Eng Gee Seng v Quek Choon Teck and Others
[2009] SGHC 205

Case Number : Suit 679/2007

Decision Date : 18 September 2009

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Ang Cheng Hock SC/Tham Wei Chern/Eunice Chew (Allen & Gledhill LLP) for the plaintiff; Foo Maw Shen/Terence Tan/Looi Hooi Ying (Rodyk & Davidson LLP) for the 1st and 2nd defendants; Cheng Wai Yuen Mark/Chin Wei Lin (Rajah & Tann LLP) for the 3rd defendant

Parties : Eng Gee Seng — Quek Choon Teck; Goh Gok Siang; DA Foods Industries Pte Ltd

Companies – *Oppression* – *Minority*

18 September 2009

Chan Seng Onn J:

The claim

1 The plaintiff brought a claim under s 216 of the Companies Act as a minority shareholder in the 3rd defendant ("DA") against the oppressive conduct of the 1st and 2nd defendants (the "defendants"), who were together the majority shareholders of DA.

2 Section 216 of the Companies Act (Cap 50, 2006 Rev Ed) states:

> Personal remedies in cases of oppression or injustice
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> 216. —(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister may apply to the Court for an order under this section on the ground —
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> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a *manner oppressive* to one or more of the members or holders of debentures including himself or in *disregard* of his or their interests as members, shareholders or holders of debentures of the company; or
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> (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which *unfairly discriminates* against or is *otherwise prejudicial* to one or more of the members or holders of debentures (including himself). [emphasis added]

3 The plaintiff pleaded at [6] of his statement of claim that the defendants had since January 2005 conducted the affairs of DA in a manner which was oppressive to the plaintiff and in disregard of (a) the plaintiff's interest as a shareholder of DA; and (b) the terms of the shareholders' agreement.

4 The plaintiff relied on the following grounds:

(a) That DA was a quasi-partnership between the plaintiff and the defendants ("the partners"). It was set up in the early 1990s to establish a duck abattoir under licence from the Agri-Food & Veterinary Authority of Singapore ("AVA") to slaughter live ducks provided by its shareholders' individual duck businesses.

(b) That DA was incorporated on an oral agreement or mutual understanding between the partners that all the three parties were to have:

(i) equal shareholding and ownership of DA;

(ii) equal rights of management of DA;

(iii) equal share in the revenue of DA, irrespective of the revenue from duck feathers that each partner contributed to DA from the ducks sent by each partner to be slaughtered at the slaughterhouse operated by DA. The revenue would be shared equally among the partners by way of, *inter alia*, directors' fees, dividends and/or loans;

(iv) to pay the same slaughtering fees per duck (*i.e.* a flat rate slaughtering fee per duck) irrespective of the number of ducks sent by each partner to be slaughtered.

(c) In breach of this understanding, the plaintiff was removed as a director and thereafter excluded from the management of DA. The plaintiff subsequently received no directors' fees, salaries or dividends. Furthermore, the slaughter fee structure was changed such that it was no longer a flat rate but one that disadvantaged the plaintiff.

Background

5 DA's revenue was derived directly from the duck slaughtering fees and the sale of duck feathers. It was not disputed that the partners each paid a flat slaughtering fee per duck from the time that DA was incorporated in August 1990 until December 2003. Prior to the plaintiff's removal as a director, the partners shared DA's revenue by way of directors' fees, salaries and loans and once, by way of dividends. The directors' fees received by each partner (including the plaintiff) from 1st September 1993 to 31 August 2005 (*i.e.* from Financial Year ("FY") 1994 to FY 2005) were the same from year to year regardless of the number of ducks sent for slaughter by each partner, until the year in which the plaintiff was removed as a director (*i.e.* FY 2006).

The law

6 Having set out a brief overview of the case before me, I now consider the law on minority oppression in relation to quasi-partnerships.

7 It is settled law that the test under s 216 is one of fairness. This was made clear by the Court of Appeal in *Low Peng Boon v Low Janie and Others and Other Appeals* [1999] 1 SLR 761 ("*Low Peng Boon*") and *Lim Swee Khiang and Another v Borden Co (Pte) Ltd and Others* [2006] 4 SLR 745 ("*Borden*"). Both cases cited the Privy Council decision of *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 ("*Re Kong Thai Sawmill*") with approval. There, the Privy Council stated at 229 that "there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made".

8 Whether or not a particular course of conduct amounts to fair or unfair play depends on the

unique factual matrix in question. There are no specific criteria governing when conduct would be regarded as unfair under s 216. Suffice to say, the courts have a wide discretion to do what is just and equitable in the circumstance.

9 Be that as it may, there must be some guidance as to how the court exercises its discretion. The principle of fairness must be applied judicially and based upon "rational principles". In *O'Neill v Phillips* [1999] 1 WLR 1092 ("*O'Neill*") at 1098, Lord Hoffmann said:

> Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history (which I discussed in *In re Saul D. Harrison & Sons Plc*. [1995] 1 B.C.L.C. 14, 17-20) that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. *The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles*. As Warner J. said in *In re J.E. Cade & Son Ltd*. [1992] B.C.L.C. 213, 227: "The court ... has a very wide discretion, but it does not sit under a palm tree". [emphasis added]

10 These "rational principles" can be found in the law of contract as complemented by principles of equity. They apply so as to reflect the principle that promises should be kept and agreements should be honoured. Thus, in the case of an ordinary company, *prima facie*, the company's formal documents lay down the basis of the association exhaustively. However, there can also exist agreements, understandings or promises as between members of an association, which are not in those formal documents, but which may give rise to reasonable or legitimate expectations on the part of minority members. The onus will then be on the minority members to show that such informal or implied understandings, giving rise to certain expectations, exist. Conduct of the majority which conflicts with such expectations may be challenged for being unfair.

11 Accordingly, unfair conduct can be established by showing that 1) there are certain expectations between shareholders; and 2) that the conduct complained of is contrary to or has departed from such expectations to the extent that it has become unfair. Thus, the courts may look into shareholders' interests and expectations to determine if and to what extent the standards of fair dealing and conditions of fair play have been departed from.

12 This approach finds its roots in *Re a company (No 000477 of 1986)* [1986] BCLC 376 ("*Re A Company*"), where Hoffmann J adopted the House of Lord's approach in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 ("*Ebrahimi*"). *Ebrahimi* concerned a quasi-partnership where it was argued that it was "just and equitable" in the circumstance to wind it up. Lord Wilberforce recognised at 379 that the "personal character arising between one individual and another" may "make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way". Accordingly, "rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure" could affect whether the controllers had acted in a manner which was unjust and inequitable so as to necessitate a winding up.

13 In approving the approach taken in *Ebrahimi*, what Hoffmann J essentially did was to apply the same principles which guide the court in respect of the UK equivalent of s 254 CA (concerning just and equitable winding up) in the context of the UK equivalent of s 216 CA. At 378, Hoffmann J said:

> [T]the interests of a member are not necessarily limited to his strict legal rights under the constitution of the company. The use of the word 'unfairly' in section 459 [of the UK Companies Act 1985], like the use of the words 'just and equitable' in [the UK equivalent of s 254 of the Companies Act] enables the court to have regard to *wider equitable considerations*. [emphasis added]

The phrase "wider equitable considerations" was taken from Lord Wilberforce's judgment in *Ebrahimi*.

