme, it is unlikely that the second defendant was an intended party to the Incentive Scheme. Further, and in any event, there was no evidence that there was assent from a majority of the directors (who at the time were Mr Shiei Nishimura, the plaintiff, the plaintiff's son, CJN, the third defendant and the fourth defendant) in respect of the second defendant being a party to the Incentive Scheme save for the

third defendant's insistence that he knew that the second defendant was a party. The plaintiff's evidence and that of the fourth defendant on this point was equivocal. In any case, both were not involved in the negotiations for the Incentive Scheme.

(iv) Purpose of the Incentive Scheme

57 It was undeniable that at the material time, the co-operation of the plaintiff (who controlled the Goh Group) and the Chua Group was required in order for the first defendant to assume a majority stake in the second defendant by way of a rights issue. Just before the first defendant assumed majority control, the Goh Group owned 495,000 shares (30.94%), the first defendant 475,000 shares (29.69%), and the Chua Group 380,000 shares (23.75%). Sim held 250,000 shares (15.63%). When the second defendant issued 800,000 new shares in 1981, the Goh Group was entitled to 247,500 new shares, the first defendant 237,500 new shares, the Chua Group 190,000 new shares and Sim 125,000 new shares. If the plaintiff did not agree to the first defendant taking a majority stake in the second defendant and caused the Goh Group to take up the 247,500 new shares, even if the rest of the shareholders agreed to refrain from taking up their new shares, the first defendant would only hold 1,027,500 shares, or approximately 42.81% of the total shareholding of 2.4 million shares. It would not have been able to gain a majority in the second defendant as desired. Similarly, if the Chua Group did not refrain from taking up its proportion of the new shares, the first defendant would not have been able to secure a majority stake. Thus, it made eminent sense for the Incentive Scheme to have been entered into between the first defendant, the plaintiff and the Chua Group to persuade them to give up, and compensate them for giving up, their entitlement to the new shares. It is unsurprising that Sim was not a party to the Incentive Scheme because his consent was immaterial. The third defendant testified that CJN did not consult Sim about the Incentive Scheme.

58 The third defendant himself agreed in cross-examination that in order for the first defendant become the majority shareholder in the second defendant, the consent of the plaintiff was required so that the plaintiff would renounce the rights issue.[note: 8] The third defendant also agreed that his father, CJN had discussed the matter with the plaintiff to persuade the plaintiff that it was best for everybody if the first defendant became a majority shareholder in the second defendant. This was consistent with the plaintiff's evidence that sometime in early 1981, CJN informed the plaintiff that the first defendant wanted to become a majority shareholder in the second defendant and told him of the benefits to the first defendant becoming a majority shareholder, including improved trade credit terms and the provision of financing. The plaintiff's evidence was that it was after this discussion that he and CJN agreed that the first defendant could become a majority shareholder if the first defendant agreed that a certain percentage of the second defendant's net profit before tax each year would be paid over, primarily, to him and CJN. The plaintiff had asked CJN to negotiate on his behalf.

59 Although the third defendant did change his evidence later, by saying that in CJN's discussion with the plaintiff, CJN was not persuading the plaintiff to renounce his shares, but rather telling the plaintiff that unless the plaintiff wished to put in more money they would have to let the first defendant come in as majority, such evidence was not convincing. As pointed out by counsel for the plaintiff, in cross-examination of the third defendant, this could not be true because the third defendant had accepted that the first defendant was needed *in particular* as majority shareholder in order for the second defendant's planned change of business model to be successful. The plaintiff could not have provided the better trade credit terms and financial support that the first defendant could as the first defendant was the manufacturer of the products the second defendant was distributing. In any event, I preferred the evidence of the plaintiff who was present at the meeting, over the evidence of the third defendant who merely heard from his father before the actual meeting, and who on the second day of cross-examination, changed his position in response to another line of questioning to say that the plaintiff only found out about the Incentive Scheme after the event when

his father informed the plaintiff about it.[note: 9]

60 On the second day of cross-examination the third defendant changed his stance yet again and denied agreeing that the plaintiff's consent was required for the first defendant to assume a majority shareholding; he explained this by saying that he and his father had a backup plan should they fail to obtain the plaintiff's consent – the Chua Group and the first defendant could co-operate to pass an ordinary resolution to issue 800,000 new shares to the plaintiff under Article 43of the second defendant's Articles of Association. Article 43provided that:

> *Subject to any direction to the contrary that may be given by the company in general meeting*, all new shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled… [if the offer is declined,] the Directors may disposed of those shares in such manner as they think most beneficial to the company… [emphasis added]

This evidence of a back-up plan was not believable. Leaving aside its unfeasibility, I found it difficult to accept that CJN had such a back-up plan in his mind because it necessitated riding roughshod over the plaintiff's wishes, which would be inconsistent with the long and close friendship between the plaintiff and CJN. I therefore reject the third defendant's subsequent evidence in favour of his original answers.

61 My view that the Incentive Scheme was an inducement for the Chua Group and Goh Group to renounce the second defendant's rights issue and allow the first defendant to become a majority shareholder and was not an encouragement for the local directors to work hard, was further supported by the fact that the terms of the Incentive Scheme were not designed to reward performance but awarded a fixed share to the plaintiff and CJN. This took place right from the first distribution carried out pursuant to the Incentive Scheme for financial year 1982.

62 Rather, the Incentive Scheme rewarded the shareholders cum directors of the second defendant, as reflected in the description of it in internal office documents concerning the allocation of profits under the Incentive Scheme that were signed by the third defendant. These documents referred to the Incentive Scheme as a "Local Director's/Shareholders Incentive Scheme", "Local Shareholders' Incentive Scheme" and "Local Shareholders'/Directors' Incentive Scheme".[note: 10]

63 Although it was possible that the Incentive Scheme could be *used* to encourage the executive Directors of the second defendant to work hard, it was not *intended* for that purpose. Significantly, not all the executive directors of the second defendant received a share of profits under the Incentive Scheme. Goh (2DW1), who was an executive Director of the second defendant since 1997, never participated in the Incentive Scheme but remained in the Senior Managers' Incentive Scheme. He gave evidence that it never occurred to him that he should be transferred to the Incentive Scheme because he was not a shareholder of the second defendant.[note: 11] In contrast, the fifth defendant, who was deemed a shareholder because he was a beneficiary of a portion of his father's shares in the second defendant, was migrated to the Incentive Scheme when he became an executive Director. Consistent with Goh's understanding, the third defendant in his third affidavit filed in the OS stated at [79]:

> When Michael, *who is not a shareholder*, became an executive Director in 1997, he continued on the same Senior Managers' Incentive Scheme… The third Applicant [meaning the fifth defendant] was transferred out of the Senior Managers' Incentive Scheme to the Executive Directors' Incentive Scheme in 1992, *as he was deemed to have an interest, under my late father's*

> *estate*. [emphasis added]

Although the third defendant under cross-examination denied that what he meant in his earlier affidavit was that Goh could not join the Incentive Scheme because he was not a shareholder, he was unable to explain what he actually meant and attempted to prevaricate by arguing that Goh would have suffered under the Incentive Scheme because it was a fixed pie. I was not convinced that the third defendant had made a mistake in his earlier affidavit. I noted that the plaintiff's son, who had received payments under the Incentive Scheme as an executive director was not a shareholder. This did not detract from my view of the Incentive Scheme because it was within the discretion of CJN to have allocated the plaintiff's son a share of the profits. The plaintiff testified that it was CJN who asked the plaintiff's son to be an executive director[note: 12] and this was consistent with the close friendship between the plaintiff and CJN and not inconsistent with the plaintiff's case.

