Lim Chee Twang v Chan Shuk Kuen Helina and Others
[2009] SGHC 282

Case Number : Suit 731/2008, SUM 4652/2008

Decision Date : 18 December 2009

Tribunal/Court : High Court

Coram : Quentin Loh JC

Counsel Name(s) : Alvin Tan (Wong Thomas & Leong) for the plaintiff; Andrew Yeo, William Ong, Paul Ong (Allen & Gledhill LLP) for the first defendant; Melvin Lum (Wongpartnership LLP) for the second, third and forth defendants

Parties : Lim Chee Twang — Chan Shuk Kuen Helina; iPreciation Fine Arts Pte Ltd; iPreciation Contemporary Pte Ltd; iPreciation Pte Ltd; iPreciation Ltd; iPreciation (HK) Limited

Companies – Oppression

Companies – lifting corporate veil

18 December 2009 Judgment reserved.

Quentin Loh JC:

1 The Plaintiff, ("Lim"), a graduate in Science (Computation) from the University of Manchester Institute of Science and Technology, aged 40, claims he is the victim of oppression as a 40% shareholder of a 'group' of companies. The alleged oppressor is the only other shareholder, the 1st Defendant, ("Ms. Chan"), who in effect holds 60% of the shares of all the companies, save one.

2 Lim seeks relief under section 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act"), as well as some other orders which boil down to an account of the inter-company invoicing, the attribution of profits and expenses amongst the companies, the validity of charging commissions by one company to the other companies, accounting practices of the companies, director's loans, unilateral and unauthorised withdrawals of sums of money by Ms. Chan, the unauthorised use of the name "iPreciation" to set up other companies, the true worth of these companies and their ability to pay dividends. There is also a prayer that Lim be bought out at a fair price by Ms. Chan.

The iPreciation Group of Companies

3 There are 5 companies within this dispute:

(i) the 2nd Defendant, iPreciation Fine Arts Ptd Ltd, ("Fine Arts"), incorporated in Singapore. Lim holds 40% of the shares and Ms Chan holds 60% of the shares. They are the only shareholders and directors;

(ii) the 3rd Defendant, iPreciation Contemporary Pte Ltd, ("Contemporary"), incorporated in Singapore. Lim holds 5% (1 share) and Ms Chan holds 95% (19 shares). They are the only shareholders and directors. Ms Chan concedes that Lim should hold 40% of the shares of Contemporary and she should hold 60% of the shares and the paper work therefor has been effected. There is a side issue as to how the shares came to be issued in this 5% - 95% proportion;

(iii) the 4th Defendant, iPreciation Pte Ltd, ("IPL"), a company incorporated in Singapore. Lim holds 1 share or 0.001% and Ms Chan holds 99,999 shares or 99.999% of the issued shares. Lim claims to be entitled to a 40% shareholding, Ms Chan disagrees and asserts Lim is holding this 1 share as a nominee shareholder. Lim and Ms Chan are the only shareholders and directors;

(iv) the 5th Defendant, iPreciation Ltd, ("BVI"), a company incorporated in the British Virgin Islands. Lim holds 40% of the shares and Ms Chan holds 60%. Again they are the only shareholders and directors; and

(v) the 6th Defendant, iPreciation (HK) Limited, ("HK Ltd"), a company incorporated in Hong Kong. Lim holds 40% of the shares and Ms Chan 60%. They are the only shareholders and directors.

For convenience, where appropriate, I shall refer to all these companies collectively as "the iPreciation companies" or "the Companies" as the context may require.

4 To complete the picture, there are three sole proprietorships:

(i) iPreciation Consultants, ("Consultants"), a sole proprietorship of Ms Chan, registered in Singapore;

(ii) iPreciation Consultants (Hong Kong), ("Consultants HK"), another sole proprietorship of Ms Chan's registered in Hong Kong; and

(iii) Nexart, ("Nexart"), a sole proprietorship of Lim's registered in Singapore.

For convenience, I shall refer to these sole proprietorships collectively as "the Sole Proprietorships" and the Companies and these Sole Proprietorships collectively as "iPreciation", or "the iPreciation entities" or "the entities" as the context may require.

5 The Writ has not been served on BVI and HK Ltd. Consequently, although named as parties, they have not been brought in as parties to these proceedings. Fine Arts, Contemporary and IPL have not played an active role in these proceedings. Mr. Melvin Lum, who represents these companies, asked to be excused from attendance at the trial as the dispute is really between the shareholders, Lim and Ms Chan.

The Business of the iPreciation Companies

6 The eight entities are involved in the art business, namely, sourcing for art works, promoting and representing artists, organising exhibitions and holding art fairs and selling art works. Their forte is in representing Asian artists, especially from Taiwan or China, and selling their art works around the world from Singapore and Hong Kong. The various functions or facets mentioned above are divided amongst the companies and sole proprietorships but which functions exactly should be carried out by which company or sole proprietorship are in contention.

Lim's Case

7 Lim's case in brief, alleges an understanding and agreement with Ms Chan arrived at in 1999 that they would both participate in the management and affairs of the companies as working directors and owners of these companies but their exact shareholdings had not been discussed. When Fine Arts was formed in 2003, Lim and Ms Chan agreed that their respective shareholdings in all companies

would be on a 40/60 basis, with Lim holding 40% and Ms Chan 60%.

8 Lim worked hard with Ms Chan to build up the business of the companies right from 1999 to June 2008 when he was excluded. His degree of involvement in the business was substantial, he participated in the affairs and management of the entities and he closed off sales on many occasions.

9 From 1999 to 2003, IPL was the only company through which the artwork business was carried on. Later as the other companies were incorporated, the businesses of all 5 companies were conducted as one integrated unit. Hence the selection of an entity for the issuance of an invoice for piece of artwork following a sale, was done on a random and arbitrary basis. Further the fixed costs, like salaries and rental were paid by Fine Arts but for the benefit of the whole group, including IPL which made no contributions since 2003.

10 The business grew after a successful exhibition in 2003. Unfortunately Lim and Ms Chan's relationship started to deteriorate around the latter half of 2005. It came to a head when Lim was wrongfully terminated on 15 August 2008 from his post as executive director of the 'group' and excluded from management and even basic information as to the affairs of the companies. There were other acts of oppression:

(i) Ms Chan admittedly misappropriated S$4.021 million on 23 and 24 April 2008 (which she claims was credited back on 9 June 2008), and S$4.38 million on 23 June 2008 (which she claims she returned on 29 July 2008); information in relation to these misappropriations were not forthcoming and were only admitted when 'her back was to the wall' and she had to file her AEIC;

(ii) Ms Chan has wrongfully and without justification refused to pay out dividends from monies held by the companies despite an accumulated cash hoard of about S$10 million;

(iii) Ms Chan has used the iPreciation name for her own purposes in another company from which Lim was excluded;

(iv) Ms Chan procured a Consignment Agreement to be entered into by Fine Arts, Contemporary and HK Ltd with IPL which was unfairly advantageous to IPL;

(v) Ms Chan caused IPL to issue invoices to all the other companies without justification and putting them into negative equity;

(vi) Ms Chan appointed solicitors to act for the companies without proper authority or board resolution authorising her to do so.

11 Lim claims that the affairs of all the companies and sole proprietorships should be taken as a whole. The entities were run as one entity with a common pool of art work, common employees and run out of one location. The expenses of the art business were borne on a 'group' basis. An act of oppression in one entity is relevant to the consideration of whether there has been oppression in all the entities because of the manner in which the business of all the companies and sole proprietorships have been conducted. It is impossible to distinguish the affairs of one company from the others. Lim therefore asks for orders against all the companies and sole proprietorships, whether within or outside Singapore. Lim also seeks an order that he be bought out as well as the ancillary reliefs and orders set out in his Statement of Claim: see [2] above.

Ms Chan's Case

12 Ms Chan avers that she is the founder of the art business, the one with the knowledge and expertise. She invested in an art gallery in Hong Kong known as Artpreciation Limited in 1993. The gallery was closed down when her partner fell seriously ill in late 1997. Lim specialises in IT, had a degree in IT and was working at the National Computer Board when she first met him in 1997 at a karaoke session organised by mutual friends. They became friends and later formed a close relationship and stayed together in early 1999. She lent him money for his IT business, which eventually failed and was wound up.

13 Ms Chan had a company, HR Resources Pte Ltd which was incorporated in 1994. She held 99,999 shares and her nominee shareholder and fellow director, Ms Hanam held 1 share. In January 1999, Ms Hanam wanted to withdraw as a director and nominee shareholder and Lim offered to help by stepping into her shoes. Accordingly, one share was transferred to Lim and he was appointed a director of HR Resources. In late 1999, Ms Chan decided to establish her own art business and changed the name of HR Resources Pte Ltd to iPreciation Pte Ltd. Ms Chan provided all the initial capital for IPL. (Lim does not dispute the fact that he did not contribute any funds, by way of capital or otherwise, for the business of IPL or indeed for any of the other companies).

14 Ms Chan allowed Lim to operate his IT business out of her IPL offices, whether it was the initial space leased from DP Architects or the subsequent shophouse at Kim Yam Road. Ms Chan also funded the lifestyle of Lim. Lim's credit card was provided by Ms Chan and she paid for his personal expenses and received expensive gifts from Ms Chan. When Lim needed money, she gave him HK$180,000 to help Lim's brother buy a bigger flat for his parents. Ms Chan also helped Lim with his IT business. In April 2000, Ms Chan paid Lim S$10,000 for the IT services he provided to IPL. Subsequently Lim's company, eJazz Pte Ltd, ("eJazz"), started invoicing IPL regularly for IT services. eJazz was wound up in 2001. Lim then helped his brother run another IT company, J Matelwoode Pte Ltd, ("Matelwoode"), which was also eventually wound up. In 1999, Lim set up another company, Inspirative Pte Ltd ("Inspirative").

15 Whilst Lim was very involved in his IT business, Ms Chan worked hard to build up the art business of IPL, to build up relationships with artists and to source for artworks. She travelled to meet artists, networking and researching the history of artists and their works. In February 2002, Ms Chan set up her own sole proprietorship, Consultants Singapore, to transact individual sales of artworks. Her efforts paid off in 2003 when she managed to persuade a prominent Taiwanese artist, Ju Ming, to appoint IPL as his agent. Ms Chan had worked hard to build a relationship with Ju Ming and his family for 2 years before she managed to secure this agency rights. At around this time she decided to set up an art gallery in Singapore and wanted to keep the retail aspect of her business separate from her agency business as she was uncertain how the retail business would fare at that time.

16 When Lim heard of her plans for her retail company and gallery, he suggested she take over his company, Inspirative which was not making any money and on the contrary was costing him money to maintain. Ms Chan agreed and took over Inspirative and changed its name to "iPreciation Fine Arts Pte Ltd" and opened her gallery at the Fullerton Hotel around September 2003.

17 Ms Chan gave Lim 40% in Fine Arts because she was concerned over his welfare. eJazz had failed. He was living with her and she was funding his daily expenses. She wanted to help him prove himself. She allowed him to help her with the IT aspects of the retail business. At that time, Lim was helping his brother with the IT business of Matelwoode. Matelwoode ceased business in the middle of 2004.

18 In early 2005, Ms Chan set up her sole proprietorship in Hong Kong, Consultants HK, for transacting sales of artworks overseas. By late 2005, Ms Chan and Lim were no longer in a personal

relationship but Lim did not want to move out of her residence at Fort Road. Ms Chan later arranged for him to stay at an apartment in Miaplace which Fine Arts leased to house business visitors. Notwithstanding the end of the personal relationship, Ms Chan continued to provide Lim with financial support.

19 In 2005, Ms Chan fell very ill. She was initially misdiagnosed and remained misdiagnosed for quite a while and in the meanwhile she was worried that there would be no one to manage the business if she became incapacitated. She thus set up BVI Ltd in October 2005 and gave Lim 40% of the shares and made him a director of the company and told him that he could help with the business if she was unable to do so. She was correctly diagnosed later and started treatment and made a slow recovery over 2006 and 2007. Despite her illness, she continued to travel to meet artists and clients and attend exhibitions. In April 2007, Ms Chan set up iPreciation (HK) Ltd for conducting sales of artworks in Hong Kong, primarily through staging exhibitions at the Rotunda, Exchange Square in Hong Kong. Ms Chan also gave Lim 40% of the share in HK Ltd. Lim did not pay for any of these shares in BVI Ltd and HK Ltd.

20 In June 2007, Ms Chan set up iPreciation Contemporary Pte Ltd in Singapore for handling sales of artworks locally without charging Goods and Services Tax. At that time, she wanted to give Lim 40% also, but their relationship was getting very strained. Lim was issued 5% of the shares but Ms Chan is willing to give him 40% and the necessary paperwork had been put in place to do so. This is no longer a live issue.

21 In April 2008, Ms Chan cancelled Lim's supplementary credit cards. There was a showdown on 5 May 2008 when Lim demanded to know why his credit cards had been cancelled and Lim demanded to be paid a dividend. A second incident followed on 10 June 2008 when Lim got very angry when he found out Ms Chan setting up a new business in Hong Kong without his involvement. Lim filed his writ on 9 October 2008.

22 Counsel for Ms Chan, Mr Andrew Yeo, contends that the acts or events which concern BVI and HK Ltd are irrelevant in these proceedings since they are foreign companies and fall outside the ambit of section 216 of the Act. A Singapore court has no jurisdiction under section 216 to order a buy-out of Lim's shares in the foreign companies. Mr Yeo submits that Lim's real motive in bringing this action was to engineer a buy-out of his shares in the companies at an inflated value, demanding a sum of S$4.5 million for his 40% shares. There was no quasi-partnership to start with, Lim never contributed a cent to the capital of the entire business, and he was a director only by reason of his close personal relationship with Ms Chan and not because of any 'business partnership' which existed between the parties.

The Issues

23 The issues of fact and law are:

(i) whether there was in fact an agreement and/or understanding between Ms Chan and Lim on the 60:40 shareholding and if so, would it extend to all the companies, including a profit sharing on the same basis for the sole proprietorships Consultants, Consultants HK and Nexart;

(ii) whether the companies have the character of a 'quasi partnership' which entitles Lim to certain 'legitimate expectations,' *ie*.,

(a) participation in the management of the companies;

(b) employment by the companies;

(c) accommodation provided by the companies; and

(d) access to information and documents relating to the companies;

and if so, whether Ms Chan is in breach of her obligations;

(iii) whether the conduct of the affairs of BVI and HK Ltd are relevant to the current proceedings and whether they can be taken into account by this court;

(iv) whether the acts complained of amount to oppression within section 216 of the Act. This includes a denial of Lim's legitimate expectations set out in (ii) above and the:

(a) misappropriation of 'group' funds;

(b) failure to pay dividends;

(c) usage of the "iPreciation" name; and

(d) invoicing by IPL of the other Group Companies for Agency Fees and Commissions;

(v) whether the continuance of this action is an abuse of process in view of Ms Chan's offer to buy out Lim on the terms set out in her solicitor's letter;

(vi) whether Ms Chan has to account for the sales of artworks carried out through Consultants and Consultants HK;

(vii) whether the entities are to be considered as one economic entity and whether Lim is entitled to the reliefs claimed; and

(viii) whether the court can and if the court does order a buy-out, then the terms upon which it should be carried out including whether such an order can extend to a buy-out of the foreign incorporated companies, BVI and HK Ltd.

There was initially another issue: Ms Chan appointed solicitors for the 'group' in her own interests and without proper authority or a board resolution. This issue was not seriously pursued and quite properly dropped by closing submissions.

Findings of Fact

24 Having heard Lim, Ms Chan and her witnesses and having considered the evidence, my findings of fact are as follows.

25 I have no doubt in my mind that Ms Chan was the driving force behind the art business of the companies. She was the one with the knowledge, the expertise, the contacts with the artists, the ability to source for art works, the actual and potential clients and the passion for the business. 1DW.6, Rex Chan, an investment manager and director of an investment management company dealing in hedge funds said this:

When it came to making the purchase, the decision to make the purchase or not, there's a little bit more I would require than just the basic information. I have consulted – I had consulted [Lim]

on the investment merits of, say, the Arch versus the Taichi. I found the answers unhelpful. However, dealing – liaising with [the 1st Defendant] directly, her knowledge was clearly more substantial. She had very strong views on investment merits of the pieces I was buying.[note: 1]

Rex Chan had stated in his AEIC that it was clear to him that Ms Chan was far more knowledgeable than Lim on matters relating to the art pieces and the artists. He felt more comfortable speaking with Ms Chan before deciding to invest in any particular art piece. He recalled that on several occasions Lim was not able to address his queries adequately in relation to the art pieces, the artists or the art market in general. I find Rex Chan to be a truthful and objective witness of fact and accept his evidence. He gave credit where it was due, *eg*, he said when he first visited the art gallery at the Fullerton Hotel, he did not know who Ju Ming was and it was Lim who introduced him to Ju Ming and his art work. He did not know the difference between the Arch and the figurine statue and Lim was very helpful in that respect. Lim also told him of the free insurance if Rex Chan bought a piece through iPreciation.[note: 2] But that was about the level of Lim's knowledge. It was suggested to Rex Chan that he was perhaps beholden to Ms Chan because his company handled iPreciation's investments. Rex Chan refuted this and pointed out that although he managed a hedge fund in which the iPreciation companies had invested in, his fees from the iPreciation companies was less than S$6,000 per annum and he explained that his main clients were large institutional clients, insurance companies, endowments, foundations and not individuals. In comparison, his purchases of the 3 Ju Ming art works alone came to S$342,250, (Taichi Arch (bronze) edition: S$130,000; Taichi Arch (wood) unique: S$160,000 and Taichi (bronze) edition: S$52,250). He also purchased two other paintings by Gao Xingjian and Cheung Yee from iPreciation. In the overall relationship, Rex Chan was more an art collector and not insignificant customer of iPreciation than iPreciation a client of Rex Chan. He gave his evidence very fairly, very clearly, taking neither side and was unshakeable. His evidence was also corroborated by the evidence of 1DW1.Lee Ka Kei, Mandy ("Mandy Lee"), at [16] of her AEIC which was not really challenged.