14 Subsequently, Hoffmann LJ expanded on this principle that informal understandings may give rise to "legitimate expectations" in *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 ("*Re Saul D Harrison*") at 19:

> [T]he personal relationship between a shareholder and those who control the company may entitle him to say that it would in certain circumstances be unfair for them to exercise a power conferred by the articles upon the board or the company in general meeting. I have in the past ventured to borrow from public law the term *'legitimate expectation'* to describe the correlative 'right' in the shareholder to which such a relationship may give rise. It often arises out of a fundamental understanding between the shareholders which formed the basis of their association but was not put into contractual form, such as an assumption that each of the parties who has ventured his capital will also participate in the management of the company and receive the return on his investment in the form of salary rather than dividend. [emphasis added]

15 Later in *O'Neill* at 1102, despite having second thoughts about using the very phrase "legitimate expectations", Lord Hoffmann's rationale for using this phrase remained unchanged. *Re A Company*, *Re Saul D Harrison*, and *O'Neill* were all decided based on the principle that the court's exercise of its wide discretion under the UK equivalent of s 216 would be kept in check by principles of equity:

> In *Re Saul D. Harrison & Sons Plc*. [1995] 1 B.C.L.C. 14, 19, I used the term "legitimate expectation," borrowed from public law, as a label for the "correlative right" to which a relationship between company members may give rise in a case when, on equitable principles, it would be regarded as unfair for a majority to exercise a power conferred upon them by the articles to the prejudice of another member. I gave as an example the standard case in which shareholders have entered into association upon the understanding that each of them who has ventured his capital will also participate in the management of the company. In such a case it will usually be considered unjust, inequitable or unfair for a majority to use their voting power to exclude a member from participation in the management without giving him the opportunity to remove his capital upon reasonable terms. The aggrieved member could be said to have had a "legitimate expectation" that he would be able to participate in the management or withdraw from the company.
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> *It was probably a mistake to use this term ["legitimate expectations"]*, as it usually is when one introduces a new label to describe a concept which is already sufficiently defined in other terms. In saying that it was "correlative" to the equitable restraint, *I meant that it could exist only when equitable principles of the kind I have been describing would make it unfair for a party to exercise rights under the articles. It is a consequence, not a cause, of the equitable restraint*. The concept of a legitimate expectation should not be allowed to lead a life of its own, capable of giving rise to equitable restraints in circumstances to which the traditional equitable principles have no application. [emphasis added]

16 I am of the view that the English courts' transposition of legal principles from the UK equivalent of s 254 to the UK equivalent of s 216, in cases such as *Re A Company*, *Re Saul D Harrison & Sons plc* and *O'Neill*, was right. This approach is, and ought to be, part of our law. In *Borden*, the Court of Appeal clearly endorsed Lord Hoffmann's approach in *O'Neill*:

> [82] A clear exposition of the rationale underlying s 216 of the CA is found in the judgment of Lord Hoffmann in *O'Neill v Phillips* [1999] 1 WLR 1092, a case under s 459 of the Companies Act 1985 (c 6) (UK), which corresponds materially to our s 216 CA. Lord Hoffmann said (at 1098–1099):
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>> In section 459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history ... that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. …
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>> Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others ("it's not cricket") it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and the background are very important.
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>> *In the case of section 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law*.
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>> T*he first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith*. [emphasis added]

17 That being so, I am of the view that it should not ordinarily be easy to establish the existence of such an informal understanding or expectation. I am mindful of the danger of the court rewriting the terms and understandings underpinning the formation of any company and I am not alone in this concern. In *Ng Sing King and Others v PSA International Pte Ltd and Others (No 2*) [2005] 2 SLR 56

(*"Ng Sing King"*), Rubin J took the view at [95] that it was "difficult to find that any legitimate expectations apart from those contained in the Agreement were created". The Court of Appeal also took a similar stance in *Borden* at [82], as quoted in the preceding paragraph.

18 Quasi-partnerships, however, are formed based on mutual trust and confidence, and their controllers ought to govern with a certain degree of integrity. Accordingly, a higher standard of governance is expected of them as compared with controllers of ordinary companies. Therefore, there should be greater leeway for finding informal understandings and expectations. This view has been clearly eludicated in cases such as *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR 827 ("*Sim Yong Kim*") and *Borden*.

1 9 *Sim Yong Kim* was a case concerning a quasi-partnership decided under s 254. Applying the reasoning of *Re A Company*, *Re Saul D Harrison & Sons plc* and *O'Neill*, it is also applicable in the present instance. There, the Court of Appeal distinguished between situations involving ordinary companies and that involving quasi-partnerships, implying that the court would be more willing to find informal understandings and expectations which could triumph over the formal documents in the latter situation when equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. First, it said at [14] that

> Whilst we agree that a company's memorandum of association is conclusive evidence of its objects vis-à-vis third parties, it is not necessarily so as between shareholders, such as the brothers here, who have entered into what is substantially a quasi-partnership using the company merely as a vehicle for an agreed object.

It then quoted Lord Hoffmann in *O'Neill* (at 1101), who in turn relied on Parker J's judgment in *Re Astec (BSR) plc* [1998] 2 BCLC 556 at 588:

> [In] order to give rise to an equitable constraint based on 'legitimate expectation' what is required is *a personal relationship or personal dealings of some kind between the party seeking to exercise the legal right and the party seeking to restrain such exercise, such as will affect the conscience of the former*. [emphasis added]

The Court of Appeal then stressed at [41] on the fact that notwithstanding the existence of a legitimate expectation, there must additionally be "instances of unfairness resulting from [these] breaches of promises that would be unfair for a member to ignore". At [40], it quoted Lord Hoffmann in *O'Neill* who said:

> This is putting the matter in very traditional language, reflecting in the word "conscience" the ecclesiastical origins of the long-departed Court of Chancery. As I have said, I have no difficulty with this formulation. But I think that one useful cross-check in a case like this is to ask *whether the exercise of the power in question would be contrary to what the parties, by words or conduct, have actually agreed*. Would it conflict with the promises which they appear to have exchanged? … In a quasi-partnership company, they will usually be found in the understandings between the members at the time they entered into association. But there may be later promises, by words or conduct, which it would be unfair to allow a member to ignore. *Nor is it necessary that such promises should be independently enforceable as a matter of contract*. A promise may be binding as a matter of justice and equity although for one reason or another (for example, because of a third party) it would not be enforceable in law. [emphasis added]

20 Turning to *Borden*, a case also involving a quasi-partnership, the Court of Appeal laid out at [82] principles similar to that of *Sim Yong Kim* and then said that the courts will insist upon a "high standard of corporate governance" on the part of the controllers at [83]:

> [83] It bears repeating that in a case such as the present where a company has the characteristics of a quasi-partnership and its shareholders have agreed to associate on the basis of mutual trust and confidence, the courts will insist upon *a high standard of corporate governance* that must be observed by the majority shareholders vis-à-vis the minority shareholders. [emphasis added]

21 Read with the distinction drawn in *Sim Yong Kim* between ordinary companies and quasi-partnerships, I am of the view that our law requires controllers of quasi-partnerships to demonstrate a higher level of governance as compared with those of ordinary companies. *Borden* touches on two aspects of corporate governance in particular. The first concerns the issue of disclosure. *Borden* appears to impose upon controllers in a quasi-partnership a duty to explain or justify their management decisions to non-executive minority shareholders (see [44] and [51]). The second concerns situations where there exists a conflict of interest. *Borden* appears to suggest that even if a particular course of conduct would not amount to unfair conduct in the context of an ordinary company, such conduct might well be regarded as unfair in the case of a quasi-partnership.

22 I now consider the case before me in the light of the law set out in the preceding paragraphs. I will first consider the nature of the understanding or expectation among the parties involved. Against that mutual understanding, I will then consider whether and to what extent the various acts complained of are contrary to or have departed from that understanding and hence, have become unfair or oppressive for the purposes of s 216.

The understanding among the partners

23 I accepted the plaintiff's submission that the historical evidence showed the true understanding or agreement (see [4] above) among the partners when DA was incorporated. Having decided not to answer the plaintiff's case, the defendants were not able to offer another version of the terms of the oral agreement or mutual understanding among the partners upon which DA was to be operated nor were they able to contradict or sufficiently challenge the version presented by the plaintiff.