64 Further, during the negotiations between the Chua directors and the first defendant regarding the removal of the existing Incentive Scheme and the formalisation of a formal joint venture agreement, the Chua brothers had taken the position that the Incentive Scheme was a condition to the first defendant's taking up majority shareholding in the second defendant, and was an agreement between the shareholders. This was recorded contemporaneously in minutes and letters by the first defendant, who certainly had no reason to fabricate these statements. For example, in a business report prepared by Mr Tomoda on 19 February 1990 concerning a trip to Singapore to negotiate the elimination of the Incentive Scheme, under the section "Chua family's arguments", it was recorded that:

> *The Incentive Scheme was agreed to as part of the fundamental prerequisites for the joint venture, when Daikin became the majority shareholder in 1981.* We will not accept eliminating it, especially because it was introduced under Daikin's initiative.[note: 13] [emphasis added]

Additionally, in a letter dated 15 November 2001 sent by the first defendant to the third defendant describing a meeting held on 13 November 2001, the fourth defendant was recorded as being "of the view that the incentive scheme [was] *a matter between shareholders* and was a matter of their right and entitlement" [emphasis added].[note: 14] These records cast doubt on the Chua brothers' credibility.

65 Although the third and fourth defendants denied taking such a position and challenged the accuracy of the record in this respect, I am not persuaded by their present denial when they did not raise the issue previously and when they took a similar position in the OS (see below). It appeared that it was only in the present proceedings that the Chua brothers insisted that the Incentive Scheme was a stand-alone agreement between the first and second defendants.

66 The Chua brothers' stance in the OS indicated that they were parties to the Incentive Scheme and possessed enforceable rights against the first defendant pursuant to the Incentive Scheme. There, they claimed damages for the wrongful repudiation of their employment agreements with the second defendant and it was pleaded that:

> insofar as the employment agreements were oral, they were made in meetings held in 1981 between, inter alia, the late Chua Joon Nam *acting on behalf of the Applicants [i.e. the Chua brothers] and the representatives of the [first defendant]*… and insofar as the agreements were made in writing, the said agreements were contained in or evidence by inter alia, a Memorandum of Agreement dated 15 July 1981…

67 The characterisation of the Incentive Scheme as part of an employment agreement was

immaterial, what was important was that the Chua brothers in the OS mounted their case on the basis that CJN had negotiated the Incentive Scheme on their behalf and that was contained in the Memorandum. Unsurprisingly, when this was drawn to the third defendant's attention under cross-examination, he disagreed and said that the application in the OS was "wrongly drafted".[note: 15] In re-examination, the third defendant referred to the supporting affidavit he filed in the OS where he said that the Memorandum was "entered into between the Company [i.e. the second defendant] and the [first defendant]" as explaining his true position in the matter.[note: 16] I do not accept the third defendant's explanation. Read in context, the quoted phrase did not mean that the parties to the Memorandum were the first and second defendants; rather, "entered into" was descriptive of the fact that the Memorandum was signed by representatives of the first and second defendants. Other portions of his affidavit confirmed this reading because the third defendant consistently described the Incentive Scheme as "a condition of the agreement when the [first defendant] took majority shareholding in 1981", and being the right and entitlement of the Chua brothers under the "joint venture agreement" between the first defendant and "Singaporean interests, represented by the Chua Group and the Goh Group", that is, the Incentive Scheme was part of an agreement between the shareholders of the second defendant.[note: 17]

68 I also found it telling that the first defendant stated in its pleadings that the Incentive Scheme "was part of the agreement for the acquisition of majority shares in the second defendant by the first defendant".[note: 18] The first defendant took the position, similar to the plaintiff, that the Incentive Scheme was an agreement between the shareholders of the second defendant, which included the plaintiff. This concession was against the first defendant's own interests and I am inclined to believe it was true.

69 In my view, the Chua brothers were blowing hot and cold in their testimony and were not credible witnesses on this issue. In the light of the instances detailed above, their theory that the Incentive Scheme had nothing to do with the local shareholders of the second defendant but was an arrangement entered into between the second defendant and the first defendant to encourage the directors of the second defendant to work hard to turn in a profit, did not ring true.

(v) Findings

70 Because the Incentive Scheme as documented did not clearly indicate who the parties to it were, the court had to examine the surrounding factual circumstances and the purpose of the Incentive Scheme to determine objectively who were the true parties to the same. I found that these consisted of shareholders of the second defendant, that is, the first defendant, the plaintiff (who may be equated to the Goh Group), and the Chua Group (which included CJN, the third defendant and the fourth defendant).

(2) Did the Incentive Scheme provide for a fixed proportion of the second defendant's profits to be paid out to the plaintiff annually or was it subsequently varied in 1990-1991 at the third defendant's sole discretion?

71 Having determined the parties to the Incentive Scheme, I now come to the second issue of what the terms of the Incentive Scheme were, in particular, whether the documented Incentive Scheme, which provided for a fixed proportion of the second defendant's profits to be paid out to the plaintiff every year, was subsequently varied in 1990 or 1991 to confer on the third defendant the sole discretion to distribute the allocated amount of the second defendant's profits based on the recipients' contributions to the second defendant.

(i) The parties' arguments

72 The plaintiff said that he was entitled to a fixed sum of one-third of the profit to be distributed in accordance with the undated variation recorded on the Memorandum. This was because he was a founding father of the second defendant and had made numerous contributions to the second defendant in its early years. The first and second defendants largely aligned themselves with the plaintiff in this regard.

73 The Chua brothers accepted the plaintiff's formula for sharing the profit incentive only as it was recorded in the undated variation to the Memorandum. However, they argued that there was no reason to apply the same distribution in respect of the 7.5% of the profits in excess of $1 million where the purpose of the Incentive Scheme was to encourage the local directors to contribute to the profits of the second defendant. Additionally, they alleged that the Incentive Scheme had been varied some time in 1990 or 1991 after the passing of CJN to allow: (1) the third defendant to recommend the amount of incentive to be allocated to each of the local directors based, *inter alia*, on their contributions to the second defendant (it was the Chua brothers' case that the plaintiff ceased to contribute to the second defendant from 1992 onwards); (2) the nominee MD and/or the Senior Managing Director appointed by the first defendant to approve the third defendant's recommendations; and (3) the shareholders of the second defendant to give their final approval at the AGMs. According to the Chua brothers, the variation was evidenced by or could be inferred from: (1) internal memoranda from 1992 to 2001 where the distribution of profit incentives was recommended by the third defendant and approved by the nominee MD; and (2) payment vouchers in respect of payments under the varied incentive scheme from 1992-2001 in accordance with the internal memoranda. The third defendant also said that he persuaded Mr Omata to keep CJN's portion of the profit incentive scheme within the pool for distribution because he and the fifth defendant would assume CJN's roles in the company.

74 It was common ground that the Memorandum provided for one-third of 15% of the first $1m of the second defendant's net profit before tax to be distributed to the plaintiff and CJN. In the light of this clear express provision, the Chua brothers' argument that there was an implied term requiring contribution before payment may be made was bound to fail. The statement in the Memorandum that the profit incentives were for "local Directors and selected officers so as to encourage them", did not in any way mandate that contribution to the company was a precondition for the allocation of incentive payments. In fact, there was no evidence to suggest that CJN had allocated payments under the Incentive Scheme based on contribution.