26 On the other hand, there is no evidence that Lim's knowledge of art, artists and the art market was anywhere near Ms Chan's level. At 5AB3249 and 3250 there is a telling fact, even when it came to framing of the picture, it was Ms Chan's views that were sought even though the email correspondence was between Rex Chan and Lim. Lim passed on Ms Chan's suggestion, and Wanni, (Rex Chan's wife and for whose study one painting was destined) says: "Please go ahead and frame the Gao Xinjiang work for us according to Helina's suggestion." I find that Lim has little or no contracts in the art market and does not possess the knowledge, ability or capability to source art works nor the capability to sustain such a business on his own. I find that his knowledge and ability in these areas are accurately described by Rex Chan, *viz*, basic and his role in the past development of the business as "peripheral". The evidence also shows that Rex Chan knows Ms Chan and Lim very well as the couples met and dined socially as well. In coming to this conclusion, I put to one side the evidence of the other witnesses which I shall come to, which corroborates from the business aspect, the evidence of Rex Chan. Under cross-examination, Lim effectively conceded that without Ms Chan's relationship with the artists, IPL's business would not have taken off.

27 I also find that Ms Chan provided all the funding for the companies and their operating capital. This was not disputed by Lim. I accept Ms Chan's evidence at [13] above and find them as proved.

Relationship Between Ms Chan and Lim up to 1999

28 It is necessary, given the issues that have arisen, to trace how Lim and Ms Chan came together, how and when the iPreciation entities came into being and their entry into the art business.

29 Most of the following facts were not really disputed. Ms Chan met Lim in late 1997 at a karaoke session organised by mutual friends. She did not exchange contacts with Lim at their first meeting. Sometime in 1998, Ms Chan met Lim by chance at a restaurant at International Plaza where Ms Chan was having lunch with another friend. She noticed a man who kept looking at her. Lim then approached her table and had a short conversation asking whether she remembered meeting him at the karaoke session. The next day, Ms Chan was having some food whilst at the Raffles Hotel, waiting for a friend to attend a concert. By chance, Lim came by and since he too was waiting for a friend, they started chatting and exchanged contacts. They kept in touch and became good friends in 1998. Although the evidence is not clear on time lines, Ms Chan was recently divorced. Their relationship developed further and so Lim, who was some 6 years younger than she was, came into her life, after her divorce and she fell in love with him. By the early part of 1999, they had formed a close personal relationship and started staying together. I am prepared to find Lim had some feelings for her initially, but they were certainly nowhere as deep as her love for him. When Lim wanted to set up his own company to carry on an IT business selling electronic equipment online in mid-1998, eJazz, she lent him S$8,000 to do so. She supported his IT ventures and businesses, paid for his living expenses, provided him a credit card, paid his mobile telephone bills and gave him expensive gifts. To his credit, Lim did not deny this. Ms Chan's evidence in her AEIC on the sums she lavished on him were not challenged and I find them proved. The extent of his dependence on Ms Chan can be seen by some of the bills paid by her on his behalf: a SingTel bill (made out to Lim's brother) for S$166.82; loans of S$3,000 to S$11,000 for October, November and December 1998, March and May 1999; similar loans continued through 2002 to 2004 and numerous credit card bills ranging from S$867.65 to S$2,649.91. In addition, he kept being paid ad hoc sums for 'director's fees' or 'bonuses', *eg*, S$2,000 on 29 December 2000, S$1,000 on 3 May 2001, S$2,000 on 31 May 2001, S$3,000 on 2 July 2003, S$3,000 on 4 August 2003, S$5,000 on 25 September 2003, S$5,000 on 24 November 2003 and S$20,000 on 5 December 2003. It will be readily seen that these sums are not true director's fees or bonuses, because Lim did very little work in the art business/IPL up to December 2003 and they were obviously sums of money given by Ms Chan to him to maintain himself. He accepted that Ms Chan had always treated him with great kindness, had provided him financial sustenance and was supportive in more ways than one. Unfortunately after about 7 years of this relationship, his feelings for her were no longer there. Yet she still continued to show him nothing but kindness and generosity. She continued to give him expensive gifts, she did not immediately ask that he leave her Fort Road residence when he pleaded that he would lose face before his parents, who thought he was doing well in life, and she later allowed him to stay in the company apartment.

30 Ms Chan bought a shelf company in Singapore, HR Resources Pte Ltd ("HR Resources", and formerly known as Globaluck International Pte Ltd) around 1994. In the beginning of 1999, in the circumstances set out at [13] above, her other director and nominee shareholder, Ms. Hanam, resigned as director and Ms Hanam's 1 nominee share was transferred to Lim. I find that Lim had the 1 share transferred to him as a nominee of Ms Chan, paid nothing for that 1 share and took over the directorship from Ms Hanam as a favour to and measure of convenience for Ms Chan. All these occurred between 12 to 18 January 1999. Lim does not dispute that at that time, he assisted Ms Chan by lending his name to be a nominee director and shareholder; (see [16] of Lim's AEIC and he also admitted this under cross-examination).

31 In the middle of 1999, she decided to set up her own art business and terminated her consultancy with her former employer, Casual Time Ltd, a garment manufacturing business in Hong Kong. In or around September 1999, she organised an art exhibition in Singapore for a Hong Kong artist, Cheung Yee, at the Alliance Francaise de Singapour. This exhibition was quite popular with the press and the public and it encouraged her to embark on her art business. She decided to use HR Resources as her vehicle to do so.

32 In November 1999, Ms Chan changed the name of HR Resources Pte Ltd to "iPreciation Pte Ltd".

33 During this period from 1997 to 1999, I find that Lim was carrying on his IT business and was not involved in Ms Chan's art business. He was working on projects with the National Computer Board and SingTel and he was busy trying to build up eJazz's business. Later on, when eJazz faltered, he got involved in his brother's company, Matelwoode. As they started staying together in 1999, I accept that Lim had some interest in Ms Chan's art business, but it was as her very close friend and companion, just as Ms Chan would have some interest in Lim's IT business and activities, as his very close friend and companion. They would not be, by any measure, considered a 'business' partner of the other. Lim attempted to claim he had an interest in art whilst he was an undergraduate, but other than this bald statement, which I find to be self serving, he never elaborated on that 'interest' or how it developed over the years. As noted before, there is an absence of any evidence of his knowledge or passion for art or the art business. On the other hand, in his AEIC, he tried to portray Ms Chan as someone working in the garment industry, without mentioning her previous gallery or passion for the arts. I find this quite misleading on his part.

The "iPreciation" Name

34 There is a dispute as to who came up with the 'iPreciation' name. I accept Ms Chan's version that this name came from her. It was her idea to use the name of her previous business in Hong Kong, 'Artpreciation', with a change to 'iPreciation' to symbolise her appreciation of art and a play on the Chinese name of 'Artpreciation', which when translated literally into English means: "He who discovers first". Ms Chan exhibited at "CSK-5" of her AEIC her name cards for both her previous Artpreciation Gallery and iPreciation with the Fullerton Hotel address and both cards contained the Chinese characters. Lim's evidence was that 'iPreciation' was picked to denote Ms Chan's and his intention to launch an art business through the internet and simply states in his AEIC: "We picked the name "iPreciation" to denote this…" Whilst that may explain the letter "i" in the lower case, he does not lay any claim to the choice of the "Preciation" portion of the name or how it or the Chinese characters came to be picked. I do not accept his evidence on this and find this claim rather opportunistic.

35 It is not disputed that Lim assisted Ms Chan register the domain name "iPreciation.com" as she did not know how to go about it. It was Lim's idea that they could sell art on the internet. Lim conceded this never took off and no sales were effected through this medium. Ms Chan's evidence, which I accept, is that she only wanted a simple website. She is not computer savvy and Ms Chan does not strike me as someone who believes art can be sold through the internet and without the personal touch. The important point to note is that this domain name was registered under IPL, there being no other entity in being in November 1999.

The "Understanding" or "Agreement" in 1999

36 Lim's case is that Ms Chan engaged him to carry out a feasibility survey on the application of internet technology to the business of sale of artwork and when his study was completed, Lim alleges Ms Chan wanted to launch a website for her fledgling art sales business and expressly asked him to join IPL as her business partner to launch this project. I do not accept the evidence of Lim for a number of reasons.

37 Under cross examination, Lim admitted that Ms Chan did not *expressly ask* him to join IPL as her business partner and that there was no express agreement between them that Lim shall be a partner of the business.[note: 3] He claimed that it was *his understanding* that he was Ms Chan's business partner. He was therefore forced to admit that his evidence was inconsistent with his pleaded case:

10. The Plaintiff first met the 1st Defendant on or about 1998 when *the 1st Defendant engaged the Plaintiff to carry out a feasibility study* on the application of internet technology to the business of sale of artwork.

11. *Upon completion of the feasibility study*, the 1st Defendant wanted to launch a website for her fledgling art sales business and *asked the Plaintiff to join her as a business partner to launch this project*.

[emphasis added]

Having admitted there was no oral statement from Ms Chan he finally was forced to admit:

I presume -- I mean, it's just that we're going to work this thing out together.

[emphasis added]

38 Again under cross examination, Lim's feasibility study, which he says was the springboard or basis of their business partnership, was not only carried out in the year 2000[note: 4], (which contradicted his evidence that their business partnership was formed in November 1999 after the feasibility study), but when that document is examined, it does not appear to be a feasibility study at all.[note: 5] He was forced to admit that his case in this respect is inconsistent with [37] of his AEIC and read with the table at exhibit "LCT-38" (serial nos. 5 and 7). I accept Ms Chan's evidence that she did not engage Lim to conduct any feasibility study and as noted earlier, she only wanted a simple website.[note: 6] A perusal of the documents Lim put forward show they were more for potential investors and shows his idea of the internet art business, (not the art business that Ms Chan was deeply and passionately into) – subscription fees estimated at $500,000-$2,000,000, secondary services at $250,000-$500,000, sale of art inventory software at $50,000-$250,000 and advertising revenue at $60,000-$120,000, whereas commissions on art sales was estimated at $60,000-$100,000 and commissions on auctions at $60,000-$100,000. These figures were plucked from the air. This internet portal business, like his other IT businesses or ventures, never took off and no sales were made through the internet. These ideas bore little to no relationship to the art business that Ms Chan was building up; the latter is better reflected, in an accounting and business sense, in the revenue/profit and items of expenditure and costs, captured in the audited accounts.

39 The evidence clearly shows that during this period, from 1999 to 2003, Lim was spending his time on his IT business although he did help out in the business, it was mainly in relation to IT services. He also helped by drafting proposals and correcting draft documents and letters because of his better facility in English, (not that it was that extremely good), and he did accompany Ms Chan on some of her trips abroad. He also helped in some liaison work in contacting statutory bodies and ministries when it came to finding a wider platform by way of exhibitions for their art business. However I find that this was more Ms Chan finding something for him to do than something that she needed him to do. That work could have been outsourced. I also find that he did so more as a companion than a business partner contributing to the growth of the art business. I accept Ms Chan's evidence that she did not want him to feel like her 'toy boy' and wanted to help him build up his self worth. It is noteworthy that Lim provided IT services through his IT companies or personally and/or with other IT providers, and that he was paid for this work. To me this shows Ms Chan actually creating work, and therefore revenue, for Lim and his IT business.

40 The evidence of a number of witnesses, which I accept, was that Lim was often out of the office doing his own IT projects and project work. Ms Chan says Lim was concurrently running his own

IT businesses with his 'role' in IPL, and later Fine Arts, until 2004/2005 and I accept her evidence. From 1999 to 2003, I find that Lim took very little part in the art business. This was clearly borne out by the evidence of Mandy Lee who worked with Ms Chan from around April 2001 to May 2003. Mandy Lee was from Hong Kong, a former colleague or Ms Chan at Casual Time Ltd, and I find her a truthful and forthright witness who had no agenda and nothing to gain. When she joined IPL, it was operating out of space sublet from DP Architect Pte Ltd and Lim used a space within IPL's premises for his IT business. When IPL moved to larger premises, a shophouse at Kim Yan Road, Lim had the use of a room on the second floor for his 'office'. There was no one else other than Ms Chan, Mandy Lee and Lim. Mandy Lee did most of the administrative work, helping Ms Chan with the communications with artists and clients, the setting up of exhibitions, the proposals, the invoicing and she was 'Man Friday' to Ms Chan and involved in almost every aspect of IPL's day-to-day affairs. This even included IT matters. Mandy Lee confirmed that all decisions were made by Ms Chan. Mandy Lee only asked Lim for his comments now and then because she had no other colleague at IPL and Lim was Ms Chan's boyfriend, but she would never take any action or decision on any matter without Ms Chan's express approval or instructions. Although Lim's contribution was supposedly with the IT issues, the job of liaising with other IT providers in the setting up of the website fell to Mandy Lee who was at the business premises all the time. Mandy Lee's evidence, which I accept, was that Lim was out most of the day; at times he would go for meetings for hours or go to the gym, using Ms Chan's car. It was clear to Mandy Lee that "the moneys used by Lim himself were given to him by [Ms Chan]" whereas all the funding of IPL was by Ms Chan and it was Ms Chan who often travelled overseas, spending a lot of time sourcing for and getting in touch with artists, building up relationships with them and building up her contacts and name in the international art world. On the other hand, it emerged from some minutes of meetings that Lim was openly nicknamed "slave" in these minutes or notes of meetings because he was so beholden to Ms Chan.

41 I therefore find there was no such understanding of a quasi partnership between Ms Chan and the Lim in 1999 as alleged by him. Neither was there any legitimate expectation of management or decision making powers, employment in IPL or the sharing in profits or of a right to accommodation. His activities, ran out of IPL's office, were consistent with his doing his own IT business and not taking any meaningful or active part in IPL's business as a partner or employee for this period. He did so only as a companion to Ms Chan.

The 'Agreement' or 'Understanding' in 2003

42 Lim also alleged that he and Ms Chan agreed, when Fine Arts was "formed in 2003", that their respective shareholdings would be on a 60:40 basis and this included IPL. I do not find this to be made out at all by Lim.

43 It is important to note that in February 2002, Ms Chan set up the second entity, her own sole proprietorship, Consultants, in Singapore for the providing of art related services such as art consultancy and art framing services. Lim must have known of this, as they were living together at that time, and he did not object to its being set up or that some of the art business would be parked under Ms Chan's own sole proprietorship. Nor was there any objection all this time until the commencement of these proceedings. Any claim by him of this entity, Consultants, must therefore fail *in limine*.

44 In 2003, Ms Chan's efforts began to pay off after her successful Ju Ming exhibition. I accept her evidence that she wanted to keep her growing retail business separate from the Agency business and decided to set up an entity in Singapore as her art gallery. She had identified her gallery space at the Fullerton Hotel. This would be her second company in Singapore and with her sole proprietorship, Consultants, her third entity in Singapore.

45 Lim came to know of this and suggested she take over his existing company, Inspirative Pte Ltd ("Inspirative"), which was incorporated by him in November 1999, for an IT project, a music portal, that never took off and was costing him money to maintain. Ms Chan agreed and the company's name was changed to iPreciation Fine Arts Pte Ltd.

46 The following is noteworthy. Lim was admittedly the person behind Inspirative, but because he did not want the directors of eJazz to know he had another company, he arranged for nominees - his father, Lim Shoo Toon and his friend, Lim Tow Kwong to be the first directors and subscribers to the Memorandum of Association. In May 2000 further shares were allotted. Lim Shoo Toon and Lim Tow Kwong each held 1,000 shares and one Tan Wee Chiew was allotted 1,000 shares.

47 In May 2003, it was Lim who arranged for his nominees, his father and his friend, to transfer 1,800 shares of his company, Inspirative, to Ms Chan for $2 and arranged the transfer of 1,200 shares in his name. It was not Ms Chan forming a company and giving Lim 40% of the shares, strictly speaking it was the other way around. In contrast, for IPL, Ms Chan only transferred one nominee share to Lim in 1999. Further when this exercise was taking place with Inspirative, if there truly was such an agreement as alleged by Lim, and especially given their close personal relationship at that time in May 2003, I would have expected the shareholding in IPL to be regularised as well. The facts that the shareholding of IPL was left unchanged and the existence of Consultants left unaltered, speak for themselves.

48 In his AEIC, Lim talks about their decision to set up another company for the retail sales, (whilst IPL was more for the corporate sales), to hold the lease and employ the staff. He then claims that with the 'formation' of Fine Arts he discussed the shareholding with Ms Chan and it was agreed that his share of the business would be 40% and Ms Chan's 60% since she funded the business and she had the 'initial' contacts in the art world which got them started. Lim completely leaves out the details in [45] – [47] above. I find this recitation in his AEIC beguiling.

49 Under cross-examination Lim conceded, again, that Ms Chan did not expressly tell him that he was entitled to 40% shares in IPL and there was no express agreement between the parties. Lim also agreed he did not ask Ms Chan to give him 40% of the shares in IPL. He conceded, yet again, that it was his "understanding" unexpressed to Ms Chan and agreed further that his AEIC to the effect that there was an express agreement between the parties was incorrect.

50 I accept Ms Chan's evidence that she was very concerned over his welfare at this point in time in May 2003; his IT projects failed one by one and she wanted to do something for him to bolster his self worth. So around 2003 when she took over Fine Art from Lim and when her art business look set to grow, she gave him a 40% shareholding in Fine Arts. But, it is important to note, she did not give him a 40% shareholding in IPL or Consultants which remained under her sole ownership. With her greater business acumen, she could see that his IT projects were all languishing or failing. eJazz was wound up in 2001 with debts amounting to some S$213,000. Lim's brother's Matelwoode ceased business around 2004. So whilst Lim still trying hard to develop his IT business or projects through 2003 and 2004, he played a very minor role in the iPreciation art business. What little he did in Fine Arts was linked to IT issues and helping out in drafting and correcting their English. I find that Lim has failed to establish any agreement or understanding as to the 60:40 shareholding nor has he established any quasi partnership in 2003 as alleged by him.