24 Having considered the agreement or mutual understanding among the partners, I shall now test the various oppressive acts alleged by the plaintiff against that agreement or mutual understanding to determine whether or not they were unfair or oppressive to the plaintiff to justify the personal remedies available pursuant to s 216.

Removal of plaintiff as director on 21 Oct 2005.

25 The plaintiff argued that in dismissing him as a director of DA, the defendants had breached his legitimate expectation to be involved in the management of DA and accordingly, this amounted to an act of oppression on the part of the defendants.

26 The defendants contended that they were entitled to remove the plaintiff as a director because of his allegedly "wrongful" conduct by allowing:

(a) Ah Guang, who was one of the plaintiff's workers, to bring a stranger into DA's office who behaved like a gangster and threatened the 1st defendant; and

(b) Eng Kwang Chiang ("EKC"), the plaintiff's son, to carry on YSH farm's pork business on DA's premises, thereby putting the duck licence of DA at risk and jeopardising the business venture of DA.

The dispute between the 1st defendant and Ah Guang, where Ah Guang had allegedly behaved like a gangster and threatened the 1st defendant

27 I did not accept the submission of the defendants that the testimony of the plaintiff and Ah Guang with regard to the dispute between Ah Guang and the 1st defendant was "unbelievable" and "ludicrous". I accepted Ah Guang's detailed testimony on how the 1st defendant became angry with him over the manner he was sorting out the crates at the premises of DA. There is no necessity to describe the incident here as it was in reality a private quarrel over an inconsequential matter that blew up when tempers flared and threats were made, and the 1st defendant thereafter made a police report three days later on 24 September 2005. What was significant was the fact that exactly a month after this incident (which took place on 21 September 2005), the plaintiff was promptly removed as a director at an extraordinary general meeting ("EGM") on 21 October 2005.

28 Ah Guang was called by the plaintiff to give evidence on the incident. Ah Guang had been consistent and did not prevaricate when tested during cross-examination. He came across to me as one who had no real interest in the case and had given his testimony truthfully. I further noted that his testimony was corroborated by the plaintiff's and EKC's affidavits of evidence-in-chief, which had been admitted into evidence at the trial.

29 Having taken a stand of "no case to answer", the defendants themselves did not testify to their contrary version of the dispute that Ah Guang had behaved like a gangster and threatened the 1st defendant. In any event, even if Ah Guang's version of the dispute was unreliable and should not be believed, the dispute between the 1st defendant and Ah Guang, in my view, could not be a defensible basis upon which the defendants were entitled to rely in order to justify their action to remove the plaintiff as a director of DA and I would have regarded the removal as having been done in bad faith because it was done more in retaliation for the misdeeds of the plaintiff's worker than for any breach of the plaintiff's duties as a director of DA.

Carrying on of YSH farm's pork business on DA's premises, thereby putting the duck licence of DA at risk and jeopardising the business venture of DA.

30 The defendants submitted that the duck slaughtering licence of DA had been put at risk by EKC because the plaintiff had allowed EKC to carry on YSH's farm's pork business on DA's premises. There was no clear evidence before me that the duck licence was in fact still at risk at the time the defendants removed the plaintiff as a director. Leaving aside for the moment the fines levied on DA by AVA, the duck licence was never revoked or suspended as a result of the storage of pork on DA's premises. If the detriment suffered were the fines imposed on DA by AVA, then I would note that YSH farm paid all the fines resulting in no actual financial detriment to DA. Under the circumstances, I did not think that there was sufficient justification for the removal of the plaintiff as a director of DA since (a) DA was no longer used by YSH farm to store pork by 21 October 2005, the date of the plaintiff's removal; (b) DA did not have to pay the fines as all the fines were paid by YSH farm; and (c) the matter must therefore be regarded as settled and concluded well before the EGM was called.

31 It was also not disputed that the defendants had long known about the pork storage at DA's premises since November 2003. It is an accepted principle of employment law that an apparently

wrongful dismissal of an employee can be justified if it is subsequently discovered that that employee had conducted himself in such a way as to make him liable to be dismissed even though the misconduct was not known at the time of the actual dismissal: *Goh Kim Hai Edward v Pacific Can Investment Holdings Ltd* [1996] 2 SLR 109 ("*Goh Kim Hai Edward*"), per Judith Prakash J at 116. This was clearly not the case here. For a long period of almost two years, no action was taken by the defendants to stop the pork storage. Hence, this was not a case as if the defendants had been unaware of the improper pork storage at the time of the plaintiff's removal as a director, and hence, did not state that as a reason for his removal at that time. AVA had fined DA three times on 26 October 2004, 30 March 2005 and 3 May 2005. Still no action was taken throughout these years to remove the plaintiff as a director.

32 On 3 May 2005, YSH farm ceased storing pork on DA's premises. Henceforth, there should be no more risk of a suspension or revocation of DA's duck licence. In my view, the cessation of storage had resolved the pork storage issue. Despite this, the plaintiff was removed as a director some 5½ months later on 21 October 2005. I concluded that the real reason for his removal was unrelated to the pork storage issue, and the defendants were merely using it as an excuse to justify the wrongful removal of the plaintiff as a director of DA.

33 Indeed, I found that the inactivity or silence on the part of the defendants on the pork storage issue, despite their full knowledge of EKC's use of DA's premises to store pork, amounted to ratification of the plaintiff's alleged breach of duty of care to DA.

34 In order that a person may be held to have ratified an act done without his authority, it is necessary that at the time of the ratification, he should have full knowledge of all the material circumstances in which the act was done, unless he intended to ratify and take the risk whatever the circumstances may have been: *Suncorp Insurance and Finance v Milano Assicurazioni SpA* [1993] 2 Lloyd's Rep 225, per Waller J at 234, cited with approval by Prakash J in *Goh Kim Hai Edward* at 134. On the present facts before me, I found that the defendants certainly had full knowledge of all the material circumstances in which the pork storage was done. They could not have been blind to the fact that AVA had levied fines against DA on three occasions because of the unlicensed storage of pork on DA's premises.

35 Ratification will be implied whenever the conduct of the person in whose name or on whose behalf the act or transaction is done or entered into is such as to amount to clear evidence that he adopts or recognises such act or transaction, and may be implied from the mere acquiescence or inactivity of the principal: F.M.B. Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 18th Ed, 2006), Article 17(3) at para 2-070. I note Moore-Bick J's insightful observations in *Yona International Ltd and Heftsiba Overseas Works Pte Ltd v La Réunion Française Société Anonyme d'Assurances et de Réassurances and Ors* [1996] 2 Lloyd's Rep 84, at 106:

> Ratification can no doubt be inferred without difficulty from silence or inactivity in cases where the principal, by failing to disown the transaction, allows a state of affairs to come about which is inconsistent with treating the transaction as unauthorised. That is probably no more than a form of ratification by conduct. Where there is nothing of that kind, however, the position is more difficult since silence or inaction may simply reflect an unwillingness or inability on the part of the principal to commit himself. For that reason it will not usually be sufficient to evidence ratification…

36 On the present facts, there was indeed no express ratification, evidenced by a written resolution of the shareholders of DA in a general meeting, of the plaintiff's conduct in allowing his son to store pork on DA's premises. The facts also did not result in a state of affairs which were

"inconsistent with [the shareholders'] treating the transaction as unauthorised". However, in my mind, this was a straightforward case. There was no third party who could have been affected by the relationship between DA and its agent, the plaintiff. If DA wanted to remove the plaintiff from his directorship because of the pork storage issue, the defendants could have done so by sheer majority vote in a general meeting once they became apprised of the AVA fines. Instead, after receiving notice of the fines on three occasions, they acquiesced in the payment of the fines in full by YSH farm. They knew that even though DA was the party fined by AVA, YSH farm paid the fines and DA's duck licence was never revoked. In fact, on 3 May 2005, EKC had removed all the pork stored on DA's premises, thus removing all possibility that their duck licence would be revoked. Yet, the defendants waited until 21 October 2005 to do anything about the plaintiff's purported breach of director's duty under circumstances that raised doubts as to the genuineness of the reasons put forward for the removal of the plaintiff as director. Therefore, on the present facts, even if the plaintiff was at all in breach (for reasons that I relate below I do not find that he was at all in breach), I found that the defendants as shareholders of DA had impliedly ratified any purported breach of his director's duties to DA by their inactivity and acquiescence.