75 In respect of the 7.5% of the second defendant's net profit before tax in excess of $1m, no express provision was made for its allocation. Nonetheless, it may be implied from the ensuing course of conduct that the parties to the Incentive Scheme had agreed to allocate it in the same way as the 15% of the first $1m of the second defendant's net profit before tax. From 1983 to 1991, just after the passing of CJN, the plaintiff had received one-third of any amount that was available for distribution, even where the profits of the second defendant exceeded $1m. It was only after CJN's passing that things began to change. As will be elaborated below, this change was unilaterally effected by the third defendant in clear opposition to the terms of the Memorandum without consulting the other parties to the Incentive Scheme.

76 The Chua brothers relied on *Churchward v The Queen* (1865) 1 QB 173 to argue that the one-third formula of allocation ought not to be applied to the profits in excess of $1m where there was no express provision to that effect. In that case, the court refused to imply a covenant into an existing agreement that would require the Crown to engage the plaintiff's services to carry mail between certain ports for the term of eleven years, whatever the circumstances that might arise, without anything on the face of the instrument to indicate that the Crown intended as much. That case, as the plaintiff correctly argued, is distinguishable. Here, it was apparent from the Memorandum that the

parties intended a fixed one-third of the profits available for distribution to be allocated to the plaintiff in respect of the first $1m of profits. The following conduct showed that this same formula was applied to the profits in excess of $1m.

77 As for the Chua brothers' contention that there was little commercial justification for awarding a fixed percentage of the incentive payments to the plaintiff who was a non-executive Director, this was a bald assertion and ran contrary to the express terms of the Memorandum.

78 I therefore find that one of the terms of the Incentive Scheme was that one third of the total profits available for distribution would be allocated to the plaintiff by CJN.

79 The third defendant accepted that had there been no variation to the Incentive Scheme as alleged, he would have been in breach of the documented Incentive Scheme. This concession reinforced my finding that contribution was never required as a condition of incentive payment under the terms of the Incentive Scheme. The burden to prove an intention on the part of all the parties to vary the Incentive Scheme as well as the precise terms of the varied Incentive Scheme lay squarely on the Chua brothers' shoulders. However they failed to convince me that there was in fact such a variation.

80 One pillar of the Chua brothers' case was that the variation to the Incentive Scheme was brought about because the first defendant had expressed dissatisfaction with it; in particular, Mr Tomoda of the first defendant had complained that the plaintiff appeared to be receiving one-third share of the profit incentives for nothing. As a result, the Chua brothers met and agreed amongst themselves that the profit incentive would be distributed to the local Directors according to their respective contributions. It was their case that the first defendant implicitly agreed to this method of allocation.

81 I disbelieve the evidence of the Chua brothers on this point. The first defendant took the position that the Incentive Scheme had not been varied. Again, this concession was made against its own interest. Although Mr Tomoda admitted under cross-examination that the Incentive Scheme had been varied after CJN's death because the plaintiff was no longer receiving one-third of the profits available for distribution, this was merely an observation of the factual situation and did not run counter to his company's case that he had not agreed to any variation or amendment to the Incentive Scheme.

82 Mr Tomoda, however, candidly agreed with the Chua brothers that the first defendant was not happy with the Incentive Scheme and that there had been negotiations about removing the Incentive Scheme after CJN's passing. One of the issues discussed was that too much of the second defendant's profits were being distributed under the Incentive Scheme. This was documented in a contemporaneous business report prepared by Mr Tomoda on 19 February 1990 after a business trip to Singapore between 14-16 February 1990, which stated as follows:[note: 19]

> (1) Daikin's arguments (to highlight problems with the Incentive Scheme)
>
> The Incentive Scheme may cause unnecessary suspicion for both sides. For instance,
>
> > (1) If Daikin raises product prices, the Chua family may suspect that the price hike is intended to reduce the Incentive Scheme.
> >
> > (2) If the Chua family is opposed to the price hike, based on such misunderstanding, Daikin may assume that their opposition is based on their desire to increase the Incentive Scheme,

rather than on market conditions…

(3) If ACE does not gear up to increase sales of packages targeted by Daikin, Daikin may suspect that ACE is refusing to do so, as it will result in a decline in the Incentive Scheme…

(4) If the Incentive Scheme increases as a result of larger-than-expected gain on foreign exchange, Daikin may conclude that the foreign exchange market was intentionally taken into account in drawing up the budget… boosting the Incentive Scheme as a result…

…

The Incentive Scheme is the seed of mutual misfortune in this sense and Daikin would like (the Chua family) to consider eliminating it, especially as more than 100 million yen has already been paid as the Incentive Scheme. [emphasis added]

Mr Tomoda denied that any unhappiness was targeted at the plaintiff's receipt of one-third allocation under the Incentive Scheme and this was consistent with his business report as well. Additionally, the third defendant's own memorandum, which was prepared contemporaneously, did not contradict the first defendant's case:[note: 20]

PATTERN OF DAIKIN'S BEHAVIOUR

…

5. Wants profit ending 31.3.1990 to be adjusted downward to reduce local Directors' incentives.

6. Wants to take away local Directors incentives.

...

8. Accuses Local Directors of cheating on forex gain.

9. Suspects Local Directors of cheating on Incentive Scheme for local Directors.

…

11. Tries to get rid of Eng Wah [plaintiff] from BOD.

12. Tries to split Eng Wah [plaintiff] and Chua Group.

…

It was apparent that even in the third defendant's own note the plaintiff was not referred to in the context of the Incentive Scheme, but as part of the discussion on management control. I preferred Mr Tomoda's evidence to that of the Chua brothers as being the most consistent with contemporaneous documents.

83 The Chua brothers' case that the first defendant's complaints prompted the variation to the Incentive Scheme was further illogical because the alleged variation in no way benefited the first defendant nor addressed its concerns as set out in Mr Tomoda's business report. The variation, described above at [73], merely changed the way the profit incentive was allocated and did not affect let alone reduce, the amount of profit incentive allocated. The variation also did nothing to

lessen the suspicion the Incentive Scheme had created between the first defendant and the Chua brothers.

84 Another reason I was not convinced that there was a variation to the Incentive Scheme as described by the Chua brothers was that the subsequent factual occurrences did not bear out the alleged new terms of the Incentive Scheme.

85 First, the allocation was supposed to have been recommended by the third defendant based on the amount of contributions of the local directors. Yet, although the third defendant's case was that the plaintiff effectively made no contributions to the second defendant by 1992, he continued to allocate 31.09% to the plaintiff in the financial year ended 1993, 27.00% in the following year, and 15.00% in 1995. It therefore cannot be that the Incentive Scheme had been modified to require the third defendant to distribute the profits of the second defendant based on the contributions of the local directors cum shareholders.

86 Second, the nominee MD or the Senior Managing Director appointed by the first defendant was supposed to have approved the third defendant's recommended allocations based on the internal memoranda from 1992-2001. This did not appear to have been so. For one, the allocation sheets for the years 1993, 1994, 1995, 1997, 2000 and 2001 in evidence before the court were not signed by the nominee MD (the 1996 allocation sheet was not available in court). These allocation sheets were either completely unsigned, or signed solely by the third defendant. Of particular interest were the allocation sheets for the years 2000 and 2001 which were in a different format from the earlier sheets. Whereas the earlier sheets would state the net profit for the year, how much was available for distribution and the distribution of the incentive payments to the various directors, before ending with "Approved By:" and leave a space for two signatures, the 2001 sheet was in the form of a memo from the third defendant to the nominee MD. It included the following:[note: 21]

> Based on the above amount of $[…] approved at our AGM on […]. *I have decided* the distribution to the shareholders/Directors in the following manner: [emphasis added]
>
> …
>
> Regards
>
> [signed]
>
> Robert Chua Teck Chew
>
> Executive Chairman

Although the third defendant described this as a mere format change insisted upon by the Japanese, in my view it was more likely than not that the change better reflected the true allocation process for incentive payments after the passing of CJN, *i.e.* it became the responsibility of the third defendant, who took over his father's role, under cl 1 of the Incentive Scheme, to allocate the incentive payments in accordance with the terms of the Incentive Scheme.