51 It is also important to note that in early 2005, Ms Chan set up another sole proprietorship, Consultants HK. There was similarly no protest from Lim and it is only when he brought this action that he claims a 40% share in this entity as well. There is no doubt on the evidence, and Lim has acknowledged this, that IPL and Ms Chan was the source of all the art work for the entities. For

example, there were the following major artist agency agreements and they were all secured by Ms Chan and entered into by IPL:

(a) Agency Agreement with the well known Ju Ming of Taiwan (some of whose works can be sold for hundreds of thousands) to be his exclusive agent in Singapore, Malaysia, Vietnam, Indonesia, Thailand, Brunei and the Philippines from 1 May 2004 to 30 April 2009;

(b) Worldwide Sole and Exclusive Agency Agreement with Ye Jian Qing of China dated 1 September 2004 for a period of 8 years or 18 months from the last exhibition, with a further 8 year option;

(c) Agency Contract with Gao Xingjian of France, covering Singapore, Malaysia, Vietnam, Indonesia, Thailand, Brunei and the Philippines, from 1 January 2008 to 31 December 2013; and

(d) Worldwide Exclusive Agency Contract with Tse Yim On of Hong Kong, 1 June 2008 to 31 May 2014.

Developments in 2005 to 2007

52 Sometime in the beginning of 2005 Ms Chan fell ill. She had developed severe hypothyroidism but she was misdiagnosed for a whole year. She also developed Sjorgren's syndrome (an auto immune disorder). Her doctors treated her for all kinds of maladies but the right one. She started having symptoms of asthma, difficulty in breathing, feeling ill, bouts of fever, feeling very cold, her voice started getting husky, she started getting rashes everywhere, she would just fall unexpectedly while walking, parts of her body went numb, she had bouts of blurred vision, she started losing hair, putting on weight and ballooned out with water retention. By June 2005 Ms Chan and Lim started drifting apart. There were no quarrels or disagreements, just an increasing distance. Ms Chan was trying to cope with her misdiagnosed illness and Lim must have been trying to cope with his businesses and projects all ending in nothing.

53 In the meanwhile, the art business was growing. Ms Chan still travelled, but with difficulty, to meet artists, clients, attend exhibitions and keep in contact with the international art world. As the art business flourished, she saw a need to set up a BVI corporation to book the sales of artworks overseas. She therefore incorporated BVI around 17 October 2005 and allotted 40% of the shares to Lim and 60% to herself.

54 I have considered the evidence surrounding this event carefully, including the possibility that this allocation of 60:40 shares in October 2005 in BVI was perhaps evidence supporting Lim's allegations of a 60:40 understanding or agreement. Having heard Ms Chan's evidence on this aspect, including her answers to questions put to her by me, I accept her evidence that as the doctors did not seem to be able to find out what was wrong with her throughout 2005, she began to worry about what would happen to the business if she became incapacitated or could not travel and she therefore gave Lim a 40% stake in the business and made him a director because if she could no longer travel, at least he could do so and attend to the business. Also by this time, his IT businesses and projects had all come to naught.

55 By the end of 2005, Lim and Ms Chan were no longer in a close personal relationship. I accept her evidence that she asked him to move out when their close relationship ended but held off when he pleaded with her that he did not want to lose face before his parents, who thought he was doing well. Eventually, she let him stay at an apartment in the Miaplace condominium which iPreciation kept for visiting artists, clients and staff. He occupied one room and had to share the apartment with

guests and overseas staff of iPreciation. I do not find that it was a term of his employment or of any legitimate expectation that iPreciation would provide him accommodation. I find he has no continuing right to accommodation. He found accommodation at Kim Yam Road and later at Fort Road as the close companion of Ms Chan, when their close personal relationship ended, she found it hard to move him out of her Fort Road residence, she asked him to move into Miaplace as a temporary measure to get him out of her residence. I find and hold that when the lease of Miaplace runs out, he has to find his own accommodation.

56 Ms Chan's illness was properly diagnosed around the end of 2005, appropriate treatment began and she made a slow recovery over 2006 and 2007. Meanwhile the art business continued to grow, and 2006 and 2007 were the best years in terms of sales.

57 Ms Chan found a need to set up the 6th entity in Hong Kong to handle sales affected mainly through exhibitions at the Rotunda in Exchange Square. She set up HK Ltd in April 2007 and again gave Lim 40% shareholding. On the 12 June 2007, she set up the 7th entity, Contemporary, in Singapore and again gave Lim 40% of the shareholding as well.

58 I must say I found this puzzling at first. In October 2005, Ms Chan had a reason to give Lim 40% in BVI and make him a director. But by 2007, when she set up the 6th and 7th entities, HK Ltd and Contemporary, she and Lim had not been in a close personal relationship for almost two years. By 2007, she must have made some recovery from her illness. On balance however, I accepted her reasons. She was still not 100% physically and still found being incapacitated a possibility.

59 In addition, I find that the stronger and real reason was that Ms Chan still had strong and deep feelings for Lim. She let him stay (albeit as a temporary expedient to get him out of her residence at Fort Road) at the company apartment. She still bought him expensive gifts, they were still together at the offices of Fine Arts and according to her, they were still good friends. They often travelled to the office together in her car. Lim was beginning to spend more time there as his IT projects had fizzled out. As late at June 2007, she speculated profitably in an IPO of Map Technology Holdings Ltd and gave Lim half of the gains. This came to $107,175.25. I accept her evidence that Lim wanted a bonus in 2007 and because he wanted to deduct some of his expenses, she set up NexArt in October 2007 for him as his sole proprietorship, she arranged for 2 pieces of Ju Ming artworks to be consigned from Consultants HK to NexArt, sold the pieces through Nexart and after paying Consultants HK S$128,000.40, left Lim around S$85,333.60 in Nexart. His income tax returns bear out some of his expenses he put into NexArt. It is also significant that he never had any complaints at that time. I also accept her evidence, which was not denied by Lim, that knowing his love for branded goods, she bought him a branded watch for about HK$100,000 in November 2005 and another in February 2006 for HK$17,000. Ms Chan had always provided for him. She created work and paid him and/or his company for IT services and then, as noted above, gave him sums of money every now and then.

60 Weighing all these factors, I find that Ms Chan made gifts of the 40% shareholding in HK Ltd and Contemporary to Lim, but she was also clearly keeping IPL, Consultants, Consultants HK for herself. It is not disputed that Lim did not pay for any of the shares in Fine Arts, BVI Ltd, HK Ltd and Contemporary. Lim also did not contribute anything towards their working capital and got his shares for free. Lim did not even pay for the setting up of NexArt.

61 There is one aspect of Ms Chan's evidence that I do not accept. She said she made it a condition of her gift of the 40% shares in Fine Arts, BVI, HK Ltd and Contemporary that if their relationship did not work out, Lim was to return those shares to her. I find this difficult to accept. When she gave Lim the shares in Fine Arts, they were staying together. I find it difficult to and

therefore do not accept that she made the gift conditional. When BVI was formed in October 2005, they had already started to drift apart but were still on friendly terms; but she was not well and on her own evidence gave Lim his 40% shares and made him a director in case she could not travel and attend to the business abroad. I cannot accept her attaching a modified condition, *ie*, if their friendship did not work out, he would return the shares to her, in the circumstances. Further in 2007 she was no longer in a close relationship with Lim for some time. It does not make sense to attach a similarly modified condition. If that was indeed true, then there was no reason to give Lim the shares in HK Ltd and Contemporary (although at that time the issued capital in Contemporary was not in the 60:40 proportion, but nothing turns on this fact). I note that neither Mr Tan nor Mr Yeo wasted much time on this 'condition'.

Lim's True Role in iPreciation

62 There is an abundance of evidence that except for what I have noted above, Lim did very little in iPreciation until 2005. When his IT ventures all came to naught and Ms Chan fell ill in 2005, he did gradually spend more of his time at the Fullerton Hotel Gallery. That was where Rex Chan met him. I find that Lim did close some sales in the later years, but they were relatively few in number compared to the overall number of sales each year. Mr Tan was only able to point to a handful of them.

63 1DW.4, Ms. Amy Chan Yuen Kwan, ("Amy Chan"), joined HK Ltd around March 2007. I find her to be a truthful witness too and I accept her evidence. She was based in Hong Kong and testified that very soon after joining she realised that Ms Chan made all the decisions in the companies. Lim was known to her as the ex-boyfriend. Lim was largely concerned with IT but was also into the administration work and liaising with clients. When she did attend meetings in Singapore, Lim's work was largely related to IT. Amy Chan's evidence was also given clearly and in a matter-of-fact manner. She was firm that whilst she may seek Lim's advice, since she was at an overseas office, the final decision would always come from Ms Chan and this included the entity that was to bill any artwork that was sold. She also said that Ms Chan was energetic, charismatic and was the heart and soul behind IPL. Ms Chan often travelled overseas to source for artists and cultivated relationships with them. She did her research, her networking and building up of contacts. All the artists IPL who signed up with IPL had a good relationship with Ms Chan. This part of Amy Chan's evidence was not challenged. Her testimony was not shaken by cross-examination. Ms Amy Chan was quite clear in her mind on her facts and did not hesitate in answering her questions.

64 1DW.5, Ms Jacqueline Lau Poh Leng ("Jacqueline"), joined Fine Arts around May 2005 as an administrative assistant. She was promoted to Assistant Manager in January 2006. Jacqueline handled the bulk of the administrative work, correspondence with artists and clients, preparing reports, cheques, invoices and related documents. Jacqueline corroborated a lot of Amy Chan and Ms Chan's evidence. I also found her to be a truthful witness on the whole but some of her answers did exhibit an understandable measure of loyalty to Ms Chan. However she was not dishonest in any of her answers and overall her testimony was also unshaken in cross-examination. She confirmed Ms Chan was the one who made all the decisions in relation to the management of the business. Jacqueline said Lim himself recognised that no action could be taken in the business without Ms Chan's approval and often Lim would himself tell Jacqueline to check with Ms Chan on various matters in relation to the business before taking any action thereon. She was also aware that Ms Chan had been lending money to the art business whenever it was needed because Jacqueline prepared the cheques from Ms Chan's personal UOB account. She too confirmed that Lim's work was mainly the IT related issues but said that he did do administrative work, liaising with clients but he had to defer all decision making to Ms Chan. I find his utility to and role in the companies to be peripheral.

65 Lim admitted that he could only give a discount up to 8% on any art piece. Anything more had

to be cleared with Ms Chan. Lim even conceded under cross-examination that he needed Ms Chan's approval to renew a credit card terminal, which he accepts was a "fairly minor aspect" of the business. As for Lim's IT services to the companies from 2005, I find that it was not satisfactory as the CRM system, which was his responsibility, did not work very well nor serve its purpose, even in something as basic as duplicating entries in the inventory. His IT draft documents reveal someone who is prone to pipe dreams; they contain great hype on the huge potential of selling art through the internet. Like his IT businesses and projects, it came to naught. As noted above, there is no evidence at all of Lim's passion for or any ability in the business or in art. Lim's own description in his 'Feasibility Study' (S/No.5 of Exhibit "LCT-38") is telling. He describes "The People Behind iPreciation". Ms Chan is described as the "founder of iPreciation … [who] has been actively involved in Asian Art since 1991 … [and] is currently the exclusive manager of renowned artists like Cheung Yee, Koo Mei and others … and has conducted numerous successful art exhibitions worldwide." In contrast, in the same document he describes himself as follows: "CT Lim is the co-founder of eJazz.com & currently serves as its CTO. CT Lim have [*sic*] an extensive experience in the formation of Internet start-ups & is responsible for many of the eJazz.com initiatives." There is no claim to any art experience or knowledge. In Exhibit "1.D-2", a proposal which Lim prepared, entitled "Sculpture City 2003", which was sent to Chairman of the Singapore Art Museum and the National Heritage Board, he describes himself as the IT and operations director "who joined the team two years ago and immediately seek [*sic*] to establish a [*sic*] internet presence for iPreciation." He makes no claim that he is a business partner of Ms Chan whereas she is described managing director of iPreciation who set up Artpreciation Ltd (Fine Art Gallery) in Hong Kong till she shifted her operations to Singapore in 1994 and importantly - set up iPreciation as its founding director. There is no reference to any partnership with Lim.

How iPreciation was run

66 Quite some time was spent on how illogical the billing, expenses and profits attribution of the iPreciation companies were. Mr Tan submits that it appeared quite random or arbitrary. There is some truth to that – there were allocations of expenditure to one entity but the sale being booked into another. Having considered the same and having gone through the evidence, it seems clear to me that first, as noted above, the source of all the artwork was IPL/Ms Chan's; it was entirely from her passion and efforts that the business was built. She made frequent trips overseas, sourcing for work and reaching out and getting to know the artists that counted. The major artists in iPreciation's books all had personal relationships with her. She therefore had the absolute discretion to decide which entity would sell a particular piece of art work. Lim admitted in cross-examination that "she called the shots." He also admitted under cross-examination that she has the right to consign the artworks under the agency agreements and as the managing director, she could decide which of the iPreciation entities would sell the artwork. Secondly, Ms Chan also made the decision as to which company bore the expenses like freight forwarding, exhibition and promotion expenses, insurance and the like. Jacqueline Lau's evidence, which I accept, is that sometimes an allocation of expenses is made to an entity because it has the cash or sales to pay that expense; hence an allocation may be made to an entity with the funds to pay and sometimes this mismatch of expenses and sales are later corrected and sometimes it is not.

67 Thirdly, I find that Ms Chan had her own way of and reasons for allocating expenses and profits to the entities, depending on her sole decision as to how much revenue an entity would get for the year and what expenses that entity would or could bear for the year and in accordance with her own plan to grow the business. This is best illustrated by Amy Chan - when referred to an email at 4AB.3177 and asked why the invoices in relation to two paintings, "Rain in the City" and "Hutong: the Lonely Wall", were issued to IPL and not HK Ltd, she said categorically without hesitation: "The invoices to be issued to which party will be decided by the boss..", *ie*, Ms Chan. Jacqueline also gave evidence to the same effect, evidence which I also accept. Jacqueline gave an example in or around

June 2007 at 4DBD pages 788-789, 791-792. IPL sold 2 water colours on paper, "Ambush" and "The Final Showdown" by Wang Wei Xin, but it was Consultants HK that paid artist. (A similar example appears at 4DBD page 794 where a Cheung Yee: Cast Paper on Wood entitled "Big Fortune 070101" was sold by IPL but Consultants HK paid the artist). When she was asked why Consultants HK was paying the artist for a paintings sold by IPL, she said: "Sorry, I got no idea." This also shows Ms Chan was not unfairly putting expenses all into Fine Arts, she was allocating expenses to other entities as well. In this case it was an entity where Lim had no share. Fourthly, Lim had absolutely no say in this. He accepted this fact under cross-examination. Fifthly, and very significantly, for well nigh to 10 years and until this action was commenced, he knew what was going on and how the entities were being run; he not only witnessed the allocation of sales and expenditure, he implemented or relayed Ms Chan's instructions on some of them and he never protested at any time or try or insist or change anything in Ms Chan's decisions. It was in truth and in fact, Ms Chan's business and he was the beneficiary of her kindness and largesse, but not her partner in the business, nor an employee who had any meaningful decision making powers. It is clear to me, and I so find, that the art business of the entities would still continue or even thrive, whether Lim was there or not.

68 I do not agree with the criticism by Lim that Ms Chan's allocation of sales and expenses was completely arbitrary. I find she had her own system and reasoning, which included expediency as she grew the art business completely with her own funds and efforts. It is instructive to trace some financial history of IPL and the entities. From 1999 to 2003, IPL was the only entity until, (Consultants was set up in February 2002 and Fine Arts in May 2003), and its audited accounts show:

(a) IPL's accounts for the financial year end of 31 December 1999 (IPL's YE 1999) show sales of S$88,201 with the cost of sales at S$46,481 and operating expenses of S$32,311 leaving a very modest profit of S$9,409. The accumulated losses were S$207,140, (down from S$279,862 for YE 1998) and Ms Chan's loan to IPL stood at S$122,464.

(b) IPL's YE 2000 show sales of S$97,725 with the cost of sales at S$49,615 and operating expenses of S$68,908 leaving a loss of S$20,798. The accumulated losses increased to S$227,938 and Ms Chan's loans to IPL increased to S$204,558.

(c) IPL's YE 2001 show sales of S$83,555 with the cost of sales at S$46,758 and operating expenses of S$135,317, (including rental of premises at S$45,587), leading to a loss of S$98,520. The accumulated losses increased further to S$326,458 and Ms Chan's loan to IPL increased to S$296,265.

These figures corroborate the evidence of Ms Chan, and I so find, that she struggled to build up the business, pumping in money at about S$100,000 a year, and working hard to lay the foundations for her art business. This began to bear fruit as the figures from the next 2 years will show.

(d) IPL's YE 2002 show sales jumping five-fold to S$445,816, but with corresponding increases in the cost of sales and operating expenses at S$651,329 leaving an even larger loss for the year of S$205,513 and an accumulated loss of S$531,971. Ms Chan's loan to IPL increased to S$442,168.

(e) IPL's YE 2003 show increased sales of S$784,638 with the cost of sales at S$451,833 and operating expenses of S$202,458 resulting in a profit of S$141,532. The accounts list exhibition expenses amounting to S$37,962 and purchases reaching S$404,184. Ms Chan's loan to IPL increased to S$504,758.

Ms Chan ploughs back considerable sums into the business by her purchases and expenses and

increases her loan to IPL yet further. No accounts for Consultants have been put in evidence. Fine Arts was launched around May 2003 and at financial year end of 31 December 2003 its audited accounts show:

(f) Sales or Revenue of S$53,365, cost of sales at S$27,250, operating expenses at S$82,042 resulting in a loss for the year at S$56,197. The rental of premises amounted to S$28,739 and staff salaries and bonuses were booked at S$22,119. Ms Chan's loan to Fine Arts amounted to S$27, 003.

FY2004, which followed upon the successful exhibition in 2003, was a good year. The respective figures for IPL and Fine Arts are as follows:

(g) IPL's YE 2004: Sales of S$1,232,549 a combined figure of cost of sales and operating expenses at S$1,203,103 leading to a modest profit of S$29,446. Ms Chan's loan to IPL increased to S$627,348. The purchases came to S$442,698 and there were significant exhibition costs of S$544,636 incurred.