37 Ratification and authorisation, where effective, have the result of putting the directors in a position where they do not commit a breach of duty to the company or are treated as not having been in breach: Paul Davies, *Gower and Davies' Principles of Modern Company Law* (Sweet & Maxwell, 8th Ed, 2008) at 583, para 16-84. Ratification is also to be distinguished from a mere decision not to sue the director. Such a decision has no effect on the director's legal position as being in breach of duty; the company can always change its mind later and sue the director: *ibid*, at 584. On the present facts, I found that the acquiescence on the part of the defendants as to the pork storage issue and the AVA fines did not evince a mere decision not to sue the plaintiff for the time being. Rather, it was an implied ratification which therefore had the effect of "forgiving" the plaintiff for his purported breach of duty to the company. Even if they wanted to sue, what could they base their suit on? DA had suffered no losses: any fines incurred were borne by YSH farm; DA's duck licence was never revoked, and there was no risk that it would be so revoked after 3 May 2005. In fact, I give my reasons below why I found that the plaintiff was not at all in breach of his duties to DA in respect of the pork storage issue. Having thus put the plaintiff in a position as if he had not committed a breach of duty to the company by their implied ratification, the defendants cannot now raise the pork storage issue as a reason for removing the plaintiff as director of DA.

38 In the premises, I accepted the plaintiff's submission that the pork storage issue was in truth never the basis for the plaintiff's removal as a director of DA in October 2005. The pork storage issue was not something that the defendants recently discovered which then moved the defendants to take such drastic and immediate action to remove the plaintiff as a director. In any case, I found that any such purported breach had already been impliedly ratified by DA by May 2005 and the defendants could not base their removal of the plaintiff in October 2005 on the claim that the plaintiff had breached his duties as a director of DA in relation to the pork storage matter.

39 In any event, there was no clear evidence that the plaintiff had in fact allowed EKC to carry on YSH farm's pork business on DA's premises. The plaintiff's evidence was that he knew that DA was not permitted to store any pork in the premises and he had told his son, EKC, not to do so. EKC agreed but it turned out that EKC did not heed his father's instructions and continued to do so. The plaintiff did not verify if EKC in fact stopped storing pork in DA's premises as EKC had promised. As the plaintiff (who was born in 1938) was of advanced age, he was not running the business anymore but left it to EKC, his son, to do so, although he remained in name as a director. The plaintiff said he did not go into the cold room to check if any pork was still stored in the cold room after EKC promised him that he would not do so. Nor did the plaintiff ask EKC whether he had kept his promise not to store pork on DA's premises. It would appear from the plaintiff's evidence that he had handed over the day-to-day

operations of YSH farm to EKC since 2000 and his knowledge as regards the pork business was limited to what EKC and the defendants told him. The plaintiff had no firsthand knowledge. This was corroborated by EKC's oral evidence. I found it hard on these facts to construe that the plaintiff had allowed his son to store pork on the premises. Since the plaintiff had already told his son not to store pork on the premises, the refusal by the son to do so without the connivance of the father, could not in my view amount to a breach of the plaintiff's fiduciary duty as a director of DA. DA itself should and could easily have taken physical preventive measures itself to bar EKC from storing pork on the premises. If DA chose to rely on the plaintiff to tell EKC not to so do, then the plaintiff did tell EKC. DA should not complain. DA cannot expect the plaintiff to take physical preventive measures on its behalf should EKC refuse to heed what the plaintiff had been telling him. Taking physical preventive measures to prevent EKC from storing pork on the premises was more an action to be taken by DA and not for DA to foist on any director, or a director who happened to be the father of EKC. As far as I am concerned, the plaintiff fulfilled his fiduciary duty to DA after he had instructed or told EKC not to store pork on the premises. Under such circumstances, it would be for DA to take further steps itself to physically bar EKC from storing pork on DA's premises when EKC refused to follow the plaintiff's instructions to cease storing pork on DA's premises.

40 EKC's refusal to obey the plaintiff's instructions to desist from storing pork on the premises, and the failure of the plaintiff to implement physical measures on behalf of DA to prevent such storage, did not in my view amount to a failure by the plaintiff to properly discharge his duty as a director of DA.

Was the plaintiff's removal as a director justified?

41 On the admissible evidence before me, I could not find any good reason that justified the defendant's removal of the plaintiff as a director. I note that the defendants pleaded at [14] of their defence that the 1st defendant told the plaintiff during the EGM on 21 October 2005 "*that he (the plaintiff) had already acted in a way that was not becoming of a director by bringing pork and pork related products onto the premises which caused DA a lot of trouble with the AVA*". Yet, no part of the minutes of that EGM actually reflected what the 1st defendant was alleged to have stated at the EGM as the reason why the plaintiff was not fit to be a director.

42 Counsel for the plaintiff rightly alluded to two possible scenarios in his reply submissions that the minutes of the EGM were either inaccurate and could not be relied upon, or the defendants had been dishonest in stating their case. The plaintiff's position was that a resolution was passed at the EGM on 21 October 2005 to remove him as a director but no reasons were actually given. However, "reasons" for his removal were later inserted in the minutes of the EGM, which meant that the minutes were not in fact an accurate record of what had actually taken place at the EGM.

43 I would have expected such an important reason (*ie*, bringing pork and pork related products onto the premises thereby getting DA into trouble with the AVA) to be incorporated into the contemporaneous minutes of meeting, if that was in fact what the 1st defendant had said at the EGM, which was specially called to remove the plaintiff as a director. I do not believe that the pork storage issue was ever mentioned at the EGM as the reason for the removal of the plaintiff as a director with immediate effect; nor do I believe that was in fact the real reason for the plaintiff's removal as a director. It must be remembered that the storage of pork and pork products at DA's premises had already ceased some 5½ months before and it was no longer a pressing or heated issue. The matter had been remedied and was not likely to recur. Moreover, all the fines had been settled with AVA and paid for by YSH farm and not by DA. DA's license was never revoked on account of the storage of the pork and pork products at DA's premises. Accordingly, I found as a fact that the true reason for the

plaintiff's removal was over a far more recent incident concerning a heated dispute between the 1st defendant and the plaintiff's worker, Ah Guang, recorded in some detail in the original minutes of the EGM, which was approved and "signed as correct record" by the 2nd defendant.

44 At this juncture, I would highlight that there was subsequently another amended set of minutes prepared to replace the original set.

45 First, the DA's company secretary provided to the plaintiff's lawyers a copy of the minutes on 7 November 2005 ("original minutes") which read as follows:

"The Chairman called the Meeting to order at 2.30 p.m. and declared the Extraordinary General Meeting duly convened and constituted.

The Chairman explained that the purpose of the meeting was to seek approval from the shareholders to remove Mr Eng Gee Seng from the Board of Directors as Mr Eng had failed to discharge his duty as director of the Company.

Mr Quek Choon Teck, the Managing Director then reported the following incident: Recently, there was a dispute between he himself and a worker employed by Mr Eng. Arrangement was made for the worker to meet and apologise to him on the issue of dispute. On the appointed day, Mr Eng came to the office and told him that the said worker wanted to see him (Mr Quek) at the coffeeshop outside the Company's factory premises. He told Mr Eng to inform the worker to come and meet him in the office. The worker then came to the factory accompanied by a stranger. The stranger, purporting to represent the worker, told him that he had checked and knew all his (Quek's) background." The stranger behaved like a gangster. Mr Quek told the stranger that he did not know him and he (the stranger) had nothing to do with the affairs between him and the worker. An argument followed. Then the worker reported to the police about the dispute. All this while, Mr Eng kept silent as if the issue had nothing to do with him.