87 Third, the Chua brothers also said that the shareholders of the second defendant approved the allocation of the incentive payments at the company's AGMs. Again, this could not have occurred on the facts and therefore could not have been one of the varied terms of the Incentive Scheme. During the AGMs of the second defendant, the specified amounts to be allocated to each individual director were not available. All that was approved was the global sum of the profits that would be distributed

to the directors as incentive payments. Hence, it cannot be said that the shareholders of the second defendant approved the allocation of the incentive payments at the company's AGMs.

88 In any event, based on my earlier finding that the plaintiff was a party to the Incentive Scheme, his consent ought to have been sought before any alleged variation could be valid as against him; likewise, the other parties to the Incentive Scheme. The plaintiff testified that he knew of no variation to the Incentive Scheme, neither did the witnesses of the first defendant. The third defendant, however, insisted that he had spoken to the plaintiff about the alleged variation in 1991 and that Mr Omata (who represented the first defendant) had expressly agreed to it. I reject the third defendant's evidence for the following reasons. First, the alleged approval of the plaintiff and Mr Omata was not the Chua brothers' pleaded case, which was instead premised on a course of conduct that occurred over a period of time. Second, there was corroborative evidence from Goh that, some time in 1993 or 1994, he noticed that the plaintiff appeared to be receiving less than the stipulated one-third and he raised the issue with the third defendant. According to Goh, the third defendant's response was that the payment was correct and that he would speak to the plaintiff about it, suggesting that he had not as yet spoken to the plaintiff. Third, the issue of the Incentive Scheme having been varied did not arise till late in the day. It was not raised in the OS even though it would have been relevant to the issue of the Chua brothers' entitlement to incentive payments. Rather, the first mention of it took place in a letter dated 5 October 2005 from the Chua brothers' solicitors to the plaintiff's solicitors which set out their defence for this suit.

(ii) Findings

89 The only valid variation to the Incentive Scheme after CJN's passing was the third defendant's assumption of CJN's role in the allocation of payments which the parties did not dispute. All other variations took place at the third defendant's initiative – there was no approval by the other parties to the Incentive Scheme let alone the plaintiff. I therefore find that the plaintiff remained entitled to a fixed proportion of one-third of the profits of the second defendant that were set aside for distribution under the Incentive Scheme. Having taken over CJN's role after his death, including that under the Incentive Scheme, it was the obligation of the third defendant to distribute the profit incentive in accordance with the Incentive Scheme. Although it may have been true that it was the work and effort of the Chua brothers that drove the company and thereby increased the second defendant's profits, this factor was irrelevant in changing the terms of the Incentive Scheme.

(3) Did any of the defendants owe a fiduciary duty to the plaintiff to ensure he received his entitlement under the Incentive Scheme?

90 Having found that the first defendant and the Chua brothers were amongst the parties to the Incentive Scheme and that one of the terms of the Incentive Scheme was that the plaintiff was to receive one-third of the profits available for distribution annually, I turn next to determine the nature of their obligations vis-à-vis the plaintiff. It was in this context that the plaintiff raised the issue of whether any of the defendants owed him fiduciary duties to ensure that he received payment according to the terms of the Incentive Scheme.

(i) The parties' arguments

91 The plaintiff's pleaded case at [29] was that he reposed trust and confidence in the first defendant and the Chua brothers, who jointly managed the second defendant, to act in good faith and to ensure that the second defendant made payments to him in accordance with the terms of the Incentive Scheme. The plaintiff stated that the second defendant and its shareholders had conducted themselves on the basis of mutual trust and confidence and treated their relationship *qua* the second

defendant as a joint venture or partnership – the first defendant was to ensure that the second defendant was properly managed while the Chua brothers were to safeguard the interests of the minority shareholders including the plaintiff.

92 In particular, the plaintiff claimed that the third defendant had taken over from CJN the fiduciary obligation of looking after his interest in the second defendant (since it was CJN who had persuaded the plaintiff to contribute to the business of the second defendant and the plaintiff reposed complete trust and confidence in him) and of ensuring that the plaintiff was paid his share under the Incentive Scheme.

93 The first defendant and the Chua brothers (but not the second defendant, as it was not a party to the Incentive Scheme) denied that they owed the plaintiff any fiduciary duties in respect of the Incentive Scheme. In the case of the first defendant, it was because it had no special relationship with the plaintiff or even any direct contact at all with the plaintiff until some time in 2001 or 2002, when the first defendant wanted support from the plaintiff in respect of the proposed joint-venture agreement. The first defendant argued that its only role was to approve the payments that were decided by the third defendant and it had no reason to suspect that the payments were being allocated wrongly. In respect of the third defendant, his counsel argued that he had hardly any contact with the plaintiff and had not assumed any responsibility towards the plaintiff. According to the third defendant, to the best of his knowledge, he had acted properly and in the best interests of the second defendant by allocating the incentive payments based on the contributions of the directors. As for the fourth and fifth defendants, they argued that they were not involved in allocating payments under the Incentive Scheme at all and had no knowledge that any of the payments were incorrect. There was therefore no basis to claim that they had breached any fiduciary duties owed to the plaintiff or were unjustly enriched.

(ii) Legal principles relating to the existence of fiduciary duties

94 The legal principles relating to when a fiduciary duty arises are not controversial although they pose difficulties with regard to application in different factual situations. The Chua brothers relied on the following extract from *Bristol & West Building Society v Mothew* [1998] Ch 1 at 18 (cited approvingly in *SM Trading Services (a firm) v Intersanctuary Ltd* [2006] 3 SLR 3979 at 421) as definitive of a fiduciary:

> A fiduciary is someone who has *undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence*. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. [emphasis added]

95 However, as the plaintiff correctly pointed out in his closing submissions, an undertaking to act on someone else’s behalf is not a prerequisite to the existence of a fiduciary duty but one of the ways in which a fiduciary relationship could be established. As stated by Gibbs CJ of the Australian High Court in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at [30]:

> I doubt it is fruitful to attempt to make a general statement of the circumstances in which a fiduciary relationship will be found to exist. Fiduciary relationships are of different types, carrying different obligations… a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose.

A similar view was expressed by Amarjeet Singh JC in *Tai Kim San & Anor v Lim Cher Kia* [2001] 1 SLR 607 at [32.1] as follows:

> I would point out at the outset that the existence of a fiduciary duty and the obligations it entails under it differ widely and will largely be dependent on the circumstances of the particular case, ie a situation specific approach has to be adopted to determine its existence.

96 I respectfully concur. A survey of the cases cited by the plaintiff and the defendants show that the courts have found the existence of a fiduciary duty on bases other than an assumption of fiduciary responsibility, including:

(1) where a person has entrusted, or in the circumstances may be treated as having entrusted, property, affairs, transactions or interests to the fiduciary (see *Bruce Peskin & Kevin Milner v John Anderson & Ors* [2001] 1 BCLC 372 at [34]); and

(2) where there is mutual reliance between the parties in a business relationship (see *SM Trading Services (a firm) v Intersanctuary Ltd* at [75]-[79]).