(h) Fine Arts's YE 2004: sales amounted to S$1,283,942, the combined cost of sales and operating expenses came to S$1,285,074 resulting in a slight loss of S$1,132. For some unknown reason, the accounts for this year are simplified without much detail. However, two items stand out, purchases came to S$841,068 and Director's fees of S$250,000 were paid out and added together amounted to S$1,091,068 or about 85% of the cost of sales and operating expenses. There were no exhibition costs or significant freight costs incurred (only S$3,700) by Fine Arts.

This shows, and I so find, that when Ms Chan decided to make a payout to Lim and herself, she booked enough revenue into Fine Arts to enable this payment to be made without declaring dividends. Ms Chan split the revenue from sales and operating expenses booked into both companies about equally although Fine Arts was only in its 2nd year of operations. It is noteworthy that she could have, but did not, make this payment from IPL. The purchases are also a significant figure but based on counsel's submissions that no agency fees were booked until 2008/2009, it appears from the cost of sales figures that significant purchases of art work were made through Fine Arts. For the FY2005, which was the year Ms Chan fell ill, it is also instructive to put the accounts of IPL and Fine Arts side by side for comparison:

(i) IPL's YE 2005: sales/revenue of S$628,673 and a government grant of S$104,739; cost of sales at S$506,810 and operating expenses of S$291,667 resulting in a loss of S$65,065. Purchases amounted to S$392,472, exhibition costs came up to S$57,003 and freight and handling charges came up to S$107,254. Ms Chan's loans to IPL increased to S$727,792.

(j) Fine Arts' YE 2005: sales/revenue amounted to S$1,048,000; the cost of sales came to S$560,712 and operating expenses amounted to S$472,647 giving a total of S$1,003,359 and resulting in a slight profit of S$15,643. Exhibition expenses came to S$35,884, rental of premises came to S$99,354 and freight and handling charges came to S$23,890. Ms Chan's loan to Fine Arts came to S$53,565.

It can be seen from the FY2005 figures that Ms Chan routed more sales through Fine Arts than through IPL. Fine Arts bore the rental of S$99,354 but the government grant of S$104,739 was booked into IPL. This was because IPL bore a larger portion of the exhibition and promotional expenses and the freight and handling charges. By this time, Fine Arts was housed at the Fullerton Hotel and had its gallery there. In early 2005, Ms Chan set up another sole proprietorship Consultants Hong Kong, again without protest from Lim. 2005 was also the year that Ms Chan set up BVI on

17 October 2005 because of her illness. On a balance of probabilities, it is unlikely that there was a strict attribution of expenses to the entity that sold the piece or artwork. I find there were discrepancies or mis-matching of sales and expenditure, but the majority of the expenses were correctly attributed or were attributed by Ms Chan according to her own system of allocation and business plans. I also find that some exhibition costs although borne by one entity would benefit the rest, *eg*, the Exhibition of Ju Ming's works at the Beijing Museum. Similarly with promotional expenses, like the exhibition costs and/or costs of producing brochures or catalogues, there could not be any strict demarcation; an exhibition, brochure or booklet on a particular artist would benefit all the entities but to a varying extent depending on how many brochures the entity distributed and how many art pieces of that artist were sold through it. There was also a time element involved. Ms Chan held an exhibition for the Hong Kong artist Cheung Yee in September 1999, but she was still selling his works to Rex Chan in 2005. Left over catalogues and brochures are still of utility to art dealers and collectors years later. But the production or exhibition costs have to be paid at the time they were produced or held. There could not therefore be a 'proper' allocation in the financial sense. In the present case, there would be a large subjective element. No accounts of BVI or HK Ltd have been put in evidence. Going forward from the eventful year of 2005, the results of the FY2006 are:

(k) IPL's YE 2006: sales amounted to S$987,948 which together with other income of S$20,000 created a total revenue of S$1,007,948; cost of sales came to S$676,640 and operating expenses of S$323,331 resulted in a small profit of S$7,977. Purchases amounted to a modest S$382,592, but exhibition costs came up to S$103,453, freight and handling charges came up to S$140,676 and advertisement costs amounted to S$22,488. Ms Chan's loans to IPL decreased slightly by S$7,005 to S$720,787.

(l) Fine Arts' YE 2006: sales/revenue amounted to S$666,262, (this included the rendering of services to S$39,409 to a corporate client); the cost of sales came to S$380,167 and operating expenses amounted to S$622,222 giving a total expenditure of S$1,002,389 and resulted in a loss of S$329,127. Purchases dropped to S$293,700. Other significant items of expenditure were rental of premises amounting to S$191,709, staff salaries and bonuses of S$95,788, travelling expenses of S$107,230, freight and handling charges of S$49,228, exhibition expenses of S$36,719 and directors' salary increased to S$36,000 (from S$4,000 in the previous year). Staff salaries and bonuses came to S$95,788. Ms Chan's loan to Fine Arts came to S$53,565 and the amount owing to a related company was S$486,500 and there was S$113,063 owing by a director but I was unable to tell which director owed this sum.

Again a rough and ready balancing of expenditure is evident. IPL bore the higher exhibition and freight costs and Fine Arts bore the rental, travelling and staff salaries and bonuses. According to Ms Chan, 2006 and 2007 were their good years. The financial results for FY2007 are:

(m) IPL's YE 2007: sales/revenue amounted to S$950,228, there were also sponsorships and a government grant of S$46,250; cost of sales came to S$878,538 and operating expenses of S$188,977 resulted in a loss of S$71,037. Purchases increased to S$757,078. Significant items of expenditure were freight and handling charges which came up to S$95,715 but exhibition costs dropped to S$25,745. Ms Chan's loans to IPL decreased slightly to S$710,623 and S$88,293 was owing to a related company. The accumulated losses of IPL stood at S$798,916.

(n) Fine Arts's YE 2007: revenue amounted to S$873,107, (excluding a small sum of S$7,000 from other operating income); the cost of sales came to S$209,913 and operating expenses amounted to S$706,149 giving a total expenditure of S$1,002,389 and resulted in a loss of S$35,955. Purchases dropped to S$154,425. Significant items of expenditure were rental of premises amounting to S$190,044, staff salaries and bonuses which increased to S$173,125,

travelling expenses amounting to S$92,986, freight and handling charges of S$49,167 and directors' salary and bonuses increased to S$68,000 (from S$36,000 in the previous year). Ms Chan's loan to Fine Arts dropped to S$30,256.

In 2007, HK Ltd was incorporated on 24 April, and NexArt was set up in July 2007. NexArt, as noted above, was formed to allow Lim to deduct some of his expenses and only 2 artworks were sold and put through NexArt, *viz*, two Ju Ming bronze sculptures sold for S$81,000 and S$225,000 respectively. NexArt's income from these 2 sales was accordingly S$306,000, the cost of sales was S$211,610.94 and Lim put through expenses of S$11,043.26. HK Ltd's accounts from 24 April 2007 to 31 March 2008 show the following:

(o) sales/revenue amounted to HK$658,652, (for comparison, approximately S$117,108 at HK$5.6243 to S$1); cost of sales came to HK$306,229, (approximately S$54,448) and administrative expenses came to HK$8,500, selling and distribution costs amounted to HK$382,439 (approximately S$67,998) and other operating expenses, (including staff costs of HK$291,264 or approximately S$51,787) came to HK$382,239, (approximately S$67,962); resulting in a loss of HK$416,498, (approximately S$74,053). Lim owes this company HK$20,662. No loans from Ms Chan are reflected in these accounts. The auditors comment that the validity of their going concern basis for the preparation of the accounts depend upon the future financial support available from its major shareholder.

69 Mr Tan submitted that Lim has managed to 'prove' a mismatch of 27 art pieces in 2007 alone as far as sales and expenditure go. Ms Chan's evidence was that 2007 was a good year and her ball park figure was that iPreciation sold 100 to 200 pieces of art work in that year. I find that 27 out of 100 to 200 art pieces sold does not really prove a random and arbitrary allocation of sales and expenditure. There is no doubt that there is evidence showing an entity selling an art piece and another entity bearing the expenditure. The figures from the audited accounts, the documents and the evidence from all the witnesses, show on balance, that Ms Chan had her own system of allocating the revenue and expenditure. She had her own ideas and rationale for setting up each entity and in which country as the business grew. She had her own reasons for parking a certain amount of sales for each entity. For example, I accept her evidence that not knowing how the retail business was going to perform, she wanted to safeguard IPL as the source of the art work and therefore set up the retail outlets as separate entities from IPL. Hence she set up Consultants first in February 2002 for her art related services like art consultancy and framing services, (later for transacting individual sales, including art pieces she discovers from her travels abroad and meeting artists), and then Fine Arts in May 2003 for the art sales in Singapore. She set up Consultants HK for the overseas sales. She set up BVI in 2005 because she was ill. She would put in sales effected at an overseas exhibition or when she sold art pieces on her trips so that the money would be retained outside Singapore. In 2007, she set up HK Ltd for the sales made through exhibitions held at the Rotunda, Exchange Square and then Contemporary in June 2007 for non-GST sales in Singapore. I find that Lim's allegations that the sales and expenditure allocation were random and arbitrary are not made out. Ms Chan's answer and logic, (to a series of questions as to whether she put IPL "first" and therefore ensuring IPL would make the most sales), are irrefutable:

There is also no point for me to not let Fine Arts sell, because if Fine Arts is in the red, I will be the sole person to fund the companies. So I would want to make sure there is, you know, enough money to run the business.

And at another time, referring to Fine Arts in 2003, Ms Chan said:

At the beginning of the year, I have been supporting the company all along … I had intention to

> separate the accounts , but because *it was left pocket and right pocket*, I did not actually charge it. The reason is also being that I want to help the company to grow to a stable situation.
>
> (emphasis added)

From the figures given in the financial statements, it is also clear that Ms Chan did park some hefty expenses like the exhibition and freight handling expenditure in IPL. She also allocated considerable sales to Fine Arts to get it going. She did this even in 2005 when she was ill and suffering significant physical ailments. As noted above for FY2004 when there was only IPL, Consultants and Fine Arts, the sales and expenditure in IPL and Fine Arts were approximately equal: see [68] (g) and (h) above. For FY2005, IPL had revenue of S$628,673 but Fine Art's revenue was S$1,048,000 and the end result was a loss of S$65,065 in IPL but a slight profit of S$15,643 for Fine Arts. Ms Chan's loans to IPL for FY2005 amounted to S$727,792. At FYE 2007, IPL's accumulated loss stood at S$798,916. I accept that I have not seen any accounts or equivalent items on revenue and expenditure in BVI, Consultants and Consultant HK. But I find the audited figures show a practical and business-like allocation of income and expenditure according to Ms Chan's method and plans to develop and grow the business. It's success is undeniable. I find Lim's attacks on these financial management issues from 1999 to 2007, bearing in mind that he contributed no capital, did not extend any loans, did not contribute in any substantial or meaningful way to the growth of the business, to be totally misplaced. He signed the audited accounts year after year whilst knowing what was being done. Having acquiesced all those years whilst enjoying the benefits, it lies ill in his mouth to now complain about how the businesses were run. In the apt words of Sir Donald Rattee in *Re Grandactual, Hough v Hardcastle* [2005] EWHC 1415 at [19] ("*Grandactual*"):

> I do not consider that the court should entertain a section 459 petition based on conduct of the Company's affairs in which the petitioners participated without protest for nine years before the presentation of the petition.

70 In *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, the House of Lords identified some attributes which ought to be present before a company would be considered a quasi-partnership. The fact that a company is a small one or a private company is not enough. Other elements had to be present and these included an agreement or understanding that all or some of the shareholders shall participate in the conduct of the business and an association formed or continued on the basis of personal relationship involving mutual confidence. On the facts of this case, I find that this first element is missing and on the second, this is not an association between Lim and Ms Chan based on a personal relationship involving mutual confidence, as one would find in two persons coming together to embark on a business in common with a view to profit. Lim was there because of his close personal relationship and later 'very good friends' relationship with Ms Chan. He was initially an appendage because of his close personal relationship with Ms Chan with little knowledge, passion, interest or capability in the art business. He was mainly doing his own IT business with only peripheral involvement in Ms Chan's art business. In the later years he did take a more active part due to the failures of his IT business ventures but he certainly had no say in any management decision. In *In Re Bird Precision Bellows* [1984] Ch 419 at 432, Nourse J characterised the personal relationship as one which does not have to extend 'beyond the confines of business, for example, into social life'. In this case it was the other way round. Further, Nourse J said, in the same passage, that there must be 'an agreement or understanding that a shareholder shall participate in all major decisions relating to the company's affairs, for example by acting as a director, even if not in the day-to-day conduct of the business.' On the evidence of this case, leaving aside major decisions, which clearly were only made by Ms Chan, Lim did not even have the authority in the day-to-day conduct of the business. Nourse J also considered the shareholders' contributions to capital. In this case, Lim did not contribute any capital nor pay anything for his shares.

The Breakdown of the Relationship between Ms Chan and Lim

71 Ms Chan and Lim's relationship as good friends completely broke down in April 2008, when Ms Chan suspected Lim of having or starting a relationship with another woman in Taiwan. He had refused to go with her on a business trip, but then took leave to go to Taiwan. It appeared that Lim had gone on his own to Taiwan before this. Lim produced a number text messages ("sms messages") received by him from Ms Chan:

> Tuesday, 15 April 2008, 1:07 PM: Thought u know my health condition.just don't use my credit card when u travel wif u r women, tq
>
> Tuesday, 15 April 2008, 1:21 PM: Do what u like,I m sure she is worth it 4 u when u decided to lie to me the very first time u made ur taiwant trip/trips.it hurts when u were the only person I trusted 4 the past 10 yrs.its ok 4 me know as this trust is totally gone n I release that n learn to live without it.u r a total stranger to me now.
>
> Tuesday, 15 April 2008, 1:24 PM: It s unfortunate 4 me to b able to sense things.i can feel/see it.i don't like,dr chong said I m very sensitive to enerby.i know what s happneing arnd me.
>
> Tuesday, 15 April 2008, 2:19 PM: By telling me u went taipei trips wif boys rather then…We only need to answer to our own conscions. Its not important as we walk diff paths now.the cause of karma is our intention of our action.i m not the person who live double/triple lifes.no sms abt this anymore pls.

This marked the end of their relationship even as good friends. This was a watershed because from this date, Ms Chan's attitude towards Lim changed. It then set in train a series of acts and events that led to this action.

72 In April 2008, Ms Chan cancelled his supplementary credit cards. In early May 2008, there was a confrontation and quarrel between Lim and Ms Chan. I accept Ms Chan's evidence that they quarrelled because Ms Chan refused to embark on a Dubai project proposed by Lim and Lim asked her to buy him out. Lim was angry that his credit cards had been cancelled and also demanded to be paid dividends. On Ms Chan's part, Lim was earning a salary of $4,000 per month from Fine Arts and she did not see why she had to continue providing him with his credit card. Ms. Amy Chan witnessed the argument between Lim and Ms Chan in early May 2008. It occurred outside the gallery and since she was in the gallery she did not know what it was about except that when Ms Chan returned, she was very distressed and in tears.

73 Some 5 to 6 weeks before the sms messages on 15 April 2008, Lim and Ms Chan's relationship was already getting strained as she suspected Lim of having or starting a relationship with someone else in Taiwan. I accept the evidence of PW.2, Ms Vivienne Lee Shu Fen of Vantage (the organisation that provided corporate secretarial services to Ms Chan), that some 2 or 3 days before 10 March 2008, Ms Chan came to see her. Ms Chan was very emotional, crying and telling Ms Lee about her relationship with Lim, how much she had helped him financially and then told Ms Vivienne Lee to issue to him not 40% but 5% of the shares in Contemporary. Prior to that, they each held one share. I therefore find this first incident to be two or three days before 10 March 2008 when Lim asked Ms Chan to buy him out. This caused Ms Chan to be very angry and very upset and Ms Vivienne Lee witnessed Ms Chan's distress on that occasion. The first incident was followed some 5 to 6 weeks later by Lim's trip to Taiwan and the sms messages on 15 April 2008.

74 On or around 10 June 2008, Lim again confronted Ms Chan at the gallery. He was furious

because Ms Chan was looking for retail space in Hong Kong and told Amy Chan not to copy Lim in on the emails exchanged between her and the geomancer. Ms Chan told Lim she did not want him involved in her new businesses. On her part, Ms Chan alleges she was very disappointed that Lim had still not got the CRM software to work properly. I have considered the evidence in relation to this issue and I find that Lim had failed to get the CRM software to perform the functions it was supposed to. Further, I also find that he failed to instruct or problem solve or liaise with the other persons who were helping him get the CRM system going.

75 I accept Ms Chan's evidence that Lim's threats and shouting at her at the gallery was disruptive and frightening the staff. This happened in a public place at the Fullerton Hotel, just outside the gallery and the second time in the presence of the staff. I accept Ms Chan's evidence that during these quarrels, Lim was very hostile and shouted at her. Once he said: "I own 40% of this chair and everything else that belongs to the company." On another occasion, Lim slammed the table, pointing his finger at her forehead and told her "watch out … if I go down you go down." This left Ms Chan very shaken. Ms Chan was also extremely upset in the witness box a number of times when she recounted how she had helped Lim and his family over a period of about 10 years, even to the extent of helping pay for a bigger flat for his parents, paying his father's medical bills which he paid with a supplementary credit card provided by her, only to be met with his ingratitude and hostility in 2008, shouting at her and not showing her any courtesy. After these incidents, Ms Chan asked and Lim consented through his solicitors, not to turn up at the office and to go on paid leave in June 2008. Ms Chan terminated his employment with Fine Arts on 15 August 2008 and gave him three months salary in lieu of notice. The Writ was filed on 9 October 2008.