The Chairman then asked the shareholders as well as Mr Eng for comments.

Mr Quek Choon Teck, the managing director had also added that if Mr Eng had any comments or objections, he should raise them at the meeting so that the minutes could be properly recorded.

Mr Eng however said that he had nothing to do with the dispute between the worker and Mr Quek.

As there were no further questions/comments from the shareholders, the following resolution was then passed:-

REMOVAL OF DIRECTOR

RESOLVED that, pursuant to Article 79 of the Company's Articles of Association, Mr Eng Gee Seng be and is hereby removed from his office of director of the Company with immediate effect.

CONCLUSION

The meeting terminated with a vote of thanks to the Chair.

Signed as a correct record.

………..

Goh Gok Siang

Chairman"

46 The above original minutes clearly set out the dispute concerning the plaintiff's worker, Ah

Guang, as the only issue that arose at the EGM. Therefore, the alleged failure of the plaintiff to discharge his duty as a director of DA pertained only to that dispute between the 1st defendant and the plaintiff's worker. The original minutes showed that the EGM resolved to remove the plaintiff as a director only on a matter involving that dispute. Absolutely nothing was mentioned in the original minutes about the improper storage of pork at DA's premises.

47 However, strangely some 11 days later on 18 November 2005, DA's company secretary found it necessary to provide the plaintiff's lawyers with an amended copy of the minutes of the EGM ("amended minutes"). I note that litigation was already contemplated at that time and lawyers were involved. The amendments (made to the original minutes) were very telling as to what was really intended to be slipped into the amended minutes.

48 The amended minutes (the words in italics being the fresh insertions and the strikethroughs being the deletions) were as follows:-

> "….. (No changes made to 1st paragraph)
>
> ……(No changes made to 2nd paragraph)
>
> *Mr Goh Gok Siang, the Chairman gave the following example*: : Recently, there was a dispute between *Mr Quek Choon Teck, the Managing Director* and a worker employed by Mr Eng. Arrangement was made for the worker to meet and apologise to *Mr Quek* on the issue of dispute. On the appointed day, Mr Eng came to the office and told *Mr Quek* that the said worker wanted to see him (Mr Quek) at the coffeeshop outside the Company's factory premises. *Mr Quek* told Mr Eng to inform the worker to come and meet him in the office. The worker then came to the factory accompanied by a stranger. The stranger, purporting to represent the worker, told *Mr Quek* that he had checked and knew all his (Quek's) background." The stranger behaved like a gangster. Mr Quek told the stranger that he did not know him and he (the stranger) had nothing to do with the affairs between him and the worker. An argument followed. Then the worker reported to the police about the dispute. All this while, Mr Eng kept silent as if the issue had nothing to do with him.
>
> ….. (No changes made to the rest of the paragraphs)
>
> **Signed as a correct record**.
>
> ………..
>
> Goh Gok Siang
>
> Chairman"

49 I found it most odd that the 2nd defendant as the chairman should be bothered with having a fresh set of amended minutes prepared just to clarify that "he, him, he himself" was meant to refer to "Mr Quek", as though it was not clear enough in the original minutes. In my mind, what was more significant was to amend the minutes of that important EGM to insert the words -- *Mr Goh Gok Siang, the Chairman gave the following* ***example****:* -- in order to give the impression that something more was discussed but not recorded in the minutes for the removal of the plaintiff as a director, namely, the improper storage of pork at DA's premises.

50 That was why the dispute with the worker, which was set out in detail in the original minutes, was now described specifically in the amended minutes as merely one "example" of how the plaintiff "had failed to discharge his duty as director of the Company". Basically, the purpose of the amended minutes was to imply that there were more reasons for the plaintiff's removal over and above what was mentioned at the EGM. This trouble taken to amend the original minutes must have been intended to allow a different interpretation of the minutes and to give it a different spin. Realising that the dispute concerning the plaintiff's worker was not really a good reason for the plaintiff's removal as a director, the defendants wanted to bring in, on an *ex post facto* basis, the matter of the improper pork storage to now justify the plaintiff's removal, which matter was at the time of the EGM no longer a live issue and which had been settled months earlier when the pork storage at DA's premises had completely ceased. In other words, the settled matter of the storage of pork on the premises was never the real reason or one of the reasons for the plaintiff's removal as a director. It was merely added on to buttress the defence as an afterthought.

51 Thus the amended minutes were forwarded to the plaintiff's solicitors some 11 days later to explain that only an "example" of the plaintiff's failure to discharge his duty as a director was given at the EGM and hence, recorded in the minutes, thereby conveniently suggesting that the rest of the examples were not raised during the EGM. I also found it peculiar that the other examples of the plaintiff's failure as a director, if they existed at all, were not mentioned during the specially called EGM. Instead, the 2nd defendant, as the chairman of the meeting, limited himself to only one example *ie*, the dispute with the worker, and left out the other significant example of the improper pork storage. Therefore, I found that there was in fact no mention during the EGM of the improper pork storage as the reason for the plaintiff's removal as a director, which was what was pleaded. The real and only reason for the plaintiff's removal was in fact the dispute concerning the plaintiff's worker as reflected in the original minutes.

52 When the plaintiff was asked to provide his comments during the EGM, the plaintiff rightly in my view said that "he had nothing to do with the dispute between the worker and Mr Quek (the 1st defendant)" as recorded in the minutes.

53 I have no doubt in my mind that the dispute concerning the worker was heated and had indeed sparked the plaintiff's removal, as the original minutes had recorded that there was an argument and the matter was even reported to the police. The defendants had used their majority power at the EGM to hit back at the plaintiff by removing him as a director for what the defendants perceived to be disrespectful behaviour of the plaintiff's worker towards the 1st defendant as the managing director of DA. The plaintiff's removal clearly did not concern the settled or resolved matter on the pork storage. To rely on a settled matter to take such drastic action to remove the plaintiff as a director, was disproportionate, rather unfair and not justifiable. If the pork storage issue was brought in just to buttress the real but bad reason for the plaintiff's removal over a dispute between the 1st defendant and Ah Guang, it would amount to conduct in bad faith on the part of the defendants. I found that the private dispute between the 1st defendant and the plaintiff's worker, one "Ah Guang", was an inconsequential matter that blew up over the sorting of some crates in DA's premises; and when tempers flared, reason was thrown out of the window leading to the EGM calling for the removal of the plaintiff as a director of DA.

54 In my view, the quarrel between the 1st defendant and Ah Guang had really nothing to do with the plaintiff or with any issue of whether the plaintiff had satisfactorily performed his duties as a director of DA in the interest of DA and its members. In fact, the evidence was that the plaintiff had even tried to placate the 1st defendant by asking Ah Guang to apologise to the 1st defendant.

55 Since the evidence on the whole showed that the private quarrel was the only basis for the removal of the plaintiff as a director, I found that the removal was wrongful and unwarranted.

56 In removing the plaintiff as a director for no good reason, the defendants had not in my opinion acted with the high standard of corporate governance expected to be observed by them as the majority shareholders. Instead, the defendants had acted unfairly and with lack of probity towards the plaintiff in removing him as a director and thereby depriving him from any say in the management of DA. Anger arising from the Ah Guang incident motivated their retaliatory actions. I concluded that the defendants had unfairly discriminated against the plaintiff in breach of their mutual understanding/agreement reached at the time of the formation of their quasi-partnership that was eventually incorporated as DA.

Charging unfair slaughter rates (change to non flat rate with effect from January 2004 with the introduction of the first rebate/quota system.)