Another common basis for finding the existence of a fiduciary relationship is the existence of a power or discretion on the part of the fiduciary by which he can alter or affect the interests of another (see John Glover, *Commercial Equity: Fiduciary Relationships* (Butterworths 1995) at para 3.15). This has been described in some cases as an inequality of bargaining power where the beneficiary lacks the ability to adequately control or supervise the exercise of the fiduciary's power (*Cook v Evatt (No 2)* [1992] 1 NZLR 676 at 685; approved in *Susilawati v American Express Bank Ltd* [2008] 1 SLR 237 at [60]). It is apparent that there is no single test that can be used to determine if a fiduciary relationship exists, given the myriad of factual circumstances which a court may face.

97 In the context of a director of a company owing duties to a single shareholder, it was common ground that although a director generally only owes fiduciary duties to the company, there may be special factual circumstances where a director will owe fiduciary duties to an individual shareholder, for instance where the director has made himself agent for the individual shareholder in the acquisition or disposal of shares in the company (*Percival v Wright* [1902] 2 Ch 421; *Coleman v Myers* [1977] 2 NZLR 225; *Glavanics v Brunninghausen* (1996) 19 ACSR 204). The Singapore High Court in *Tai Kim San & Anor v Lim Cher Kia* at [28]-[29] endorsed the above-mentioned cases although on the facts of the case, it came to the conclusion that no fiduciary relationship existed between the plaintiffs who were shareholders (and subsequently directors in the company) and the defendant (who was managing-director of and a shareholder in the company) in relation to the plaintiffs' sale of shares to the defendant. This was because there was no relationship of confidence and trust between the plaintiffs and the defendant – theirs was a purely business relationship and they seldom met or went out socially. Additionally, the plaintiffs were not dependent on the defendant for information concerning the company's performance or valuation, were involved in the decision making process of the company and were aware of how the company was run and what its revenues and profits were. Finally, the defendant had no hand in wanting the plaintiffs to sell their shares to him.

98 In summary, the representatives of the first defendant and the Chua brothers, in their capacity as directors of the second defendant, owed no general fiduciary duty to individual shareholders of the second defendant. The court's task in the present case would be to determine if one or more of the bases as discussed in [96] above had been established on the facts such as to give rise to special circumstances upon which to found a fiduciary relationship between the first defendant, the Chua brothers and the plaintiff. If not, whether there were any other obligations owed by them to the plaintiff.

99 The plaintiff did not seriously pursue the argument that the first, fourth and fifth defendants had breached any fiduciary duties owed to him. In fact, the plaintiff only sought a remedy as against the third defendant in relation to a breach of fiduciary duty by arguing that a constructive trust existed over the incentive payments that ought to be but were not allocated to him by the third defendant. Although the plaintiff argued that he had reposed trust and confidence in the first, fourth and fifth defendants, this appeared only to be in the context of a shareholder trusting the directors of a company to act in the company's best interests, on which the plaintiff did not complain.

100 In my view, there were no special factual circumstances to show that the first, fourth and fifth defendants owed the plaintiff any duty to act in the plaintiff's *personal* interests in respect of the Incentive Scheme. I accept the evidence of the first, fourth and fifth defendants that they were not involved in the allocation and distribution of the profits under the Incentive Scheme. It was apparent from the internal memoranda discussed at [86] above and the third defendant's succession of CJN that it was the third defendant who bore the sole responsibility of deciding the amounts to be paid to each of the directors under the Incentive Scheme. Consequently, as against the first, fourth and fifth defendants, the plaintiff failed to prove the existence of any fiduciary relationship or even any contractual obligation to ensure that he received his share under the Incentive Scheme. Based on the terms of the Incentive Scheme, the first defendant merely agreed to allow a certain proportion of the second defendant's profits to be distributed to the local officers of the second defendant in the stipulated manner, whereas the fourth and fifth defendants were, like the plaintiff, simply recipients of the amounts allocated to them.

101 Following from this, it cannot be said that the fourth and fifth defendants had been unjustly enriched at the plaintiff's expense. The plaintiff's attempt at proving his case of unjust enrichments against the fourth and fifth defendants also appeared to be half-hearted. No arguments were presented to establish the elements of unjust enrichment other than the assertion that because the third defendant had stated that he allocated the profit incentives based on the contributions of the directors, that meant that part of the plaintiff's one-third share must have been distributed amongst the Chua brothers proportionally. This did not suffice.

102 The question that remained was whether the third defendant owed fiduciary duties to the plaintiff in the circumstances of the case. I do not think so for the following reasons.

103 First, the third defendant did not assume or undertake the responsibility of looking after the plaintiff's interests in relation to the negotiation of the Incentive Scheme or the allocation of profits under the Incentive Scheme. It was not disputed by the plaintiff that he had hardly any contact with the third defendant and unlike CJN, the third defendant did not meet personally with the plaintiff to discuss matters of the second defendant or in relation to the Incentive Scheme. Although the third defendant had conceded in cross-examination that he had a duty to ensure that the plaintiff received his entitlement under the Incentive Scheme, this did not necessarily mean that he had undertaken a *fiduciary* duty towards the plaintiff. I do not think that the concession was conclusive in the light of the other evidence regarding the relationship between the plaintiff and the third defendant which, by all accounts, was not close.

104 Second, it also cannot be said that the plaintiff had entrusted or in the circumstances must be taken to have entrusted any of his property, affairs or interests to the third defendant although this could be said in relation to CJN. I have earlier found that CJN had acted on the plaintiff's behalf in negotiating the Incentive Scheme. It was also apparent from the evidence that CJN and the plaintiff had a close personal and working relationship – they had known each other for some 10 years before founding the second defendant together; the plaintiff left the running of the second defendant to CJN, and provided financial assistance to the second defendant whenever he was called upon to do

so. Essentially, the plaintiff had entrusted his interests in the Incentive Scheme as well as a significant amount of his finances to CJN – the former being personal to him and the latter to benefit the second defendant. To this extent, I accept the plaintiff's submissions.

105 However, I do not accept that because the third defendant took up the mantle of CJN after his father's passing and assumed CJN's duties in the second defendant, that this necessarily meant that the third defendant was now entrusted with looking after the plaintiff's *personal interest* in the Incentive Scheme just as his late father was. CJN had not been entrusted with looking after the plaintiff's interest in relation to the Incentive Scheme merely because he was the Managing Director of the second defendant, but because of the close relationship between CJN and the plaintiff – they had frequent meetings and conversations which included discussion of the terms of the Incentive Scheme. This close relationship was missing as between the third defendant and the plaintiff. Consistent with the authorities cited in [97] above, the special circumstances upon which to base a fiduciary relationship between a director and an individual shareholder must exist as between the claimant and the party whom the claimant says is his fiduciary.

106 Neither do I accept the argument that because the plaintiff carried on in the same way after CJN's passing (namely, not being involved in management, not raising queries at the second defendant's AGM and accepting his incentive payments without question) that it meant that he had entrusted his interests in relation to the Incentive Scheme to the third defendant. Those actions (or inactions) were equivocal at best. They could well indicate that the plaintiff was no longer interested in the second defendant's business after the passing of his good friend and was choosing to focus on his other investments.

107 There was no basis for the plaintiff to have relied on the third defendant to take care of his personal interests under the Incentive Scheme and on the evidence before the court, I did not believe the plaintiff did so. The plaintiff had his daughter Min Yen (PW2) represent him at the AGMs of the second defendant when he could not attend personally.[note: 22] The plaintiff also sent his daughter to attend the second defendant's first board meeting in Japan in 2002 – he did not rely on the third defendant to represent him.[note: 23] When the representatives of the first defendant approached the plaintiff to seek his support for the proposed joint-venture agreement and also in relation to the OS, the plaintiff likewise spoke for himself and did not align himself with the third defendant.[note: 24]

108 Third, mutual reliance or a relationship of trust and confidence between the plaintiff and the third defendant was likewise absent in relation to the Incentive Scheme. Although the plaintiff insisted that he trusted the third defendant just as he trusted CJN, unlike his relationship with CJN, there was no mutuality in his relationship with the third defendant. The third defendant may have been courteous and cordial towards the plaintiff because the plaintiff was his late father's friend, but he treated the plaintiff as an ordinary shareholder in the second defendant – he did not rely on the plaintiff to provide financial assistance to the second defendant as CJN did.