76 Mrs Chan was very upset and broke down in tears a number of times during cross-examination. Two things need to be said at this juncture. First, Mr Tan was very courteous, whilst still pushing hard, in his cross-examination of Ms Chan. He exhibited the best traditions of the Bar in pushing his client's case hard but without discourtesy to Ms Chan. Ms Chan's breaking down was due to her painful recollection of past events and not because of Mr Tan's manner of cross-examination. Secondly, my sympathy for Ms Chan is one thing, but what the facts are, objectively ascertained, and the application of the law to them is quite another.

77 The events that occurred after the complete breakdown of Ms Chan's relationship with Lim are more conveniently dealt with after I deal with my decision on some of the factual issues.

Whether there was an agreement or understanding on a 60:40 shareholding

78 My findings and answers to first issue, (i) at [23] above are as follows:-

(a) I find and hold that Lim is not entitled to a 40% shareholding in IPL. He holds the one share in IPL as a nominee of Ms Chan, and is a 'nominee' director as well. I find and hold that Ms Chan is entitled to ask Lim at any time to transfer, within 5 working days of receipt of Ms Chan or her solicitor's request, his one nominee share to Ms Chan's nominee, resign as director and sign the necessary letters, resolutions and documents to effect the same and I so order.

(b) I find and hold that there was no quasi partnership between Lim and Ms Chan in IPL. Lim had no legitimate expectations in IPL as there was no agreement or even understanding between Lim and Ms Chan whether in 1999 or in 2003 or at any other time that Lim would have a 40% shareholding in IPL.

(c) I find and hold that Lim also had no legitimate expectation in the running or management of IPL.

(d) I find and hold that Lim has no share in the business of Consultants and Consultants HK nor in the later companies set up by Ms Chan, *viz*, 'Modern Singapore' and 'Modern Hong Kong' and it follows that Lim has no legitimate expectations or entitlement in the running or management of these entities.

(e) I find and hold that Ms Chan has no share in NexArt and it remains the sole proprietorship of Lim. I find that NexArt was set up, at Lim's request, for the purpose of allowing Lim to deduct some expenses of his own and the sale of the two art pieces and the sharing of the proceeds are not to be disturbed or undone. No problem arises from Nexart as there were no more transactions effected through Nexart and here is no claim by Ms Chan for the expenses of setting up Nexart. Nexart is the responsibility of Lim from the date of this judgement. Ms Chan or her solicitors are to hand over all relevant papers and documents in relation to Nexart to Lim or his solicitors within 5 working days of this judgement.

(f) As between shareholders who are before me *in personam*, I find and hold that Ms Chan made a gift of a 40% shareholding in Fine Arts, BVI, HK Ltd and Contemporary to Lim. Lim did not pay for any of these shares or contribute in any way to their capital. The gift was unconditional. Lim nonetheless is and remains a 40% shareholder and director in these companies. Insofar as my decision relates to the shareholding in BVI and HK Ltd, both shareholders are before me *in personam*. As there is no proof of foreign law, I assume the law of the British Virgin Islands and Hong Kong are the same to Singapore law: see *N V De Bataafsche Petroleum Maatschappij v The War Damage Commission* [1956] MLJ 155. I take comfort in the fact that as the British Virgin Islands and Hong Kong are former colonies of England, common law countries and have largely similar legislation governing companies. Insofar as the shareholdings in BVI and HK Ltd are concerned, if I am held to be wrong by a higher court on my jurisdiction on this issue, then my decision shall be limited to Fine Arts and Contemporary.

Whether the companies have the character of a 'quasi partnership' which entitles Lim to certain 'legitimate expectations,' and if so, whether Ms Chan is in breach of her obligations

79 In view of my findings above, the answer to issue (ii) at [23] above is as follows:-

(a) I find and hold that there was no quasi partnership between Lim and Ms Chan in IPL, Consultants and Consultants HK and accordingly Lim does not have any legitimate expectations in relation to their management, employment, accommodation or, subject to what I hold in this judgement, access to information and documents relating to the foregoing entities. As stated at [55] above, when the lease at the Miaplace apartment runs out, Lim has to vacate the apartment and find his own accommodation.

(b) I find and hold that there was no quasi partnership between Lim and Ms Chan as shareholders in Fine Arts, BVI, HK Ltd or Contemporary; it follows that Lim does not have any legitimate expectations in relation to their management, employment or accommodation, but Lim is entitled to access to information and documents relating to the foregoing entities in his capacity as director and shareholder of the same. The same considerations apply here as above in relation to the relationship of the shareholders in BVI and HK Ltd. If I am held to be wrong by a higher court on my jurisdiction as to BVI and HK Ltd on this issue, then my decision shall be limited to Fine Arts and Contemporary.

(c) I find and hold that Lim does not have a legitimate expectation or right to continued employment by Fine Arts and I further find and hold that Lim was lawfully terminated as an employee of Fine Arts.

Whether the Court can consider the conduct of affairs in BVI and HK Ltd

80 This brings me to issue (iii) at [23] above and Mr Yeo's contention, forcefully put, that first, this court had no jurisdiction in a section 216 action over foreign companies, *ie*, BVI and Consultants HK, and second, even assuming there were acts of oppression in the conduct of affairs of BVI and Consultants HK within the meaning of section 216, those acts or events are irrelevant when considering the section 216 action *vis-à-vis* the Singapore companies, IPL, Fine Arts and Contemporary. Finally, Lim had failed to prove how any particular affair or conduct by BVI or HK Ltd became the affair of either Fine Arts, Contemporary or IPL so as to become the affairs of the latter.

81 There is little doubt that Mr Yeo is right on the first argument. Section 216 clearly provides, *inter alia*, remedies for shareholders or debenture holders of "a company". Under section 4 of the Act, this is defined to mean "a company incorporated pursuant to the Act or pursuant to any corresponding written law." In *Ting Sing Ning (alias Malcom Ng) v Ting Chek Swee (alias Ting Chik Sui)* [2008] 1 SLR 196, the Court of Appeal held that a foreign company, (in that case incorporated in Hong Kong) was not entitled to relief under section 216A of the Act. By a parity of reasoning, neither would section 216 apply to BVI and Consultants HK. It is therefore not surprising that Lim never served the Writ on BVI or Consultants HK even though they are named defendants. There is a more basic principle of jurisdiction - the High Court does not have jurisdiction over foreign companies under section 17(c) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed.):

> **Civil Jurisdiction – specific**
>
> 17. Without prejudice to the generality of section 16, the civil jurisdiction of the High Court shall include –
>
> …
>
> (c) jurisdiction *under any written law* relating to … companies;
>
> [emphasis added]

I am therefore bound to stay within the four corners of section 216 and the Act.

82 As for Mr Yeo's well argued second proposition, it appears the position is not covered by authority. Mr Tan's equally well argued position is that this court has jurisdiction to make the orders sought by Lim, including those relating to the foreign companies, because of the manner in which the affairs of the 'group' are all tied up. They were all operated as one integrated unit without distinction and they had a common pool of artwork, common staff, a common computer system and operated out of the same business premises and gallery. I do not think that is quite enough to justify my lifting the corporate veil: see *Adams v Cape Industries Plc* [1990] 2 WLR 657 ("*Adams")* and *Win Line (UK) Ltd v. Masterpart (Singapore) Pte Ltd* [2000] 2 SLR 98 ("*Win Line"*). In *Win Line*, Prakash J said:

> 43 The plaintiffs also submitted that the evidence disclosed that Masterpart and D&M were organised as one economic entity and for that reason it would be correct to make D&M responsible for the liabilities nominally incurred by Masterpart. That argument is one that has been made in previous cases to justify lifting the corporate veil that exists between a parent company and its subsidiaries within the same group. *Even in such a situation the argument has not been well received. In the Cape Industries case, the court considered that the concept of the group as a single economic entity could not justify any departure from the normal rule that each 'company in a group of companies … is a separate legal entity and liabilities' (see the*

judgment of Slade LJ, at p.532). Even where one company is a subsidiary of another, there is no presumption that the subsidiary is the parent company's alter ego (see p.537). Referring to the arguments in the case that all members of the Cape group of companies should be regarded as one or as being virtually the same as a partnership in which all the companies were partners, Slade LJ said:

> "In our judgment, however, *we have no discretion to reject the distinction between the members of the group as a technical point*. We agree with Scott J that the observation of Robert Goff LJ in *Bank of Tokyo v. Karon (Note)* [1987] AC 45, 64 are apposite:
>
> > [Counsel] suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically, he said, they were one. *But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be bridged*.

[emphasis added]

83 *The Albazero* [1977] AC 774 is a case along the same vein where each company in a group was treated as a separate legal entity. Concord Petroleum, a subsidiary of Occidental Petroleum, shipped a cargo of crude oil from Venezuela to Europe. During the voyage, Concord Petroleum transferred the ownership of the cargo to another subsidiary of Occidental Petroleum. The vessel and cargo were totally lost. Concord Petroleum sued the ship owner for the loss. The ship owner successfully contended that the true plaintiff with the cause of action was the assignee of Concord Petroleum, even though both companies were subsidiaries of Occidental Petroleum. The assignee could no longer bring an action because of limitation. Roskill LJ said (at 807) that it was a fundamental principle of English law:

> … long established and now unchallengeable by judicial decision…that each company in a group of companies…is a separate legal entity possessed of separate legal rights and liabilities so that the rights of one company in a group cannot be exercised by another company in that group even though the ultimate benefit of the exercise of those rights would enure beneficially to the same person or corporate body irrespective of the person or body in whom those rights were vested in law.

84 In *PP v Lew Syn Pau* [2006] 4 SLR 210, Menon JC started his judgement with this:

> 1 The study of company law often begins with the celebrated decision of the House of Lords more than a century ago in *Salomon v Salomon & Company, Ltd* [1897] AC 22 ("*Salomon*"). In that case, the House of Lords held that a company and its shareholders had separate legal personalities and that the actions and liabilities of the former were not ordinarily to be attributed to the latter. That proposition might seem trite today but its familiarity should not be allowed to obscure its continuing vitality as a fundamental principle of company law.

However, *Lew Syn Pau*'s case involved a statutory offence under section 76(1)(a)(i) of the Act which prohibited a company giving, whether directly or indirectly, financial assistance for the purpose of acquiring a company's own shares or that of a holding company. Such provisions found criminal charges and are construed strictly. As a foreign subsidiary fell outside the ambit of section 76 (since section 76(1) referred to "a company", *ie*, a company incorporated pursuant to the Act or pursuant to any corresponding written law), it was illogical that its holding company should somehow find itself to have contravened the prohibition in section 76(1)(a)(i)(A) by virtue of the action of its subsidiary which was not prohibited by that provision. Lifting the veil of incorporation to found criminal or quasi-

criminal liability was thus not allowed.

85 But for purposes other than statutory offences under the Act, is the separate legal entity principle applied strictly? The *Win Line* case illustrates that as far as contractual obligations are concerned, the law recognises each company as a separate legal entity. The 1st defendant also cited Woon's Corporations Law (LexisNexis, 2009, issue 20) (at [452]) as follows:

> In practice despite the separate legal entity doctrine a group of companies is often run as a single commercial entity. Sometimes the group is one in the legal sense of a holding company and its subsidiaries (see annotations to ss 5, 5A abd 5B); sometimes the group is a collection of companies that share a common controller. *In either case, the separate entity doctrine applies so that each company is treated by law as a separate person*: *People's Insurance Co (M) Sdn Bhd v. People's Insurance Co Ltd* [1986] 1 MLJ 68."
>
> [emphasis added]

But it is equally clear that there must be exceptions. The question therefore is how far is *Salomon* to be carried.

86 In cases where a company is used fraudulently as a front or to commit a fraud, the court will pierce the corporate veil. In *Asteroid Maritime Co Ltd v. The Owners of the ship or vessel "Saudi Al Jubail"* [1987] SGHC 71, one Mr Orri had set up a whole host of ship owning companies. The plaintiff arrested the "Saudi Al Jubail" over a charter party dispute with defendant regarding the charter of the "Fidelity". Under section 3(1)(h) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Ed), the plaintiff could only invoke the *in rem* jurisdiction if he could satisfy the court that the person who would be liable in an action *in personam* was, when the cause of action arose, the charterer of a ship and that the ship which was arrested was at the time when the action was brought, beneficially owned as respects all the share therein by the same person. The defendant applied to set aside the arrest and claimed for damages for wrongful arrest. The court found a web of one ship companies run by Mr Orri, including non-existent companies, and held that Mr Orri owned and ran Saudi Al Jubail Navigation Co Ltd, (which was a non-existent company), Omega Shipping Co Ltd, (the company that had purportedly transferred the title in the vessel to Saudi Al Jubail Navigation Co Ltd) as well as Saudi Cargo Carriers Co Ltd, (the company the defendant alleged were liable *in personam*), and was the charterer of the "Fidelity" and that Omega Shipping Co Ltd and Saudi Al Jubail Navigation Co Ltd were mere corporate names which Mr Orri had abused as a cover for his own trading and shipowning activities. The court therefore held he was the beneficial owner of the vessel at the time the writ was filed and refused to set aside the arrest. In so holding, Lai, J referred to at [23]:

> "..the practice of shipowning through a parent company and subsidiaries or through a network of associated companies with more or less common shareholders and directors"
>
> [emphasis added]

The former referred to vertical corporate structures but the latter referred to horizontal corporate structures.

87 In *Win Line* case, Prakash J said the court would only pierce the corporate veil where the corporate structure was merely a device, façade or sham and where special circumstances existed indicating that it was a mere façade concealing the true facts. The learned Judge adopted the legal reasoning of Toulson J in *Yukong Line Ltd of Korea v Rendsburg Investments Corporation (No.2), The Rialto* [1998] 1 Lloyd's Rep 322, at 328 to 320, as to when the corporate veil should be lifted where

the corporate structure is merely a device, façade or sham. But the present case is outside this group of cases.

88 In *DHN Food Distributors Ltd v. Tower Hamlets London Borough Council* [1976] 1 WLR 852 ("*DHN Food Distributors")*, DHN was the holding company in a group of three companies. BI, one of the wholly owned subsidiaries, owned freehold land which was used in the business of the holding company but BI itself did not carry on business. The other subsidiary owned the vehicles used in DHN's business. On the compulsory acquisition of the land, the DHN claimed compensation for disturbance of its business. The Court of Appeal upheld the claim with Lord Denning stating at 860 as follows:

> These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says… This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should for present purposes, be treated as one, and the parent company D.H.N., should be treated as that one. So D.H.N. are entitled to claim compensation accordingly.

The *DHN Food Distributors* case has not been enthusiastically received and this leaves some amount of uncertainty as to which cases it will be applied to in future. In *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90, the House of Lords said that the crucial factor in the *DHN Food Distributors* case was that the company operating the business had complete control and ownership over the land-owning company. In *Adams*, in dealing with the issue whether Cape Industries had a presence in the USA through its subsidiaries who sold asbestos products in the USA, the English Court of Appeal upheld the principle of separate corporate identity, even between subsidiary and holding company and in so doing approved *The Albazero* and explained the *DHN* case as one turning "on the wording of particular statutes or contracts." Slade LJ said at 536 that "save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v A Salomon & Co Ltd* [1987] AC 22 merely because it considers that justice so requires." The House of Lord dismissed a petition by the plaintiff to appeal.

89 In the *Win Line* case, Prakash J did not say whether *DHN Food Distributors* would be applied in Singapore but distinguished it from the case before her on the basis that the group she was dealing with did not have common shareholders.

90 *Kumagai Gumi Co Ltd v Zenecon Pte Ltd* [1995] 2 SLR 297 ("*Kumagai"*), is a case nearer point. Here the Court of Appeal lifted the corporate veil in an oppression action under section 216 and considered the affairs of one company, the subsidiary, as being the affairs of the holding company where (a) the holding company nominated a director to the subsidiary's board and (b) the holding company had an interest in the nominee director discharging his duties to the subsidiary. Conduct which is a breach of the nominee director's duties to the subsidiary may be considered as relevant conduct in the affairs of the holding company for the purposes of determining oppression under section 216. The Court of Appeal said at [57]:

> It was certainly in the interests of KZ [the holding company which was a joint venture of two companies, Kumagai and Zenecon] that Low [KZ's nominee director in the subsidiary, KPM] should discharge his duties as director of KPM properly. Therefore, when Low was acting as a director of KPM, he was also acting as nominee of KZ. When he and his co-directors of KPM carried on the business of KPM, which served only the interest of Low and/or Zenecon [Low's company] and in disregard of the interest of KZ, he acted in breach of his duty to KZ, and such conduct on his

part was also conduct in the affairs of KZ and oppressive to Kumagai as a shareholder of KZ.

This principle and reasoning is supported by some English and Australian cases.

91 In *Nicholas v Soundcraft Electronics Ltd* [1993] BCLC 360 ("*Nicholas"*), a minority oppression petition under section 459 of the 1985 English Companies Act was presented in respect of a subsidiary. The holding company, Electronics, held 75% of the subsidiaries shares with the balance held by 2 individuals. It had been agreed that Electronics would support the subsidiary until it was financially viable although the extent of the support was not defined. In the event Electronics withheld support. It was held that since Electronics exercised detailed control over the affairs of the subsidiary, it was doing so as part of its control over its subsidiary's affairs, the non- payment therefore did related to the manner in which the affairs of the subsidiary were conducted. Fox LJ said, at 364:

> It seems to me that Electronics, when it withheld payments from the company, was doing so as part of general control of the financial affairs of the company. It exercised that general control be deciding how much the company should receive (by withholding sums due to the company) and restricting the company's ability to spend money (by the signature requirements on cheques drawn by the company). In my view Electronics, when it withheld from the company payments which were due to the company, was conducting the affairs of the company.