57 The plaintiff's case was that by implementing various quota and rebate systems, the plaintiff was effectively charged unfair slaughter rates per duck that were much higher than the defendants. The plaintiff took the position that all the quota and rebate systems from January 2004 to date were inequitable when the defendants departed from the partners' original understanding that they would pay the same slaughter rates per duck. Essentially, the quota and rebate systems were unfair to the plaintiff because he eventually ended up paying more than twice the slaughtering fee per duck that the defendants paid. This was a manifest departure from the agreement that had been in place for 13 years (since 1990) that all the partners would pay the same flat rate slaughtering fees per duck.

58 The differential slaughter rates per duck for the partners occurred even before the plaintiff was finally removed as a director on 21 October 2005. Being in the majority, the defendants would unilaterally set the slaughtering rates and then inform the plaintiff of their decision. Neither the plaintiff nor EKC had agreed to the implementation of the quota and rebate systems. The plaintiff had no knowledge of the basis for the implementation of the quota and rebate systems. EKC had stated that the quota system implemented in 2004 was fair because he did not have the detailed figures then. However, after he reviewed the figures, it then became clear to him that the first quota system was, in fact, unfair. This was because the ultimate effect was to allow the defendants to pay a lower slaughter rate per duck than what the plaintiff was made to pay.

59 In the final version of the quota and rebate system that was put in place by the defendants for the three months prior to October 2007 when the present proceedings were commenced, the plaintiff found himself to be paying approximately 23.7 cents per duck that he sent to DA for slaughtering whereas the defendants paid an average slaughtering fee of 10 cents per duck for the same time period. By devising quota and rebate systems that essentially increased the slaughtering fee per duck paid by the plaintiff to more than twice that paid by the defendants, the defendants had brushed aside the plaintiff's interest and clearly departed from the understanding among the partners.

60 I accepted that the understanding was for each to pay the same (net) slaughtering fees per duck (after taking the rebate into account), *i.e.* to regard each duck farm owned by each of the partners as a customer of DA, regardless whom the duck farm belonged to, and to treat them all on the same basis. In other words, the initial understanding of the partners, which stood unrebutted by the defendants, was for DA to charge the same slaughtering fees per duck (*i.e.* a flat rate slaughtering fee per duck) based on the average cost of slaughter and irrespective of the number of ducks sent by each partner to be slaughtered. There was no reason for DA to subsidise the duck farms, which were not subsidiaries of DA in any case. How DA profited from the subsequent sale of duck feathers as a by product of its duck slaughtering should have nothing to do with the slaughter

prices charged to the duck farms. How DA made its profit from the sale of duck feathers should only concern the shareholders of DA. All shareholders should share equally in that profit. Here however, the slaughter charges based on the quota and rebate system implemented by the defendants disadvantaged and discriminated against the plaintiff's duck farm considerably. The plaintiff also did not profit equally from the overall profitability of DA's business as he did not enjoy any director's fees, dividends, salaries or any preferential loans after his removal as a director. He was locked into the company and shut out from enjoying any benefits thereafter.

61 Accordingly, I found that the imposition of a system (including different quota and rebate systems which was what the defendants did) that effectively charged a different slaughtering fee per duck for different duck farms would be imposing a differential treatment for duck farms owned by the different partners, contrary to their initial understanding. Making the plaintiff pay higher slaughtering charges was financially detrimental to the plaintiff. It represented unequal and unfair treatment by the majority shareholders, and was oppressive to the plaintiff, the minority shareholder.

62 The defendants' case as submitted was that the structure of the quota and rebate systems was based on the relative sizes of the cold rooms used by each partner. The 2nd defendant had the largest cold room, followed next by the plaintiff. The 1st defendant had the smallest cold room. If the quota was met, the slaughtering charges would be reduced. The plaintiff accepted and paid slaughtering fees on this basis for almost two years without complaining. Even after his removal, the plaintiff paid slaughtering fees according to the non-flat rate system for another two years without any complaints.

63 However I noted that there was no clear admissible evidence specifically adduced by the defendants to prove that the structure of the quota and rebate system was in fact based on the relative sizes of the cold rooms.

64 First, I did not give much credence to the explanation given, and to what was said by the 1st defendant in March 2008 long after the dispute had arisen, which was recorded in the minutes of the 17th AGM dated 7 March 2008 (*i.e.* that the various categories of charges under the rebate system was based on the different usage of the space and the cold rooms), since the 1st defendant failed to testify in court and offer himself for cross-examination, but instead decided to rely on a "no case to answer". More importantly, the defendants could not rely on the minutes of the 17th AGM as evidence of the fact that the quota and rebate system was indeed based on the relative cold room sizes, simply because of the existence of an out of court statement made by the 1st defendant and recorded at the 17th AGM, when the 1st defendant, who was available to testify, did not do so. The evidence was thus inadmissible as hearsay evidence. Further, it was based on a mere happenstance from the relative sizes of the cold rooms allocated to each partner that some percentages roughly tallied with the quota and rebate computations. But that did not mean that the parties had agreed to a quota and rebate structure that was based in fact on the relative cold room sizes. In any event, there was no clear logic why that should be so. Since there was no exchange of any cold rooms amongst the partners (which meant that the relative cold room proportions remained unchanged), then why was there a need to keep changing the quotas and the rebate system if indeed the duck slaughtering charges were based on the different cold room space allocated and used by the three different partners? If the cold room proportions suggested by the defendants were correct, then none of the quotas matched this proportion apart from the quota implemented on 1 January 2004.

65 In stark contrast, the historical data captured in exhibit "P4" showed that the partners paid a flat slaughtering fee for each duck slaughtered, regardless of the cold room space allocated to them.

This indicated to me that the mutual understanding all along among the partners was that a flat slaughtering fee per duck would be paid. On the evidence, I found that the plaintiff had not consented to any variation in the slaughter fee structure. The defendants unilaterally set the slaughter rates and then informed the plaintiff of their decision. The plaintiff had no choice but to comply as the defendants together held the majority (66%) of the shares. I found it difficult to believe that the plaintiff would have voluntarily agreed to a system that discriminated against himself in terms of pricing for slaughtering rates per duck, when all were equal partners. From paying the same slaughtering fee per duck as the defendants, it was not likely that the plaintiff would have agreed to the quota and rebate systems that eventually resulted in the plaintiff paying an average slaughtering fee of 23.7 cents per duck for the 3 months prior to October 2007 (when the present proceedings were commenced), while the defendants paid an average slaughtering fee of only 10 cents per duck for the same time period. Effectively, the plaintiff was paying more than twice the slaughtering rate per duck that the defendants were paying to slaughter their ducks at DA.

66 I further noted that that the defendants had not pleaded that the quota and rebate systems correlated to the proportion of cold room space each partner was allocated. Instead, the defendants pleaded that the quota and rebate systems were to match the "non-shared facilities" used by each of the partners. These "non-shared facilities" allegedly included not only the cold rooms but also "offices, workers' rest areas, distributing and packing areas and outside area including the loading and unloading bays." However, no evidence was adduced by the defendants of the partners' relative allocations of these "non-shared facilities".

67 The fact that the quota and rebate system was purportedly linked to the proportion of cold room space allocated to the partners was not even pleaded supported my conclusion that it was more a figment of the defendants' imagination and an afterthought raised only for the purpose of defending the plaintiff's claim at the trial.

Denial of other benefits to the plaintiff

68 Since its incorporation, DA had never declared any dividends, except for one instance in August 2004. The profits of DA were normally distributed amongst the partners, who were all directors of DA, in the form of directors' fees and salaries. By removing the plaintiff as a director of DA on 21 October 2005, the defendants excluded the plaintiff from receiving these directors' fees and salaries. On the other hand, the defendants continued to pay themselves large sums of money in directors' fees and salaries. For the FY ending 31 August 2006, the defendants paid themselves $100,000 each in directors' fees, whilst paying the plaintiff only $16,670. In addition, they paid themselves directors' salaries of $89,023 and $34,034 each while paying the plaintiff only a salary of $2,012. Subsequently, after the plaintiff commenced the present proceedings, the defendants decided not to authorise DA to pay directors' fees for the financial years ending 31 August 2007 and 31 August 2008, but they continued to pay themselves directors' salaries and bonuses on those salaries.