109 That leaves the final basis, which is the existence of a power or discretion on the part of the fiduciary by which he can alter or affect the interests of another. *Prima facie*, this seems to apply to the situation between the plaintiff and the third defendant under the Incentive Scheme because the third defendant had, after his father's passing, assumed the task of allocating the incentive payments to the plaintiff. The plaintiff argued that this placed the third defendant in a superior position to the plaintiff, who was vulnerable because of his passive role in the second defendant.

110 In my judgment, this was not an accurate characterisation of the third defendant's power under the Incentive Scheme. Further, the plaintiff was not as vulnerable as he would have this court

believe. After CJN's passing, the third defendant assumed the task of allocating the incentive payments. In respect of the plaintiff, this should have been a simple task of setting aside one-third of the profits to him. The third defendant's failure to do so did not mean that he had a power or discretion by which he could affect the plaintiff's interests, it only meant that the third defendant had breached the terms of the Incentive Scheme. Additionally, the plaintiff was an experienced and capable businessman. Once the shortfall in the incentive payments to him was discovered, the plaintiff immediately took steps to enforce the Memorandum and in financial year 2002 he received his one-third share. This was a man who was capable of looking after and did look after his own interests – he was not at the mercy of the third defendant's exercise of power or discretion.

(ii) Findings

111 Although the plaintiff claimed that he reposed trust and confidence in all the defendants to act in good faith and to ensure that the second defendant made payments to him in accordance with the terms of the Incentive Scheme, he only argued in particular that the third defendant owed him fiduciary duties and was a constructive trustee of the sums that should have been but were not paid to him under the Incentive Scheme. However, I find on the facts that there were no special circumstances upon which to find a fiduciary relationship between the plaintiff and the third defendant in relation to the Incentive Scheme. Nevertheless, the third defendant did have a contractual duty to allocate one-third of the profits available for distribution to the plaintiff under the terms of the Incentive Scheme. He breached this duty to the plaintiff and remains contractually liable.

(4) Did the plaintiff waive any of his rights to payment under the Incentive Scheme?

112 I now come to the defence of waiver. The first and second defendants did not rely on this defence. It was the Chua brothers who argued that the plaintiff knew or ought to have known that he was not receiving one-third of the profit available for distribution. This would have been apparent at least in financial year 1995. In 1995, the second defendant's profit before tax (as stated in its audited accounts) was $972,000 and the plaintiff received $24,000 in incentive payments. A rough calculation would have shown that so long as the second defendant's net profit before tax was $1m, the plaintiff should be receiving at least $50,000 in incentive payments. The Chua brothers also argued that the plaintiff could have compared the amounts of incentive payments in previous years with the profit before tax of the second defendant – a significant increase in the company's profit before tax ought to translate into a significant increase in respect of the profit incentives received by the plaintiff (assuming he was entitled to one-third of the profits available for distribution). By accepting the amount allocated to him without protest and by approving the directors' remuneration (including the incentive payments) at the second defendant's AGMs, the Chua brothers submitted that the plaintiff had waived his right to receive 5% of the second defendant's net profit before tax.

113 The plaintiff, on the other hand, rightly pointed out that the Chua brothers' case on waiver was vaguely framed. The term "waiver", as was pointed out in *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR 288 at [28], bears different meanings to different judges at different times; it could mean variation or forbearance or rescission. According to the learned authors of *Spencer Bower: The Law Relating to Estoppel by Representation*, fourthed (LexisNexis, 2004) at 357:

> It is more useful to use [the term 'waiver'] in a narrow sense to describe an end result or consequence, namely the abandonment of a right, rather than the process by which that result is achieved or brought about. For this reason it is best used in conjunction with the terms election and estoppel to mean the abandonment of a right as a consequence either of a binding election or of a finding of promissory estoppel, as in the phrases 'waiver by election' or 'elective waiver' or 'waiver by estoppel'.

This view is consistent with that held by major textbook writers in this field, including J Beatson, *Anson's Law of Contract*, 28th ed (Oxford University Press, 2002) at 525-527 and *Chitty on Contracts* at para 22-040.

114 Waiver by election occurs when a person has two inconsistent rights or courses of action and only one of which can be exercised; in such a case, a person's choice by overt act communicated to the other party that he is relying on one such right or course of action precludes him from later claiming the benefit of another (see *The "Pacific Vigorous"* [2006] SGHC 103 at [15]). It was said in *The "Pacific Vigorous"* that a prerequisite of an election is that the party making the choice must be aware of the facts which had given rise to the existence of his right of election and must demonstrate knowledge of the existence of choice. The alleged election, if by conduct, must further be unequivocal in the sense that the conduct must be capable of one construction only – that the person had chosen to forego his rights (see *Bayerische Hypo und Vereinsbank AG v C K Tang Ltd* [2004] SGHC 254 at [175]).

115 It is irrelevant to the issue of waiver by election whether the plaintiff *could or should* have been aware of his right to make a choice. I reject the Chua brothers' contention that the plaintiff *must* have known that he was not receiving his proper share of the profits of the second defendant. On the facts, it could not be said that the plaintiff's forbearance in claiming his one-third share was unequivocally the result of a conscious choice to waive his rights to that one-third share.

116 I believed the plaintiff's testimony when he testified that he had not looked at the accounts of the second defendant and only became aware of the shortfall in payments in 2002 when he took steps to find out more about the amounts that were paid out under the Incentive Scheme from the first defendant and then demanded that he receive his one-third share. This was consistent with the undisputed evidence regarding the plaintiff's lack of involvement in the affairs of the second defendant. Further, the plaintiff's unquestioning acceptance of the amounts allocated to him was not unequivocal evidence of a choice to waive his rights under the Incentive Scheme as the Chua brothers argued. Rather, this was how the plaintiff had always behaved towards receiving payments from the second defendant since 1983. Although the plaintiff attended the AGMs of the second defendant and voted to approve the remuneration of the directors (which included the incentive payments), this also could not be evidence of knowledge on his part that he was receiving less than his entitlement under the Incentive Scheme because no precise breakdown was made available to the plaintiff as to how much of the total directors' remuneration was payment under the Incentive Scheme; information as to the total amount available for distribution under the Incentive Scheme was also not contained in the accounts of the second defendant nor mentioned at its AGMs. Given the plaintiff's consistent passivity over the years since the time of CJN, it was probably the case that he did not make rough calculations as to how much he could expect under the Incentive Scheme based on the reported profits of the second defendant, neither did he compare the amount he received with the reported profits of the second defendant over the years.

117 Because it could not be shown that the plaintiff had knowingly made a choice to forbear from enforcing his rights under the Incentive Scheme, he did not elect to waive his rights under the Incentive Scheme.

(5) Was the plaintiff estopped from claiming any shortfall in payment under the Incentive Scheme?