Further, Ralph Gibson LJ said, at 368:

> It is in accordance with the view expressed by Lord President Cooper that *the section warrants the court in looking at the business realities of a situation, and does not confine them to a narrow, legalistic view*. Those statements apply, in my judgment to the current provisions of the Companies Act 1985, which Fox LJ has set out in his judgment.
>
> [emphasis added]

92 This was followed by *Gross v Rackind, Re Citybranch Group Ltd* [2004] 4 All ER 735 which involved the striking out of a minority oppression action under section 459(1) of the 1985 English Companies Act, on the basis that the prejudicial conduct related to the conduct of a subsidiary. A petition was brought to wind up Citybranch Group Ltd ("the company") by shareholders (the "Rackinds") owning 50% of the shares. The other shareholders petitioned for minority oppression. One of the acts relied upon to support the petition for minority oppression was that Mr Rackind had dishonestly or improperly appropriated the funds of a wholly-owned subsidiary of the company ("Citybranch"). On that basis, the Rackinds applied to strike out the action. The Court of Appeal cited the *Nicholas* case with approval and held that the conduct in the affairs of one company could also be conduct of the affairs of another, since a holding company had been held to have been conducting the affairs of a subsidiary. Sir Martin Nourse, in discussing *R v Board of Trade, Ex p St Martins Preserving Co Ltd* [1964] 2 All ER 561 ("*Board of Trade")* (which involved a company seeking an order for mandamus against the Board of Trade for the appointment of an Inspector to investigate the affairs of the company and the question was whether the affairs of the company ceased to be its affairs on the appointment of a receiver and manager and the court there held it had not), first cited Phillimore J and then said, at [25] & [26]:

> Phillimore J, who gave the leading judgment, said, at p.613:
>
> > In speaking of "its affairs" in connection with a company, the natural meaning of the words connotes *'its business affairs*.' What are 'its affairs' when the company is in full control? They

> must surely include *its goodwill, its profits or losses, its contracts and assets including its shareholding in and ability to control the affairs of a subsidiary, or perhaps in the latter regard, a subsidiary such as Atholl Houses Ltd*. In ordinary parlance the affairs of the applicant company must surely have included its shareholding in TG Tickler Ltd, and its power in virtue of that shareholding to control the board of that subsidiary and the disposition of Atholl Houses Lrd, the wholly owned sub-subsidiary.
>
> TG Tickler was a 98% subsidiary of the company and Atholl Houses Ltd was a wholly-owned subsidiary of TG Tickler Ltd.
>
> *The observations of Phillimore J demonstrate that the expression "the affairs of the company" is one of the widest import which can include the affairs of a subsidiary. Equally, I would hold that the affairs of a subsidiary can also be the affairs of its holding company, expecially where, as here, the directors of the holding company, which necessarily controls the affairs of the subsidiary, also represent a majority of the directors of the subsidiary*.
>
> [emphasis added]

The English Court of Appeal followed the NSW Supreme Court decision of *Re Dernacourt Investments Pty Ltd* [1990] 2 ACSR 553 ("*Dernacourt"*): see below at [95].

93 The above cases, including the *Kumagai Gumi* case, involve holding and subsidiary companies. In the present case Lim holds 40% and Ms Chan holds 60% in each of the different companies – the Singapore companies, Fine Arts and Contemporary, and the foreign companies, BVI and HK Ltd. They are also the only directors of these companies. There is no holding and subsidiary, or vertical structure but a horizontal corporate structure with common shareholders, holding identical proportions of shares, and who are directors in all these companies. Mr Yeo relies upon *Grandactual* which involved a horizontal corporate structure. There were two companies. G was the restaurant operating company in London, and the other IL, (an Isle of Man company), under the same ownership and owned in the same proportions as the shares in G, holding the intellectual property rights. G entered into licensing agreement with IL with IL receiving a royalty of 2% of the gross sales or G. There were three classes of shares in the companies: A shares, (41,000 shares of one penny each) which were voting shares, C shares, (2 million shares of one penny each), which were redeemable, non-voting cumulative preference shares issued to outside investors and B shares, (2 million shares of one penny each), which were non-voting and could be acquired by C shareholders once the C shares had been redeemed. Until redemption, profits would be split 90:10 in favour of the investors, upon redemption, future profits would be split 50:50 between the A and B shareholders. When further financing was required for G, inadvertently, more C shares were issued exceeding the amount of the authorised share capital. There was also a mistake in G's articles which provided for redemption of the C shares at its nominal value instead of the price paid for them by the C shareholders. Some nine years later, disputes arose. The directors of G attempted to amend the articles but the petitioners, who held C shares, refused to support the amendment. No similar problem stopped the redemption of C shares in IL since IL had always retained a positive surplus and no one could complain if the directors redeemed the C shares at the price paid for them. That was done by IL but the petitioners refused to accept the redemption moneys. The petitioners brought an application to rectify oppressive acts that were unfairly prejudicial to them as shareholders of G. It was alleged, *inter alia*, that the majority shareholders had redeemed shares in IL without redeeming shares in G, (a failure to maintain similar capital structures in G and IL), so the net effect was that the majority shareholders, (who also owned majority shares in G), stood to receive 50% of the profits in IL. The majority shareholders applied to strike out the petition on the basis that the allegations related to the affairs of IL, not G. The petitioner argued that the allegations also related to G as well as IL as both companies were under

the control of the majority shareholders and that both form part of the overall scheme set out in the original business plan and on the strength of which, the petitioners took shares in G. As noted previously, Sir Donald also held that the petitioners could not complain about the conduct of the company's affairs in which the petitioners had participated without protest for nine years before presentation of the petition. The learned Judge agreed with the respondents that the affairs of IL were not the affairs of G, and said, at [29], that:

> …it may in certain cases be possible to say that conduct of the affairs of one company also constitute conduct of the affairs of another when the first company either is controlled by or has control of the other. That, if I may say so, is perfectly understandable. However, the principle is of no avail to the petitioners in the present case, in which IL had no power to control the company [G] and was subject to no power of control by the company. Mr Green sought to argue that the first to third respondents as directors of the company had control over IL… In my judgment, the fact that they also had control over the company cannot be said to make the affairs of one company the affairs of the other, and I so decide.

94 There were two *rationes decidendi* in *Grandactual*. The first was based on acquiescence and participation in the conduct for complained against for nine years. That would have disposed of the petition. The second was that the affairs of IL were not the affairs of G. The second *ratio decidendi* would also have disposed of the petition independent of the first. Whilst the second *ratio decidendi* ruled that in a horizontal two company structure, even with common controlling shareholders, the affairs of one are not the affairs of the other, it appears from subsequent judgements that categories may not be closed. In *Hawkes v Cuddy (No.2)* [2007] EWHC 2999 ("*Hawkes")*, two businessmen, C and H agreed to establish a company that came to be known as Neath Rugby Ltd, ("Neath"), which would in turn acquire a rugby club. Both would own one share. Neath was entitled to appoint a nominee director to sit on the board of a company known as South West Wales Ruby Ltd ("SWL") which owned a regional rugby club known as Ospreys. C was nominated to fill this appointment. Later H petitioned to be allowed to buy-out C's share in Neath on the basis that the affairs of Neath was being conducted in a manner unfairly prejudicial to him. H argued that C did not, as Neath's nominee director to SWL, protect the interests of Neath. C applied to strike out the petition. Although the facts concerned a vertical structure, Lewinson J did not seem to discount the possibility of the affairs of one company being considered the affairs of another, non-related company and held at [207] and [213]:

> *There is some learning on the question of whether the affairs of one company can count as the affairs of another. There is no absolute rule that the affairs of one company cannot count as the affairs of another; but the question is fact-sensitive. In looking at the facts, the court must look at the business realities and must not adopt a narrow, legalistic view*.
>
> …
>
> Sir Donald's formulation of the principle [in *Grandactual*] rests on the fact of control by one company over another. If company A controls company B then the affairs of company B can count as the affairs of company A, and vice versa. This has the merit of a simple and straightforward test. Commonality of directors is also an important feature. Neither feature is present in this case. Mr Chivers said that in the present case there was negative control, in the sense that Neath could block action by the Ospreys by instructing the nominee director not to agree to a proposal made by the other. I reject this submission for two reasons. First, I do not consider that Neath would have been entitled to instruct its nominee director to cast his note in a particular way, still less to vote against something that he believed was in the best interests of the Ospreys. Secondly, the concept of negative control is not one that appears in the cases, and

in my judgement goes too far. Even a 26 per cent shareholder has a form of negative control in the sense that he can block a special resolution, but in such a case I do not consider that that form of negative control would make the affairs of the one company the affair of the other … I am not persuaded that in any general sense it is possible to say that the affairs of the Ospreys are the affairs of Neath.

[emphasis added]

95 In Australia, the *DHN Food Distributors* case has been interpreted as meaning that the separate personalities of companies in a group may be ignored only if "there is in fact or in law a partnership between.." them: see *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* (1986) 5 NSWLR 254 at 267. The Australian cases follow the English cases and the *Kumagai* decision in extending the section 216 principle to one company's affairs being the affairs of another in a holding-subsidiary or *vice versa* situation. In *In re Norvabron Pty Ltd (No.2)* (1986) 11 ACLR 279, Norvabron was a holding company which had a wholly owned subsidiary, Transfield. A petition was brought alleging minority oppression in respect of Norvabron. Derrington J, at 292, dismissed the argument that the conduct relied upon is limited to the affairs of Transfield whereas the application was necessarily directed at Norvabron as being "artificial in the extreme. The technical answer is that the directors of Norvabron knew very well what was happening in respect of Transfield … because they were the persons involved." This decision was followed in *Dernacourt* where Powell J at 556 and 561 said:

The words 'affairs of the company' are extremely wide and should be construed liberally: (a) in determining the ambit of the 'affairs' of the parent company for the purposes of section 320, the court looks at the business realities of a situation and does not confine them to narrow legalistic view; (b) 'affairs' of a company encompass all matters which may come before its board for consideration; (c) conduct of the 'affairs' of a parent includes refraining from procuring a subsidiary to do something or condoning by inaction an act of a subsidiary, particularly when the directors of the parent and the subsidiary are the same...

Although the relevant plaintiff must demonstrate that it is the relevant company's affairs which are being so conducted, I am prepared to proceed on the bases, first, that in an appropriate case, the conduct of a holding company, or of such of its directors who happen to be directors of the relevant subsidiary, towards a subsidiary, may constitute the conduct in the affairs of that subsidiary; (*Scottish Cooperative Wholesale Society Ltd v Meyer* [[1959] AC 324]), and, secondly, that, in an appropriate case, the conduct of a subsidiary, or of some or all of its directors who happen as well to be directors of the holding company, may be regarded as part of the conduct of the affairs of the holding company: *In re Norvabron Pty Ltd (No.2)* [11 ACLR 279]...

These Australian cases seem to lay down two requirements for the affairs of one company to be the affairs of another. First there must be the holding-subsidiary structure, and secondly, they must have common directors. In *Morgan v 45 Flers Avenue Pty Ltd* (1986) 1 ACLR 361, the Supreme Court of New South Wales held that there is a presumption, until the contrary is proved, that the board deliberations of a director appointed by a corporate shareholder do not fall within the affairs of that shareholder. This seems to suggest that the more important factor is the control by common directors.

96 The question to be asked is: what is the mischief that the courts set out to remedy in section 216 action? The obvious case is where the majority shareholder(s) are guilty of unfairly prejudicial conduct in the affairs of a company to the detriment of the minority shareholder(s). In *Kumagai* our Courts, like the English and Australian courts, are willing to intervene where the unfairly

prejudicial conduct in one company, a subsidiary, affects the affairs of the holding company and thereby also becomes the affairs of the holding company. The converse also holds true where the facts warrant it. Another situation where the courts will be willing to consider that conduct in the affairs of Company A will affect the affairs of Company B must be those special cases where the court is willing pierce or lift the corporate veil, *eg*, where there is fraud. Cases like *Win Line* show that where only contractual obligations are involved, stringent threshold criterion have to be met before the courts are willing to lift the corporate veil. Further, the lack of common shareholders indicate the enforcement of the separate legal entity doctrine strictly. These cases are therefore few and far between. Are the category of exceptions closed? I do not think they necessarily are but courts should be slow to create new ones. There is a line of thinking that a court should be able to pierce the corporate where the "justice of the case" demands it: see *Walter Woon on Company Law* (Revised 3rd Ed, 2009) at [2.86-2.87] citing *Tengku Abdullah ibni Sultan Abu Bakar v Mohd Latiff bin Shah Mohd* [1996] 2 MLJ 265. In my view this should not be followed. It is inherently vague to be a concept of much guidance and would be akin to equity being measured by the length of the Lord Chancellor's foot. I agree with the following passage in Gower & Davies, *Principles of Modern Company Law* by Paul L Davies (8th Ed, Sweet & Maxwell 2008) at [8-11]:

> Although the interests of justice may provide the policy impetus for creating exceptions to the doctrines of separate legal personality and limited liability, as an exception in itself it suffers from the defect of being inherently vague and providing to neither courts nor those engaged in business any clear guidance as to when the normal company law rules should be displaced. Consequently, it is difficult to find cases in which 'the interests of justice' have represented more than simply a way of referring to the grounds identified above in which the veil of incorporation has been pierced.

The English, (save for the *Grandactual* case) and Australian judgments cited say that the phrase 'the affairs of the company" are extremely wide and should be construed liberally, the courts look at the business realities of a situation and do not confine them to a narrow legalistic view. The use of such phrases indicates that the courts should not be straight jacketed when it comes to dealing with issues like those in section 216. Hence, cases like the *DHN Food Distributors* case. But I accept there are limits in adjudicating section 216 actions, the courts have to stay within the powers conferred by that section, *eg*. a court is not free to make an order or direction against a foreign company under section 216.

97 In the final analysis, under section 216, why are the affairs of one company, the subsidiary, also the affairs of another company, the holding company? The answer must be because the plaintiff was able to show, on the facts, that the affairs of the subsidiary actually affected or impacted the holding company. It is based on purpose of the section, the mischief it intends to address and why on certain facts, the separate legal entity principle must give way but only insofar as it is necessary, to fulfil the purpose of and policy behind that provision. Margaret Chew, *Minority Shareholders' Rights and Remedies*, (2nd Ed, 2007), which has been cited with approval in a number of cases, argues at 122 that a compendious interpretative approach with an emphasis on the rationale and purpose of section 216 should be adopted. The starting point must be that the onus of proof is on the party alleging the affairs of Company A are also the affairs of Company B. If a party can show it does, then in my view, the courts can intervene on that basis, but subject to the limitations of section 216. *Re Grandactual* shows that common shareholders and directors with similar proportioned shareholding in both companies does not, *per se*, entitle the complainant to say therefore the affairs of Company A must necessarily affect and be the affairs of Company B. Just because Company A is a subsidiary or parent of Company B *per se* too would also not be sufficient. Delay in bringing the action or acquiescence in the conduct of the affairs of the company destroy the right of a plaintiff under

section 216. The cases cited above also show that just because the companies are operating as one economic unit is insufficient; the contrast can be seen in cases like *The Albazero*, which are the rule, and the exceptional case of *DHN Food Distributors* which is a decision on its own special facts, *ie*, a case of assessing quantum of compensation in a land acquisition case and where the facts show the "subsidiaries are bound hand and foot to the parent and must do just what the parent company says." The complainant must be able to show something more, including how the conduct of the affairs of Company A are affecting the affairs of Company B.

98 If the position were otherwise, there will be a serious gap in the remedies available to an aggrieved minority shareholder. The horizontal structure of these companies here are not an uncommon business model. There are many one ship companies whose shares are held by the same shareholders and they often have the same directors. Conduct which is clearly oppressive and commercially unfair in the 'group' can be shielded from a section 216 action by ensuring the profits and assets of the local company are stashed away in the foreign company. This can be done legally, without wrongful conduct, *eg*, revenue generating sales can be booked into the foreign company through a slanted contract with the local company bearing the costs or expenses thereby benefiting the foreign company. These can be perfectly legal and tax planning arrangements. The local company just about breaks even or books a small and sustainable loss each year. The majority shareholder then refuses to declare dividends in the foreign company, removes the minority shareholder as a director of the foreign company and terminates his employment in the foreign company but otherwise leaves the minority shareholder untouched in the local company. In such a situation if there are the same 2 shareholders in the foreign company and the local company and the same 2 persons are also the only directors in both the foreign and local company, does the minority shareholder have no remedy in Singapore? Does he have to take his dispute to and litigate in two jurisdictions?

99 The artificial nature of a company as a separate person or legal entity in the eyes of the law has to be remembered and decisions for and actions by it have to be taken for it by natural persons: see Gower & Davies, *Principles of Modern Company Law* at [7-1]. A company acts through its board of directors or its managing director or its officers or employees. In the words of Lord Denning MR in *HL Bolton (Engineering) Co Ltd v. TJ Graham & Sons Ltd* [1957] 1 QB 159 at 172, we look to the "directing mind and will of the company"; see also *New Line Productions Inc v. Aglow Video Pte Ltd* [2005] 3 SLR 660 below. Here we have a fact situation that does not appear in any of the cases cited above. There are only 2 shareholders and directors in all the companies; their shareholding is in the same proportion. The business is a very special kind of business and not a common commercial activity. The books and papers of Fine Arts, Contemporary and BVI are kept in the Fine Arts office. The employees, until more recent times, were all employed by Fine Arts and in Singapore. The two directors and shareholders reside in Singapore, hold their meetings for Fine Arts, Contemporary, BVI, HK Ltd and IPL and make their decisions in Singapore. More accurately, until they fell out, Ms Chan made all the important decisions and he went along. The business address of BVI is the service provider in Hong Kong, not the British Virgin Islands. No meetings are hold in the British Virgin Islands nor is there a place of business there. The artificial nature of a corporation being a separate legal entity is, for that very reason, recognised in conflict of law situations: see **Dicey & Morris: The Conflict of Laws (14th Ed., 2006), Vol.2, 30R-001 – 30R-002**: The domicile of a corporation is in the country under whose law it is incorporated and a corporation is resident in the country where the central management and control is exercised. There is no doubt that on the facts, Ms Chan is the mind and directing will of IPL, Fine Arts, BVI, HK Ltd and Contemporary. I am therefore of the view that I can take the conduct and affairs of BVI and HK Ltd into account if they also affect or impact the Singapore companies.