69 The substantive effect was that the defendants were keeping DA's profits for their own benefit, whilst denying the plaintiff his fair share of the same since his removal as a director following the dispute over Ah Guang. In my view, this was grossly inequitable to the plaintiff as an equal partner in DA and was in breach of the partners' mutual understanding that they would all share equally in the profits of DA, regardless of how much they each contributed to the revenue of DA by way of the number of ducks each would send to DA for slaughtering. This clear mutual understanding was supported by the undisputed evidence that each partner received equal directors' fees every year since 1994, regardless of the number of ducks that they each slaughtered at DA.

70 As an equal shareholder of DA with the defendants, the plaintiff naturally expected as a matter

of commercial fairness to share in the profits of DA in proportion to his shareholding, and not have the defendants divert the company's profits all to themselves by not declaring dividends but siphoning out the profits to themselves by way of directors' fees and salaries for themselves with nothing for the plaintiff going forward after his removal as a director.

71 Apart from paying themselves relatively high directors' fees and salaries and their refusal to declare dividends, the defendants had further appropriated DA's money indirectly to themselves by causing DA to advance to them directors' loans on highly favourable terms, whist denying the plaintiff the same benefit. Prior to the plaintiff's removal as a director, the amount loaned by DA to the 1st and 2nd defendants and the plaintiff was $155,000, $270,000 and $170,000 respectively. However, after the plaintiff's removal as a director, the defendants began to authorise DA to advance larger loans to themselves at reduced interest rates. On 21 March 2006, the defendants passed a board resolution increasing the directors' loans that DA could advance to them to $650,000 each. In addition, the interest payable on these loans was reduced from 0.4% per month to 0.3% per month. The plaintiff, who was no longer a director of DA, was obviously precluded form taking up such loans. Just prior to 24 October 2007, being the date of the commencement of the present proceedings, the loans to the 1st and 2nd defendants had substantially increased to $903,128.77 and $409,891.77 respectively.

72 Accordingly, the defendants had appropriated DA's assets for their own benefit to the exclusion of the plaintiff. This was yet another instance of unfair discrimination against the plaintiff in breach of the partners' original understanding.

Defendants' justification for non-payment of directors' fees and salary to the plaintiff

73 The defendants' justification that the non-payment of directors' fees and salary to the plaintiff following his removal as a director was not unfair treatment was because the plaintiff in the past had removed a former partner's representative on the board of directors at an EGM and thereafter excluded that partner from receiving directors' fees and his full salary. This submission was in my view a non-starter. It would be a matter for the former partner's representative to take appropriate legal action against the plaintiff if these allegations were indeed true and were sufficient to make out a case of oppression. Even if that were to be so, it still could not be a legal basis upon which another set of majority shareholders such as the defendants could subsequently act oppressively towards the plaintiff as a minority shareholder just because there had been past acts of oppression perpetrated by the plaintiff together with others, against some other minority shareholder. Two wrongs would not make the second wrong a right.

74 As could be seen from the table below, no directors' fees were declared after the defendants became aware of the brewing legal dispute with the plaintiff and they were therefore careful not to declare any directors' fees on 31 August 2007 and 31 August 2008 to avoid creating further evidence of unfairness. But the declaration of directors' fees in August 2006 was most telling. There was a big jump in the quantum of directors' fees of $100,000 declared for each of the defendants in comparison with the meagre $16,670 in directors' fees given to the plaintiff. From previous parity in directors' fees for all the directors, it moved to flagrant disparity. In my view, there was little regard for the interest of the plaintiff as a minority shareholder holding significant shareholding in DA.

DIRECTORS' FEES DECLARED FOR EACH OF THE FINANCIAL YEARS

FY end	Revenue	Plaintiff	1st Defendant	2nd Defendant	Total

31 Aug ‘03	$2,580,108	$70,000	$70,000	$70,000	$210,000
31 Aug ‘04	$2,754.786	$80,000	$80,000	$80,000	$240,000
31 Aug ‘05	$2,661,078	$70,000	$70,000	$70,000	$210,000
31 Aug ‘06	$2,703,020	$16,670	$100,000	$100,000	$216,670
31 Aug ‘07	$3,293,877	-	-	-	-
31 Aug ‘08	$2,311,678	-	-	-	-

Defendants’ justification for non payment of dividends

75 The defendants justified their refusal to declare dividends on the basis that the renovations to the cold rooms had been carried out and a blast freezer had been installed for the benefit of all the partners. The defendants’ submitted that the reconstruction to the cold room and renovation works carried out in early 2008 cost about half a million dollars and DA was in no position to declare any dividends.

76 However, I noted that DA apparently had sufficient funds such that it was able to increase the loan amounts to the remaining directors *i.e.* 1st and 2nd defendants, following the plaintiff’s removal as director in October 2005. The defendants’ explanation did not sit well with the fact that DA was in a position to lend spare cash in the company to its remaining directors, the defendants, but did not have sufficient cash to declare dividends to benefit all of DA’s shareholders including the plaintiff.

77 I also did not accept the rationale offered by the defendants that the loans were to generate interest income for DA, when the interest rate was well below market rates for unsecured loans. If it was to generate profits, then there would be much better ways to generate additional revenue than to lend it at highly favourable terms/below market rates to its existing directors, whilst denying the plaintiff the same loan benefits.

78 Where in particular, DA as a company had a policy or practice of generally not declaring dividends even when profits had been made, which were not required for other more important or pressing purposes, then there would be a much greater expectation from shareholders who had invested in DA that they would benefit in other ways from participating in DA in relevant positions so as to be able to obtain their fair share of directors’ fees, salaries and/or loans from the company on the same favourable terms as other shareholders. If all these benefits were also denied to a minority shareholder holding a significant number of shares, which essentially meant that the non-benefiting shareholder had been locked in and would never benefit from their investment in the shares of the company no matter how profitable the company might be, then the *prima facie* conclusion would be that the minority shareholder, denied of such benefits, would have been treated unfairly and oppressively by those majority shareholders in control, who were allowed and given such benefits, unless there were good reasons for excluding the minority shareholders from the same benefits to disadvantage them. The court would examine if on the whole there was oppression, disregard of a member’s interest, unfair discrimination or otherwise unfair prejudicial conduct by the majority shareholders. If so, then the minority shareholders would have a remedy under 216 of the Companies Act.

"No case to answer"

79 Since the defendants had submitted that they had "no case to answer", they did not adduce any relevant admissible evidence to contradict the evidence adduced for the plaintiff's case, in particular the plaintiff's evidence of the breach by the defendants and the points of mutual understanding or terms of the agreement amongst the partners that formed the underlying basis for the incorporation of DA which would govern how the operation and affairs of DA should be conducted subsequently. Neither had the defendants adduced any relevant admissible evidence sufficient to explain how their conduct or actions were not unfair or oppressive.

80 The defendants submitted that the plaintiff had not made out a *prima facie* case of oppression on the face of the evidence before the court and further that the plaintiff's evidence was so unsatisfactory or unreliable that he had not discharged his burden of proving that the defendants had (a) acted in a manner oppressive to him; (b) acted "unscrupulously, unfairly or with any lack of probity"; or (c) disregarded his interest as a shareholder of DA.