118 In *Chitty on Contracts* at para 22-040 (cited approvingly in *T2 Networks Pte Ltd v Nasioncom Sdn Bhd* [2008] 2 SLR 1 at [69]), it is said that waiver by estoppel may be held to have occurred if, "without any request, one party represents to the other that he will forbear to enforce or rely on a

term of the contract to be performed or observed by the other party, and the other party acts in reliance on that representation". The key elements are therefore a representation of forbearance to enforce a term of the contract on the part of one party and reliance on that representation by the other party. The representation must be clear and unequivocal and there is no ground for saying that mere delay, however lengthy, destroys contractual rights save in exceptional situations where the law imposes a duty to disclose facts or to clarify a legal relationship and the party under the duty fails to perform it (*Chitty on Contracts* at para 3-092).

119 The defence of waiver by estoppel fails in this case because there was no unequivocal representation on the part of the plaintiff to forbear from enforcing his rights under the Incentive Scheme. The plaintiff's silence and inactivity could not be indicative of a representation of forbearance in itself at law, and more so on the facts where the plaintiff had since 1983, accepted his incentive payments unquestioningly and voted at the AGMs to approve the directors' remuneration without knowing how much of that remuneration represented incentive payments or what the percentage allocated to each director was. Such conduct was perfectly consistent with the plaintiff's passive attitude towards the affairs of the second defendant and could not constitute an unequivocal representation that he would not enforce his rights under the Incentive Scheme. Further, there could not have been reliance on the part of the third defendant because, on the third defendant's own case, he made the allocations of the incentive payments prior to the second defendant's AGMs and the making of payment to the plaintiff. Hence, the third defendant's allocations must have been independent of any representation by the plaintiff supposedly consisting of acceptance of the incentive payments and voting in favour of the directors' remuneration at the second defendant's AGMs.

120 There is no need to say anything further on the defence of estoppel save that for the same reasons expressed above in relation to waiver by estoppel, the plaintiff cannot be estopped from enforcing his rights under the Incentive Scheme.

121 In my view, the Chua brothers' case, whether based on waiver by election or waiver by estoppel must fail because the plaintiff had neither knowingly made a choice to abandon his right to one-third of the second defendant's net profit before tax available for distribution under the Incentive Scheme, nor represented to the third defendant that he was going to forbear to enforce the terms of the Incentive Scheme.

(6) The defence of time bar

122 In the light of my above findings, the third defendant is contractually liable to the plaintiff for failing to allocate the incentive payments to him as per the terms of the Incentive Scheme. Nevertheless, one final issue remains to be resolved and that is, whether any part of the plaintiff's claim is time-barred because this suit was brought in 2005 whereas the shortfall in incentive payments occurred as far back as 1992. Under s 6(1) of the Limitation Act (Cap 163, 1996 Rev Ed) ("the Act"), an action founded on a contract cannot be brought after the expiration of 6 years from the date on which the cause of action accrued. Thus, the defence of limitation would apply against the payments due to the plaintiff prior to financial year 1999. This was not disputed by the parties.

123 Nevertheless, in respect of those payments, the plaintiff argued that s 29(1)(b) of the Act was applicable to postpone the limitation period because the plaintiff's right of action had been concealed by fraud. That section states as follows:

> **Postponement of limitation period in case of fraud or mistake.**

29. —(1) Where, in the case of any action for which a period of limitation is prescribed by this Act —

(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent;

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

…

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

124 In order to rely on s 29(1) of the Act, the plaintiff must show that his right of action had been concealed by the fraud of the third defendant. This is the threshold criterion after which, it is a matter of determining when the period of limitation begins to run – whether at the time the plaintiff discovered the fraud or when the plaintiff could have with reasonable diligence discovered it.

125 Quoting the following passage from Lord Denning MR's judgment in *King v Victor Parsons & Co* [1973] 1 WLR 29 at 33, the Court of Appeal in *Bank of America National Trust and Savings Association v Herman Iskandar & Anor* [1998] 2 SLR 265 at [73]-[74] held that although "fraud" under s 29(1) was not confined to the common law sense of fraud or deceit, there must at least be a "deliberate act of concealment":

The word 'fraud' here is not used in the common law sense. It is used in the equitable sense to *denote conduct by the defendant or his agent such that it would be 'against conscience' for him to avail himself of the lapse of time*. The cases show that, if a man *knowingly commits a wrong (such as digging underground another man's coal); or a breach of contract (such as putting in bad foundations to a house), in such circumstances that it is unlikely to be found out for many a long day, he cannot rely on the Statute of Limitations as a bar to the claim*: see *Bulli Coal Mining Co v Osborne* [1899] AC 351 and *Applegate v Moss* [1971] 1 QB 406. In order to show that he 'concealed' the right of action 'by fraud', it is not necessary to show that he took active steps to conceal his wrong-doing or breach of contract. It is sufficient that he *knowingly committed it and did not tell the owner anything about it*. He did the wrong or committed the breach secretly. By saying nothing he keeps it secret. He conceals the right of action. He conceals it by 'fraud' as those words have been interpreted in the cases. [emphasis added]

126 The Court of Appeal also agreed (at 36) with Megaw LJ in *King v Victor Parsons & Co* that it was not sufficient to constitute fraud where the defendant "ought to" have known the facts upon which the inference could be drawn that there was wrongdoing or a breach of contract save in special circumstances. Nevertheless, subjective knowledge of wrongdoing is not necessary and the claimant may still rely on s 29(1) of the Act if he can show that the defendant had behaved recklessly (*Bank of America National Trust and Savings Association v Herman Iskandar & Anor* at [75]). As said by Lord Denning MR in *King v Victor Parsons & Co* at 34:

To this word "knowingly" there must be added "recklessly"… like the man who turns a blind eye. He is aware that what he is doing may well be a wrong, or a breach of contract, but he takes the risk of it being so. He refrains from further inquiry lest it should prove to be correct: and says nothing about it. The court will not allow him to get away with conduct of that kind. It may be that he has no dishonest motive: but that does not matter. He has kept the plaintiff out of the knowledge of his right of action: and that is enough… If the defendant was, however, quite

> unaware that he was committing a wrong or a breach of contract, it would be different. So if by an honest blunder he unwittingly commits a wrong (by digging another man's coal), or a breach of contract (by putting in an insufficient foundation) then he could avail himself of the Statute of Limitations.

127 In this particular case, the crux of the matter is whether the third defendant *knowingly or recklessly* breached the terms of the Incentive Scheme. The third defendant submitted that he had not fraudulently concealed anything from the plaintiff because he was not aware that the plaintiff was entitled to one-third of the profit incentive regardless of his contribution; based on his understanding, the local directors were always paid the profit incentive based on their contributions to the second defendant. The third defendant also argued that he did not allocate the profit incentive unilaterally but after negotiations with Mr Omata from the first defendant. However, these arguments did not stand up to scrutiny. As stated earlier at [85], the profit incentive was not allocated based on contribution, especially in relation to the plaintiff. I have already rejected (at [88] above) the third defendant's claim that approval had been sought from Mr Omata regarding the variation of the Incentive Scheme. Rather, the evidence showed that the third defendant had recklessly, if not knowingly, reduced the incentive payments made to the plaintiff contrary to the terms of the Incentive Scheme.

128 The incentive payments were decreased very gradually from 1992 onwards and the difference would have been impossible to notice on the basis of rough calculations. Since there was no similar gradual decrease in the plaintiff's contributions to the second defendant from 1992 onwards, the only reasonable inference to be drawn therefrom is that the third defendant had deliberately reduced the plaintiff's incentive payments knowing that such action may well have been a breach of the Incentive Scheme. Additionally, the third defendant had not spoken to the plaintiff about the alleged variation to the Incentive Scheme where the plaintiff's share would no longer be fixed at one-third (see [88] above). Yet, the third defendant knew that the Incentive Scheme was an agreement between the shareholders and this was the position he had taken in the OS – his present stance that only the first and second defendant were parties to it was not credible (see [54]-[60] above). Based on all the circumstances, I find that the third defendant had recklessly, if not knowingly, concealed from the plaintiff that the plaintiff was receiving less than one-third of the profits available for distribution under the Incentive Scheme.