100 If Lim can show, and the onus is on him to do so, for example that various sums of money which were from art works sold through the Singapore companies but were banked into BVI's account

and invested, then withdrawals of money made by Ms Chan from BVI's account in circumstances which amount to unfairly prejudicial conduct must also be so in the Singapore companies as it impacts Lim *qua* shareholder of the local companies, Lim must have some remedy under section 216. Similarly if Lim can prove Ms Chan refused to declare dividends because of a lack of profits in the Singapore companies as most of the profits were booked, at Ms Chan's sole discretion into BVI, that too would amount to unfairly prejudicial conduct to Lim *qua* shareholder of the local companies. So too if Lim can prove that Ms Chan made the Singapore companies bear all the expenses but booked the majority of the sales into BVI thus rendering the local companies into loss position or negative equity through oppressive conduct. The question for me therefore is whether Lim had proved the allegations made by him and whether they are such as would affect the affairs of the local companies. I therefore return to the facts and my findings and the application of the law to them.

Whether the Acts Complained of Amount to Oppression within the Meaning of Section 216

101 I find that once Ms Chan decided to end her relationship with Lim on 15 April 2008, she embarked on a series of actions to cut him off. These actions were totally different in character from her actions up to December 2007 and early March 2008 and will have to be carefully examined.

102 Ms Chan's first rude awakening that Lim was a shareholder in Fine Arts, BVI, HK Ltd and Contemporary, whether she liked it or not, came when he asked her to buy him out during their quarrel over the Dubai project on 7 or 8 March 2008. That resulted in her rushing over to Vivienne Lee, pouring out her sorrows and grievances and then instructing Ms Vivienne Lee to issue only 5% of the shares in Contemporary to Lim and 95% to her. About a month later, Lim made his trip to Taiwan trip which resulted in the sms messages on 15 April 2008 and the cancellation of Ms Chan supplementary credit cards issued to Lim. At or around this period, Ms Chan must have also realised that she had been ploughing back the profits all these years and had actually also built up those entities where Lim held a 40% share.

(a) Misappropriation of 'Group Funds'

103 Lim complains about 4 sums that were withdrawn by Ms Chan. The first is the sum of S$4,021,000 which Ms Chan withdrew around 23 April 2008 from the BVI account with Clariden Leu. This was some 8 days after she sent the sms messages to Lim. Ms Chan obviously realised that she had been funding the companies and ploughing back the profits all these years, Lim had never paid anything for his shares, had contributed only very peripherally to the business and now Lim was going to be able to lay claim on a 40% stake in some or all of the companies. Ms Chan says she withdrew this money because they formed part of her loans to the companies. The reason why she suddenly found it desirable to withdraw her loans is obvious. She may have decided to break off all relationship with him but he was still a 40% shareholder in some of the companies. And she had ploughed back a lot of the profits into those companies. However some friends of Ms Chan told her that this withdrawal was 'not fair' to Lim and despite the serious quarrel they had on 5 May 2008, Ms Chan put the S$4.021 million back on or around 9 June 200.

104 On the 12 June 2008, because of Lim's hostility, shouting and disruption, Ms Chan asked him, and through his lawyers agreed, to take paid leave. About a fortnight after that, Ms Chan again withdrew sums of money amounting to S$4.38 million on 23 and 24 June 2008. The evidence shows four sums totalling S$4.38 million drawn over two days, but nothing turns on that. These withdrawals were, Ms Chan says, on the same basis, they were loans made to BVI by Ms Chan. Again she returned the S$4.38 million on or around 29 July 2008.

105 Misappropriation of company funds by a majority shareholder is a classic act of oppression: see

Re Elgindata Ltd [1991] BCLC 959 where that court said:

> By its very nature the misapplication of a company's assets by those in control of its affairs for their own benefit or for the benefit of their family members and friends, is unfairly prejudicial to the interests of the minority shareholders.

But was this really a misappropriation in the true sense of the word? I do not think that is entirely correct a characterisation. The complaint is more accurately this: Ms Chan unilaterally withdrew these substantial sums without consulting Lim and without Lim's consent. There is no doubt that Ms Chan had made loans to the entities. Lim accepts that all the capital and funding of these entities was by Ms Chan. He did not contribute a cent in monetary terms.

106 Ms Chan says her withdrawal of the S$4.021 million from BVI was to secure her outstanding loans to IPL, Fine Arts, BVI and HK Ltd. This must mean, and I so find, that funds in excess of what was necessary to keep the companies going, were put into BVI's account with Clariden Leu. It cannot be disputed that Ms Chan lent substantial funds to these entities. Neither can Lim dispute this; if he tried to, all that is needed is to show that he signed the audited accounts of IPL and Fine Arts, where the loans from Ms Chan are clearly set out. At YE 2007, Ms Chan's loan to IPL stood at S$710,623 and to Fine Arts at S$30,256. There was no loan from Ms Chan to HK Ltd reflected in the accounts up to 31 March 2008. I do not have the accounts for BVI. The total loans to IPL and Fine Arts come up to S$740,879 at YE 2007.

107 Ms Chan claims that she made a loan of S$1,186,202.29 to BVI in November 2005 to open the BVI Clariden Leu account. The opening of this account is consistent with the sales picking up in 2004 and 2005 and the setting up of BVI in October 2005. Lim says this sum was taken from sales effected by the 'group', especially Consultants HK and was but mere accounting for the proceeds since all the entities were run as one group. It was therefore not really a loan at all. Lim points to evidence (5 invoices exhibited by him) which shows that sales were made through Consultants HK, amount to S$313,488. Lim also points to Ms Chan's admission in [158] of her AEIC that the entire remittance of S$1,186,202.29 came from the sales made through Consultants HK. I have considered the evidence and the cross-examination of both parties and I find that the sum of S$1,186,202.29 was remitted by Ms Chan to BVI as a loan in November 2005 to open the BVI account. Consultants HK is the sole proprietorship of Ms Chan and whatever profits come from Consultants HK belong to her. Similarly, I find the sum of HK$603,436 at [161] of her AEIC, also from the sales affected by Consultants HK, belongs solely to Ms Chan and this too was a loan from her to BVI. There was no need for her to account for it to 'the group' as Lim contends.

108 Ms Chan claimed she deposited another S$1,582,941.34 as a loan to BVI in November 2006. This too was contested in cross-examination and challenged as a mere accounting for proceeds of sale by the 'group' of the Ju Ming sculptures. Ms Chan's reason for depositing this sum was also contested by Lim as unbelievable. Having heard and weighed the evidence, I find that Ms Chan also made a further loan of S$1,582,941.34 to BVI in November 2006 through the sale of the Ju Ming sculptures which were acquired from her own personal funds. I also accept her reason for this deposit for possible leases in Hong Kong, Taipei and/or Beijing. 2006 and 2007 were the best years and with the large sales in 2004, I accept that Ms Chan was preparing for expansion. I do not know if there were any other loans, but these sums came up to about S$2,876,434.

109 Lim's only real complaint was not that the loan was made, as the evidence on the remittance is quite clear, but that these were purportedly from proceeds of sales transacted by 'the group', including the sole proprietorships, and therefore Ms Chan must account to 'the group' for this amount. I do not accept that submission. I have found that Lim never objected to the setting up of these sole

proprietorships nor did he object when some of the sales were made through these entities all though the years. I have also found and held that Consultants and Consultants HK belong to Ms Chan solely and Lim has no share in them. It is also clear from the evidence that Ms Chan had her own accounts from which she made loans to the entities and also had a personal account with Clariden Leu well before BVI opened an account with them. The documents clearly show two different accounts with not insubstantial sums of money.

110 Ms Chan withdrew these two large sums as a clear knee-jerk reaction to the quarrels she was having with Lim over this period and when it sank home that ending her personal relationship with him still left him a 40% shareholder in some of the companies she had set up. Both these sums have been returned within one to one and a half months after their withdrawal. There is no prejudice to Lim. Mr Yeo contends, correctly, that the act of oppression and the effects have already ceased and to properly found an action for oppression under section 216, it must be continuing at the time the actions is brought: see *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 ("*Re Kong Thai*") and *Walter Woon on Company Law* at [5.56]. However that is not to say that a court cannot take cognisance of the fact that a large unilateral withdrawal was made, not once but twice. I also accept that Ms Chan was not forthcoming when he was seeking information on these sums. In *Re Kong Thai*, the complaint was that A and B had made drawings by way of loans of a considerable amount from the company, unauthorised by the board and in contravention of the Companies Act, unsecured, made at a time when the company was under capitalised and without a charge being made for interest. By the time of the hearing, all these loans had been repaid with interest. Lord Wilberforce nonetheless noted whilst there is no particular relief needed or can be given in respect of these acts, they nonetheless remain material evidence of 'oppression' or disregard; he held:

> Thirdly, in a number of United Kingdom decisions it has been held that for s 210 to apply the complainant must show oppression continuing up to the date of proceedings (e.g. *Re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042); where there has been oppression in the past, the section does not bite. Their Lordships agree that the wording of the section (and the same is true of s 181(1)(a)) relates to a present state of affairs: "are being conducted", powers "are being exercised" are grammatically clear: the language may be contrasted with that of s 181(1)(b) which refers to an act of the company which has been done or threatened. But this argument must not be taken too far. What is attacked by sub-s (1)(a)) is not particular acts but the manner in which the affairs of the company are being conducted or the powers of the directors exercised. And these may be held to be "oppressive" or "in disregard" even though a particular objectionable act may have been remedied. *A last minute correction by the majority may well leave open a finding that, as shown by its conduct over a period, a firm tendency or propensity still exists at the time of the proceedings to oppress the minority or to disregard its interests so calling for a remedy under the section. This point is well brought out in Re Bright Pine Mills Pty Ltd [1969] VR 1002, 1011-2*.
>
> [emphasis added]

Similarly in *Re Spargos Mining NL* (1990) 3 ACSR 1, Murray J held:

> It is clear, I think, from the section itself that it is not necessary that the unfairness be continuing at the time of the petition or at the time when the court comes to consider the matter. But, of course, past unfairness referable to particular acts or omissions may lead a court to exercise its discretion to particularly seek to remedy the result of that particular act or omission or may cause the court to conclude that in the exercise of its discretion there is no present requirement for the grant of relief in relation to past oppression. The operation of the section is not in that sense to be construed as in any way punitive and, of course, I have already

> referred to the point noted in Wayde's case as well as in Thomas' case, that the court will be reluctant to intervene if to do so really makes the application of the section a process in which the court, without clear justification simply takes over the management of the company.
>
> Certainly it is to be noted that s 320(2)(a) speaks of an opinion of the court about oppression or unfairness in the present tense and there is authority to support the view that so far as that provision is concerned, at least, the oppression must be continuing as at the date of the petition and the hearing: see Re Jermyn Street Turkish Baths Ltd [1971] 1 WLR 1042 at 1059 (although that was an extreme case, relating to a share issue which had taken place 15 years prior to the proceedings); ; Re Bright Pine Mills Pty Ltd [1969] VR 1002 at 1012; ; Re Tivoli Freeholds Ltd [1972] VR 445 at 452-4 ; Re Campbell Tube Products Ltd [1976]1 NZLR 64 at 71-2 ; Re Anti-Corrosive Treatments Ltd (1980) ACLC 34,165 at 34,170.
>
> Of course, I think it is equally clear that the broader formulation of s 320 since the decisions cited above, indicates clearly that the court is not to be fettered in determining the existence of grounds for relief by such considerations and past conduct will clearly ground the relief under s 320(2)(b), and relief within the broad generality of powers which then follows.

111 Lim's complaint over a third sum goes back somewhat earlier than the above withdrawals in April and June 2008. There was an earlier withdrawal of S$550,000 from BVI on 19 October 2007. However this sum was withdrawn under very different circumstances. Ms Chan wanted to buy a Porsche. I accept her evidence that Lim not only willingly stood by without demur, on the contrary he said that she had worked so hard and she deserved the car. He admitted he went to the showroom with her to look at the car. However in the event Ms Chan did not buy the car as there was a long waiting list but purchased a second-had Porsche Targa instead. I accept the unchallenged evidence of Ms Chan that Lim also drove the car whenever he wished to and Ms Chan exhibited her insurance certificate which showed Lim as a named driver. Ms Chan had therefore withdrawn this sum with his knowledge. During that period, they were still on a 'good friends' relationship and she was still buying Lim gifts, she was still providing him with his credit card and she had given him over S$100,000 from the IPO speculation. Not only did Lim not have any ground to complain about this withdrawal, on the contrary, I find that he agreed to it. Further I do not accept his evidence that he expected to draw out a sum equivalent to his 40% shareholding as well at some time in the future since he had no immediate need for any money. He had to admit under cross-examination, yet once more, that he never said anything about this to Ms Chan at all and he never raised this until he commenced this action.

112 The remaining complaint is the withdrawal of the S$420,000 from IPL's UOB account in June 2008. There were clearly director's loans booked into IPL's audited accounts in amounts that exceeded this S$420,000. I have also found that Lim has only one share in IPL and he holds that as a nominee of Ms Chan. Ms Chan is entitled to obtain repayment of her loan and Lim has not entitled to object. A complaint that this repayment was procured without a board resolution is not a valid complaint. The evidence is that the companies were run informally without board resolutions for day-to-day matters and Lim himself conceded under cross-examination that it was never the practice to pass board resolutions for such matters.

113 Of the four sums alleged to be acts of oppression or commercially unfair conduct, the last two are clearly not so. The unilateral withdrawals of the S$4.021 million and the S$4.38 million could have been acts of oppression or commercially unfair conduct but they were returned shortly after they were taken out without loss to the companies. Whilst they are not acts of oppression in themselves, they are unilateral withdrawals of large sums of money which I can take cognisance of when considering the totality of the allegations and consider what remedies should be applied.

(b) Failure to Pay Dividends

114 Lim claims another act of oppression is the failure to pay dividends when there is such a huge cash hoard of S$10 million in the 'group'. It is well settled that the payment of dividends is a commercial decision and courts are reluctant to interfere unless the directors are shown to have exercised their powers for improper purposes or in bad faith without commercial justification: see Robin Hollington, *Shareholders' Rights*, (Sweet & Maxwell, 5th Ed. 2005) at [7-112]. *Walter Woon on Company Law* at [12.87] states:

> A member has no unconditional right to receive dividends. Even for preference shareholders there is no obligation on a company to pay dividends when profits are available, unless there is a specific provision in the articles that gives a right to a dividend. Assuming that profits are available the decision as to the quantum (if any) of dividends to be paid is a matter of business, not of law. A shareholder cannot compel a company to declare dividends. However, the consistent refusal of majority shareholders to declare dividends when profits are available may amount to unfairness to minority shareholders justifying relief under s 216, especially if the majority are being remunerated in some other way.

Gower and Davies*, Principles of Modern Company Law* at [20-11] similarly states:

> Thus, minority shareholders have no legitimate expectation that dividends will be paid just because they are shareholders in a quasi-partnership company. However, there may be particular circumstances in which the payment of no or only derisory dividends will amount to unfair prejudice, for example, where there was an arrangement that all the profits of the company would be taken out of the company in one way or another; that the fiscally efficient way of doing this had been to pay large remuneration to the directors; and that the fact that the petition was not a director deprived the petitioner of any share of the profits.

In *Re Tri-Circle Investment Pte Ltd* [1993] 2 SLR 523, Prakash J said at [41]:

> The court, however, is not here to second guess management decisions of corporations. As long as such decisions are taken honestly and in good faith the fact that they are wrong decisions does not entitled disgruntled shareholders to apply for relief under section 216.

115 Ms Chan had two reasons for not declaring dividends. The first was her concerns over the unprecedented economic crash of September 2008 which would impact greatly on the art industry and businesses. This was a bona fide commercial decision taken in what she honestly believed were the best interests of the companies. Rex Chan also bore this out – in fact he had warned her about the dismal economic outlook in the course of their conversations in 2006 and 2007, he advised that she should liquidate her investments, sell as much as possible and preserve as much capital as possible in preparation for re-investing in the downturn. Rex Chan also exhibited some contemporaneous emailed articles from July 2007 to January 2008. One of his emails to Ms Chan, dated 20 October 2007, quoted his September 2007 newsletter: "Given Asia's increased dependence on the US consumer, we expect a rude awakening soon." Ms Chan therefore started looking at how to cut costs. In 2009, with hindsight, Ms Chan and Rex Chan were proved right. Sales plummeted for 2009. Ms Chan also gave the reason that until she sorted out the accounts, she would not know what the profits were. I will deal with this reason below.

116 I do not find that Lim has proved that the companies have such a huge cash hoard as alleged. Lim puts forward the sum of S$10 million but accepts that this will only be so if I do not find that Ms Chan made the loans referred to above and that all the companies are brought into one group. If I

add up the three loans, (converting the HK$603,436 as above), they amount to over S$2.876 million. When Lim asked Rex Chan for his view as to whether S$2 million was the correct assessment of his stake, Rex Chan was shocked and thought it was a ridiculously large sum of money and told Lim so. Rex Chan has assessed and valued companies for 10 years of his professional life. On balance, and subject to the caveat below, I accept Ms Chan's reasons for not declaring any bonus as a bona fide commercial decision and I do not find this to be an act of oppression.