81 As the plaintiff was of advanced age, there would be instances where he was not entirely coherent. He had suffered from some memory lapses in the course of giving evidence, for instance, his evidence on the manner he had affirmed his affidavit. If he had been entirely coherent on all the past events, in particular over dates, times and other minor details, I might even suspect that his evidence could well be rehearsed. After reviewing the evidence adduced for the plaintiff's case as a whole and giving some discount for the fact that he was some 71 years old, I did not think that the plaintiff's evidence in the main had been so inherently unsatisfactory or unreliable that his evidence had to be disregarded. On the whole, I found that the plaintiff had established a *prima facie* case of oppression. Since the defendants had elected for the course that they had no legal case to answer, the *prima facie* case of the plaintiff stood unrebutted. Accordingly, I found that the plaintiff's claim under s 216 of the Companies Act against the defendants was made out.

Conclusion

82 The plaintiff had shown that the defendants had acted in a manner which was unfairly discriminatory, oppressive and also in total disregard of his rights as a shareholder by (i) excluding him from the management of DA which meant that he could no longer draw any directors' fees, salary and directors' loans at favourable interest rates; (ii) depriving him of his entitlement to a one-third share of DA's revenue; and (iii) varying the manner in which the costs of slaughter were to be paid for to the detriment of the plaintiff, in breach of their agreement or mutual understanding upon which DA was incorporated.

83 The plaintiff had invested in equal shares with the two defendants in DA and had continued to slaughter his ducks at DA, thereby contributing to DA's revenue both in terms of duck feather revenue and by paying higher slaughtering fees per duck compared to the defendants. Yet the plaintiff received absolutely nothing in return as all the benefits of DA, in terms of director's fees, salaries and company loans at low interest rates and on favourable terms, went essentially only to the two defendants in majority control of DA. The result of the actions of the defendants in control of DA, tailored to deprive the plaintiff of his rightful share of the benefits as per their understanding when DA was first incorporated, was in my view grossly inequitable to the plaintiff. They had indeed acted unscrupulously and had departed from the standard of fair dealing. If the totality of the defendants' actions did not amount to oppressive, unfair and discriminatory conduct, I do not know what would.

84 Accordingly, I allowed the plaintiff's claim as the plaintiff had made out more than a *prima facie* case allowing him to invoke s 216 of the Companies Act against the defendants. The defence of "no

case to answer" failed. I set out the detailed orders I made at **Annex A** to this judgment to make explicit the mechanism by which the parties had to value the shares of DA and thereafter, the defendants had to buy out all the plaintiff's shares in DA at the purchase price as determined by the qualified valuer appointed by the parties.

ANNEX A

Orders made:

(1) The 1st and 2nd Defendants are to purchase the Plaintiff's shares in the 3rd Defendant.

(2) The price of the Plaintiff's shares in the 3rd Defendant is to be determined by an independent valuer, who is to be appointed by agreement between the Plaintiff and the 1st and 2nd Defendants within 14 days hereof. All wasted costs of this appointment in the event the valuation is not required to be done, shall be borne entirely by the plaintiff.

(3) The independent valuer is to fix the purchase price at a fair value as at the date of this Judgment, on a *pro rata* basis without any discount for lack of control and/or lack of marketability.

(4) In fixing the purchase price, the independent valuer should:

(a) Include in the value of the 3rd Defendant all sums paid by the 1st and 2nd Defendants to themselves in directors' fees in excess of any directors' fees paid to the Plaintiff from 21 October 2005 to the date of this Judgment.

(b) Include in the value of the 3rd Defendant all sums paid by the 1st and 2nd Defendants to themselves in directors' salaries in excess of any directors' salaries paid to the Plaintiff from 21 October 2005 to the date of this Judgment. In this regard, the Valuer is to take the total directors' salary paid to the 1st and 2nd Defendants from 21 October 2005 to the date of this judgment, and divide the same in accordance with the proportion of directors' salaries paid to the Plaintiff, and the 1st and 2nd Defendants for the year ended 31 August 2005. The total salary payable to the Plaintiff from 21 October 2005 to the date of this judgment pursuant to such calculation shall stand as the excess of the directors' salaries paid by the 1st and 2nd Defendants to themselves.

(c) Treat all directors' loans made by the 3rd Defendant to the Plaintiff, 1st and 2nd Defendants as fully recoverable.

(d) Make any necessary adjustments to the value of the 3rd Defendant to account for any deviations by the 1st and 2nd Defendants from the understanding between the Plaintiff and the 1st and 2nd Defendants as set out in paragraphs 4(c) and 4(e) of the Statement of Claim (amendment No. 4) in relation to (i) the rebates paid by the 3rd Defendant to its customers, and (ii) any slaughtering fees paid by its customers to the 3rd Defendant, from 21 October 2005 to the date of this Judgment. The details of such adjustments are set out in the Schedule to this Judgment.

(5) The fees, expenses and disbursements of the independent valuer arising out of and/or in connection with the fixing of the purchase price are to be borne by the 1st and 2nd Defendants.

(6) The Plaintiff and the 1st, 2nd and 3rd Defendants are to render any assistance required of them and provide any documents and/or information requested from them by the independent valuer.

(7) All fees, costs, expenses and disbursements incurred by and charged to the 3rd Defendant arising out of and/or in connection with the discovery of documents and/or in response to requests for information from the Plaintiff in relation to this action are to be borne by the 3rd Defendant. All other costs, expenses and disbursements incurred by and charged to the 3rd Defendant arising out of and/or in connection with the Plaintiff's complaints and this action are to be fully reimbursed by the 1st and 2nd Defendants.

(8) Parties shall be at liberty to apply.

(9) The Plaintiff's business shall be allowed to continue to remain on the 3rd Defendant's premises up to 1 month after the date on which the 1st and 2nd Defendants complete the purchase of the Plaintiff's shares.

(10) The costs of this action are reserved.

SCHEDULE

Rebates

(1) In respect of the rebates paid by the 3rd Defendant to its customers for supplying ducks for slaughter for the period from 21 October 2005 to the date of this Judgment, the independent valuer shall ascertain the average rebate per duck paid to each of the Plaintiff and the 1st and 2nd Defendants by the 3rd Defendant by totalling the rebates paid to each customer, and dividing the total rebate paid to each customer by the total number of ducks slaughtered by that customer at the 3rd Defendant's abattoir for the period(s) that the rebates were paid.

(2) The independent valuer shall then obtain the total excess rebate paid to the 1st Defendant by the 3rd Defendant by first obtaining the difference in the average rebate paid per duck to the 1st Defendant and the average rebate paid per duck to the Plaintiff, and then multiplying the difference by the total number of ducks slaughtered by the 1st Defendant at the 3rd Defendant's abattoir for the period(s) that the rebates were paid. The independent valuer shall obtain the total excess rebate paid to the 2nd Defendant by the 3rd Defendant in the same manner.

(3) The independent valuer shall include in the value of the 3rd Defendant, the total excess rebates paid to the 1st and 2nd Defendants by the 3rd Defendant.

Slaughtering Fees

(4) In respect of the slaughtering fees paid by Plaintiff and the 1st and 2nd Defendants to the 3rd Defendant for the period from 21 October 2005 to the date of this Judgment, the independent valuer shall ascertain the average slaughter fee per duck paid to each of the Plaintiff and the 1st and 2nd Defendants by the 3rd Defendant by totalling the slaughter fees paid by each customer, and dividing the total slaughter fees paid by each customer by the total number of ducks slaughtered by that customer at the 3rd Defendant's abattoir for the period(s) that slaughtering fees were paid.

(5) The independent valuer shall then obtain the total shortfall in slaughtering fees charged to the 1st Defendant by first obtaining the difference in the average slaughtering fee paid per duck by the Plaintiff and the average slaughtering fee paid per duck by the 1st Defendant, and then multiplying the difference by the total number of ducks slaughtered by the 1st Defendant at the 3rd Defendant's abattoir for the period(s) that slaughtering fees were paid. The independent valuer shall obtain the total shortfall in slaughtering fees charged to the 2nd Defendant in the same manner.

(6) The independent valuer shall include in the value of the 3rd Defendant the total shortfall in slaughtering fees charged to the 1st and 2nd Defendants.

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