129 The threshold having been crossed, I now have to determine when the plaintiff discovered the fraud or could with "reasonable diligence" have discovered it. The period of limitation would then run from that time, meaning that claims arising after that time would be disallowed. According to the learned authors of *Halsbury's Laws of England*, vol. 28, 4th ed. (Butterworths, 1997) at para 1122, in respect of s 32(1) of the UK Limitation Act 1980 which is in *pari materia* with our s 29(1):

> The standard of diligence which the plaintiff needs to prove is high, except where he is entitled to rely on the other person; however, the meaning of 'reasonable diligence' varies according to the particular context. In order to prove that a person might have discovered a fraud, deliberate concealment or mistake with reasonable diligence at a particular time, it is not, it seems, sufficient to show that he might have discovered the fraud by pursuing an inquiry in some collateral matter; it must be shown that there has been something to put him on inquiry in respect of the matter itself and that if inquiry had been made it would have led to the discovery of the real facts. If, however, a considerable interval of time has elapsed between the alleged fraud, concealment or mistake and its discovery, that of itself may be a reason for inferring that it might with reasonable diligence have been discovered much earlier.

130 In *Peco Arts Inc v Hazlitt Gallery Ltd* [1983] 1 WLR 1315, a case where a work of art believed to

be valuable was subsequently discovered to be a reproduction, the issue arose as to whether the purchaser had exercised "reasonable diligence" in the context of the UK Limitation Act. The English High Court at 1322-1323 held that the precise meaning given to the phrase "reasonable diligence" must vary with the particular context in which it is applied. In that particular case, it did not mean the doing of everything possible nor necessarily the use of any means at the plaintiff's disposal nor even necessarily the doing of anything at all, but simply the doing of that which the ordinary prudent buyer and possessor of a valuable work of art would do having regard to all the circumstances. The Court concluded that although the plaintiff could have had the artwork valued soon after she purchased it, in the circumstances, she was entitled to rely on the reputation and recommendation of the expert and the art gallery and was entitled to assume that they were satisfied that the artwork was authentic.

131 I agree with the reasoning in *Peco Arts Inc v Hazlitt Gallery Ltd* that what "reasonable diligence" requires depends on the circumstances of the case. Here, the question is whether a reasonable person in the plaintiff's shoes would assume that the profit incentive being allocated to him was correct. If so, reasonable diligence did not require the plaintiff to make any enquiries at all.

132 The evidence showed that the plaintiff had trusted CJN to allocate him his proper share of the profit incentives under the Incentive Scheme and that CJN in fact did so, save for a small underpayment of $167 in 1985. It was because of the plaintiff's close friendship with CJN that he had been involved in founding the second defendant in the first place. Subsequently, after CJN's passing, the third defendant took over his late father's role in the second defendant and also in allocating payments under the Incentive Scheme. I believed the plaintiff's evidence that he relied on the good reputation of the third defendant (who was the eldest son of his very good friend and who had also been involved in running the second defendant since its inception), and assumed that the third defendant would allocate him his proper share. It never occurred to him to question the third defendant's allocation. The plaintiff was also unaware of any variation in the substantive terms of the Incentive Scheme and in fact there were none. In the circumstances, although the plaintiff could have made inquiries to find out the precise percentage of the profits he was receiving under the Incentive Scheme, or taken steps to analyse the accounts of the second defendant and compare those accounts with the actual payments he received, there was nothing to prompt him to do so before 2002 when it was suggested to the plaintiff by representatives of the first defendant that the Chua Directors had mismanaged the second defendant.

133 I therefore find that the plaintiff can rely on s 29(1) of the Act under which the limitation period would be extended to 2002. The plaintiff's claims are therefore not time barred.

134 There is no need to deal with the plaintiff's additional argument under s 22(1)(*b*) of The Act that the third defendant remains liable to him as his trustee, as I had earlier found that there was no fiduciary relationship between the plaintiff and the third defendant.

Application for leave to file further submissions

135 Before I conclude, I should refer to one matter. Counsel for the Chua brothers applied for leave to file reply submissions. Their counsel wrote to the court on 8 August 2008 alleging that the plaintiff, in his closing submissions, had misinterpreted the law on a fundamental issue of the case. The Chua brothers sought to introduce a new case that was not pleaded or put to the plaintiff during cross-examination. Counsel for the plaintiff unsurprisingly replied on 11 August 2008 to object to such a request in the light of the timelines imposed by the court for the plaintiff to respond to the arguments made by the Chua brothers. Without waiting for a reply from this court, counsel for the Chua brothers wrote again on 14 August 2008 with a point by point rebuttal of the plaintiff's letter. This was an

attempt to place arguments before the court regardless of whether the court consented to receive such arguments in the first place. I disallowed the Chua brothers' application.

Conclusion

136 For the foregoing reasons, I dismiss with costs the plaintiff's claim against the first, second, fourth and fifth defendants but allow the plaintiff's claim with costs against the third defendant for breach of the terms of the Incentive Scheme, in the sum of $1,097,653.00 with interest. It was the third defendant's responsibility under the Incentive Scheme to allocate payments to the directors, including the plaintiff. Whatever his intentions may have been, he breached that responsibility by unilaterally varying the terms of the Incentive Scheme.

137 The plaintiff had asked for a *Sanderson* order (*Sanderson v Blyth Theatre* [1903] 2 KB 533) for costs to be made in the event that he succeeds against some but not all of the defendants. I decline to make such an order because the plaintiff's case against the fourth and fifth defendants was weak to begin with and it was not seriously pursued. None of the other defendants had attempted to shift any blame onto the fourth and fifth defendants or had compelled the plaintiff to join the two to the suit in any other way. The plaintiff's case against the first and second defendants was also separate from that against the Chua brothers. It would be inappropriate for the unsuccessful third defendant to pay the plaintiff's costs to the first and second defendants. Costs should follow the event. The first and second defendants shall have their costs on a standard basis to be taxed unless otherwise agreed. Because the Chua brothers were jointly represented but only the fourth and fifth defendants succeeded against the plaintiff, the fourth and fifth defendants will not be able to recover the full cost of the joint defence for all three persons. They should only be able to recover half their taxed costs (unless otherwise agreed) including disbursements, of their joint defence as the focus was largely on the third defendant.

[note: 1]2AB2.

[note: 2]3AB87.

[note: 3]N/E 42-43

[note: 4]*Ibid.*

[note: 5]AEIC of Chua Teck Chew at [32]-[33]; AEIC of Chua Teck Meng at [28]; AEIC of Chua Teck Seng at [23].

[note: 6]N/E1829-1830.

[note: 7]N/E 2145-2147.

[note: 8]N/E 1819-1820.

[note: 9]N/E 1876-1877.

[note: 10]See 1AB459-460, 462, 464-467, 470, 472-475.

[note: 11]N/E1461- 1462.

[note: 12]N/E 111.

[note: 13]1DB32.

[note: 14]1AB479.

[note: 15]N/E1884- 1885.

[note: 16]See Affidavit of Robert Chua Teck Chew filed 5 June 2002 in the OS at [44], in 1AB554.

[note: 17]See 1AB547, 554, 555 and 562.

[note: 18]Defence of first Defendant (Amendment No. 3) at [12].

[note: 19]DB31-33.

[note: 20]2AB1.

[note: 21]1AB474.

[note: 22]N/E57.

[note: 23]N/E232.

[note: 24]N/E260; 676-677.

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