117 The caveat is this. If Ms Chan could withdraw such large sums, over S$4 million each time, it raises the question whether Lim is possibly correct in his complaint about the lack of dividends being paid out. There is a significant cash surplus held in BVI. I doubt very much if it is S$10 million as Lim claims. Even if we take away the S$2.876 million and then those sums which belong to entities where Lim has no share, like IPL, Consultants and Consultants HK, there was still enough for Ms Chan to withdraw slightly over S$4 million each time. Exactly how much there is there I am unable to ascertain. The Clariden Leu current account of BVI at 3AB.1959-1974 was not touched upon in the cross-examination. It does not give the complete picture because there is no records of the number of size sums of money in fixed deposits. There are a number of trades like foreign exchange spot deals and it does show fixed deposits maturing and being rolled over. It shows the withdrawal of S$4,021,310.63 when a time deposit was liquidated on 23 April 2008 and withdrawn and then a payment in of the same sum on 9 June 2008 with S$4,021,000 going back on a time deposit on the same day. The current account balance was S$218,677.17 after the withdrawal. On 23 June 2008, with a current account balance of S$673,105.41 from 18 June 2008, there were two withdrawals of S$1,600,000 each and S$800,000 making a total of S$4,000,000 withdrawn, a liquidation of a time deposit yielding S$4,021,439.56 credit and a balance of S$694,544.97. On 24 June 2008 a further S$380,000 was withdrawn leaving a balance of S$314,703.19. There was a liquidation of a time deposit and S$3,300,158.22 was credited into the account on 25 June 2008. The sum of S$4,380,000 ws paid in on 29 July 2008 and the balance in the current account amounted to S$7,794,671.12. By 13 April 2009, all I can see is a fixed deposit of S$6,000,000 and by 27 April 2009 there is a balance of S$378,239.93. I have no idea what the withdrawals and payments were for after 29 July 2008 and clearly am not in any position to make any findings. In the correspondence between the solicitors, there is an alleged figure of S$8 million. Rex Chan, with whom the monies of BVI and Ms Chan are invested, and who has experience in valuing and investing in companies for 19 years, has given his honest view on the value of the shares. As noted above, in September 2008 he thought the sum of S$2 million was a ridiculously large sum for Lim's stake. But I accept that was in September 2008 when Lehman Brothers had collapsed and AIG would have followed suit except for the bail out, and today the economic scene is not at desperate as it was then although recovery is still patchy and uncertain. The figure lies somewhere within these ranges and it is unsafe, and unnecessary, for me to make any finding in this respect, except to say that there was enough for Ms Chan to have withdrawn over S$4 million each time that she did.

118 Even if the cash surplus is around S$4.5 million, then given the nature of the art business of the entities, given the accumulated losses shown in some of the audited accounts, *eg*, S$798,916 in IPL for FY2007, given the severe melt-down from mid September 2008, the sales of only about 10 pieces, the uncertainty in recovery going forward, bearing in mind that art remains a luxury item and considering the ability to continue to sustain the business, keeping this cash surplus cannot be said to be an oppressive act aimed at keeping Lim out of his legitimate rights to a dividend payment. This is not at all a case like *Re Gee Hoe Chan Trading Co Pte Ltd* [1991] 3 MLJ 137 where the majority shareholders only benefitted themselves and "gave hardly any benefits to the minority shareholders.." As noted above, Lim had been receiving payments over the years.

(c) Usage of the iPreciation Name

119 I have already found that this name belongs to IPL and Ms Chan. I therefore find that Ms Chan allowed the other entities to use this name. Lim has no basis for complaint and especially in view of my findings on ownership of the entities and that iPreciation was registered under IPL.

120 The answer to issue (iv) (c) at [23] above is therefore that the use of iPreciation name in Modern and Modern HK are not acts of oppression or unfair commercial conduct. Lim has no right to use this name as it belongs solely to IPL and Ms Chan.

(d) The Consignment Agreements and Invoicing of the Entities by IPL for Agency Fees & Commissions

121 Lim complains that Ms Chan surreptitiously excluded him from the office from 12 June 2008 by asking him to go on paid leave, so that she could hide her withdrawal of money from BVI and put measures in place to hollow out the other companies whilst enriching IPL. Two measures were implemented in 2008 and 2009.

122 The first was the consignment agreements, under which specific art pieces were consigned by IPL to the other entities for sale for specified periods, and upon sale, the entity would repatriate all the funds and be given a 30% commission by IPL. Going forward, from 18 January 2008, no iPreciation entity was going to get its art pieces to sell for free.

123 Lim complains that this is oppression. He complained that Ms Chan put these Consignment Agreements in place surreptitiously. They were part of her plan to hollow out the 'retail' companies. Hence, although he was a director of these companies, Ms Chan did not discuss this with him, and she got various employees like Jacqueline Chan to sign on behalf of Fine Arts or Amy Chan to sign on behalf of HK Ltd instead of asking him as a director to do so. Ms Chan on the other hand testified that she had always meant to regularise the position, it was only that before this she was so busy and then ill that she never had the chance to do so. It does seem coincidental that these agreements were actually signed in 2009 and backdated to 2008.

124 However, Ms Chan called an expert witness, 1DW.6 Ms Marjorie Chu to give evidence on the reasonableness or otherwise of the Consignment Agreements and arrangements entered into. Ms Chu is an accountant by profession, working in a firm of chartered accountants from 1961 to 1969. From 1970, she owned and ran her own art gallery specialising in Contemporary Singapore and Southeast Asian Art and is a collector herself of Singapore, Asian, Indian and Australian contemporary art and collector of Southeast Asian and Chinese ceramics. She has been involved in the art gallery business for some 38 years, wrote a book in 2003, "Understanding Contemporary S.E.Asian Art", gave a public lecture in 2005 entitled 'Understanding Contemporary Southeast Asian Art', was an External Lecturer at the Temasek Polytechnic (Hospitality and Tourism Course and art management course for 2006 and 2007, which included how to and the process of managing an art business, including aspects of marketing, promoting and selling artworks in Singapore), was the Organiser of the ArtSingapore Art Fair for 2002 and 2004 and was the President of the Art Galleries Association Singapore for 2004, 2005 and 2006. She was also President of the Southeast Asian Ceramic Society for 2005 and 2006. I accept her as an expert for the evidence she was giving and I also accept the evidence she gave. Her evidence was that paying the artist 50% to 60% of the retail price and the gallery retaining the balance was not unusual. In a consignment situation, *ie*., where there is a gallery, the source gallery, with exclusive rights to sell, but with the discretion to assign the marketing and selling the art work to another gallery, the retail gallery, it is usual for the retail gallery to (a) pay the artist a percentage of the retail price agreed between the artist and the source gallery, (b) pay the source gallery a commission of about 10% to 15% of the gross proceeds, (for the source gallery's work done in sourcing for the artwork), and (c) keep the balance of the sale proceeds. Where her gallery obtained

the art piece from the artist and consigned it to another gallery to sell, it was usual for her to deal with the artist direct and the retail gallery only has to sell the art piece and pay her a commission of 30% or higher of the gross sale proceeds. The retail gallery renders her a bill for its commission and from the proceeds of sale, Ms Marjorie Chu would pay the 30% commission, pay the artist the agreed fee and keep any balance. She also testified that the lack of any formal written agency or other agreements are not unusual in the art world where trust and honour are important qualities in the world of art. As for the levying of agency commission by IPL for the years 2005 to 2007 at 15% of the net proceeds of sale, Ms Chu testified that it is generous to the retailers/consignees as it is normal to charge 15% of the gross proceeds of sale. She is of the view, and I accept her evidence, that the charges and practices of IPL in this respect are consistent with industry practice and not unusual.

125 There was unchallenged evidence from Ms Chan at Exhibit "CSK-34" of her AEIC that IPL entered into similar agreements on similar terms, (including a 30% commission), with non-iPreciation entities. IPL entered into a Consignment Agreement dated 28 June 2008 with Asia Art Center Ltd of Taipei and with Trillium Graphics of Brisbane, California. I therefore find that the entering into of the Consignment Agreements *per se* was not something intrinsically unfair nor was it unusual or commercially unfair to Fine Arts, Contemporary and HK Ltd. Prior to from inception to 2008, Ms Chan had absolute discretion as to which entity would bill for piece of artwork sold and which entity bore the expenses connected thereto and to the business as a whole. From 1999 to end 2007 and a least into the first two months of 2008, Lim never objected, was happy to go along with and accepted the practices adopted by Ms Chan from 1999 till then. I also find that he had no right to expect Ms Chan, going forward into the future, to continue sourcing for the artwork and allow the retail outlets to sell them without charge.

126 I therefore hold that the consignment agreements do not amount to oppressive or commercially unfair conduct. Ms Marjorie Chu, whose evidence I have accepted, says this is quite a common practice. IPL has also entered into a similar arrangements with two third party galleries outside the 'group'. Importantly, Ms Chan has supported all the entities from 1999. With the complete breakdown in their relationship, is she duty bound or obligated in these circumstances to continue this same generous practice? The answer is clearly no. The question then is could she backdate them to 2008, with the first Consignment Agreement taking effect from January 2008? Subject to what I hold below, the answer is a qualified yes. This will be dealt with later.

127 The second measure Ms Chan put in place is in a different category. It will be recalled that IPL entered into Agency Agreements which provided in the main that the artists would receive between 40% to 60% of the sale price of the artworks and IPL would keep the balance. This was to cover the freight and insurance charges, the promotional expenses, the running of the gallery or exhibitions or promotional materials or books to promote the artist. In some instances it also covered the cost of advances to artists. There was nothing remarkable about this arrangement, Ms Marjorie Chu also testified to this. Ms Chan then decided which entity would sell the artwork and which entity would bear the expenses. IPL was the source of the artworks and it would have been unremarkable for IPL to charge a commission or agency fee for part of the sale price of any artwork sold by a retailer. Prior to June 2008, Ms Chan did not seek to recover any of these agency commissions or fees from the 'retail' entities. After June 2008, Ms Chan decided to start charging these commissions and started back charging these commissions to 2005. Lim says this is oppressive and commercially unfair conduct on him as a minority shareholder.

128 The evidence shows that from 12 June 2008, Ms Chan started invoicing all the other entities for a 15% commission (on net sales proceeds) for all past art works sold by them going back to 2005. At 5.AB.3507, there is a letter from Wong, Thomas & Leong dated 24 June 2009, enclosing an annexure listing out 66 invoices, dated from 24 June to 31 July 2008 totalling S$5,645,102.50 asking

what these invoices were for. This back charging of commissions to 2005 had a drastic effect on the accounts of the entities selling the art pieces. Lim exhibited Balance Sheets for Fine Arts and Contemporary as of 31 March 2009 and for IPL as of FYE2008. Before I proceed to set out the relevant figures extracted from them, I must say my figures may contain errors because the copies given to me were absolutely appalling. They were readable only with great difficulty, even with a magnifying glass and even then I had to compare two different copies of the same pages to try and make out the figures. But I have to do the best I can because neither party could provide better copies, something which I find quite surprising:

(a) IPL's YE 2008: income/revenue from sales came up to S$2,152,437.77, cost of sales came up to S$503,574.23, operating expenses came up to S$629,415.03, (exhibition expenses: S$1,779.00, freight handling charges: S$37,430.44, purchases: S$447,519.32 and closing stock at S$16,745.00), resulting in a profit of S$1,018,447.43. In addition there were Commissions Receivable of S$837,161.31, Agency Commission of S$3,029,710.00. This resulted in a Net Income of S$4,894,932.84 and a total net equity of S$4,505,574.03, (share capital of S$100,000, retained earnings of S$499,258.61 and income of S$4,894,574.03). By comparison, the total net equity from the Balance Sheets of 2006 and 2007 are S$259,583 and S$351,567 respectively.

In contrast:

(b) Fine Arts (Balance Sheet as of 31 March 2009): total assets of S$642,484.16 (main comprising cash at UOB account: S$159,711.25, accounts receivable of S$210,609.13, a deposit of S$59,552 and an amount owing from Ms Chan of S$41,838.54) and total liabilities of S$2,393,926.86 resulting in a negative equity of -S$1,751,442. By comparison, the 2006 and 2007 Balance Sheets show a positive net equity of S$613,574 and S$735,914 respectively.

(c) Contemporary (Balance Sheet as of 31 March 2009): total assets of S$165,913.10 (mainly comprising cash at UOB account: S$60,622.86, accounts receivable of S$20,100.00, an amount owed by one of the artists, Ye Jian Qing of S$60,200.00) and total liabilities of S$238,345.69 (including S$46,701.31 owing to Ms Chan), which result in a negative equity of -S$72,432.69. (Contemporary was incorporated on 12 June 2007 and no accounts for FYE 31 December 2008 have been put in evidence).

I asked Mr Tan how these back-dated invoices were going to be booked when the accounts for the years 2005, 2006 and 2007 have already been finalised and closed, (Ms Chan has signed the 2007 accounts but Lim has refused). He frankly admitted he did not know how that was going to be done but he assumed the accountants would have some way to do so.

129 Ms Chan said that she had always meant to sort out the accounts, *ie*, this invoicing of 15% commission to the selling entities for IPL's costs and efforts in sourcing the art work, otherwise the entities were getting to sell their art work for free. Ms Chan said her intention, known to Lim, was there since 2003. In 2005 she fell ill and was unable to do the inter-company billing, in 2006 and 2007 she was recovering and thirdly the CRM was not ready to do so. Ms Chan claims she expressly said this again to Lim in 2007 and Lim never protested. Ms Marjorie Chu said billing 15% on the net sales proceeds was fair because the market norm was 10% on the gross sales proceeds. Ms Chan refers to a meeting in March or April 2007 where Amy Chan was present together with Lim where this invoicing was raised and when Lim was asked to ensure the CRM could cater for this. However her evidence during cross-examination was not all that clear. Mr Tan's submissions that her answers were evasive are not without foundation. Ms Chan also relies on the evidence of asking Jacqueline Lau to learn bookkeeping to do this inter-company invoicing. Jacqueline Lau's evidence was not very clear either and in her AEIC says that she is not aware of what the commission arrangement was prior to the year

2008. Amy Chan's evidence was also not very strong on this point. She seemed to be referring more to the billing between IPL and HK Ltd. This means it related to 2007 transactions. All this was strongly disputed by Lim. Having considered and weighed the evidence I do not accept Ms Chan's evidence on this point. I find that her own method of allocation of revenue and expenditure followed her own system right up to end 2007 and perhaps into February 2008 and before her first quarrel with Lim around 7 or 8 March 2008. There was some evidence that on some payments to third parties like freight forwarders, Ms Chan gave instructions to and Jacqueline wrote in manuscript the entity that was to bear that expense. But these invoices were few in number and neither party has comprehensively gone through the evidence and drawn up tables to support their case. I find that on the whole, Ms Chan's system of allocation of revenue and expenditure up to end 2007 and into February or March 2008 did not contemplate inter-company or inter-entity billing.

130 Just as Lim was bound to accept the practices, the allocation of revenue and expenses from 1999 to 2007, (despite his refusal to sign the FY 2007 accounts because by the time they were completed, their dispute had already reached an advanced stage), so is Ms Chan similarly bound not to disturb or re-write the past financial accounts. The back charging of the 15% commission clearly amounts to commercially unfair conduct.

131 The law as to what is oppressive conduct under section 216 of the Act is well settled. It occurs where there has been a visible departure from the standards of fair dealing and a violation of what is commercially unfair conduct. The Court of Appeal's decision in *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] 4 SLR 745 ("*Lim Swee Khiang")* sets out the guiding principles. Chan CJ laid down the following at [80] – [82]:

> 80 The law on acts that are considered oppressive to a minority shareholder or in disregard of his interests is settled. Although the courts have been slow to intervene in the management of the affairs of companies (see for example Re Tri-Circle Investment Pte Ltd [1993] 2 SLR 523) on the ground that a minority shareholder participates in a corporate entity knowing that decisions are subject to majority rule, s 216 of the CA enjoins them to examine the conduct of majority shareholders to determine whether they have departed from the proper standard of commercial fairness and the standards of fair dealing and conditions of fair play: Re Kong Thai Sawmill (Miri) Sdn Bhd [1978] 2 MLJ 227 at 229.
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> 81 In Re Kong Thai Sawmill (Miri) Sdn Bhd, Lord Wilberforce described the disregarding of minority interests as something more than a failure to take account of the minority interests, such as an awareness of the minority interest and an evident decision to override it or brush it aside. In In re Five Minute Car Wash Service Ltd [1966] 1 WLR 745 at 752, Buckley J made it clear that the director in that case had to have 'acted unscrupulously, unfairly or with any lack of probity'. Margaret Chew, author of Minority Shareholders' Rights and Remedies (Butterworths Asia, 2000) pertinently states at pp 107 and 108 that:
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> > Section 216 of the Companies Act was conceived and passed with the objective of protecting minority shareholders from majority abuse. In order to offer effective and comprehensive protection, section 216 confers on the courts a flexible jurisdiction to do justice and to address unfairness and inequity in corporate affairs. …
> >
> > The courts may be said to be empowered under section 216 of the Companies Act to re-lay the boundaries of what is or is not fair as between corporate participants.
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> 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):

> 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. …
>
> 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.
>
> 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.
>
> *The 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]

132 Applying these principles to the facts as I have found them, the answer to issue (iv) at [23] is as follows:

(a) Lim is not entitled to participation in the management of the companies, employment by the companies and accommodation and has therefore not made out any case on oppressive conduct under section 216. He similarly fails on his complaint with regard to the use of the iPreciation name.

(b) Lim is entitled to information and documentation relating to Fine Arts, Contemporary and on the same basis set out in [78] above, in BVI and HK Ltd as a director of the company. He is also entitled to such information that is made available to shareholders of a company. Insofar as

he has been denied such documents and information leading up to this trial, his complaints of oppressive conduct have been made out.

(c) The back charging of the commission invoicing to 2005 is oppressive conduct under section 216.

(d) The backdating of Consignment Agreements to January 2008 signed in 2009 without Lim's knowledge is also oppressive conduct. I find and hold that given the complete breakdown of Ms Chan and Lim's relationship on 15 April 2008, it would only have been fair, exercising my discretion, to have started putting into effect the consignment agreements from 1 July 2008.

(e) I also note that whilst no longer continuing or a live issue, Ms Chan had caused the shares of Contemporary to be issued disproportionately to the agreed percentage when she made a gift of that 40% shareholding to Lim. If this was continuing, it would amount to oppressive conduct under section 216. Since it is not, I am taking a note of it.

(f) The same is also true of her withdrawals of S$4.021 million on 23 April and S$4.38 million on 23 and 24 June 2008. Whilst the money was returned, and there was some basis for their withdrawal as loans repayable on demand to the companies, Ms Chan did so unilaterally and without informing Lim.

Moreover, transactions such as these withdrawals and the back charging of commissions and back dating of consignment agreements are matters I am entitled to take note of and in considering the remedies available to the parties.

Is the Conduct in BVI and HK Ltd also the Affairs of Fine Arts, Contemporary and Fine Arts?

133 My view of the law has been set out above. Is the conduct of the affairs of one entity also the affairs of another in the iPreciation 'group'? I start off with the observation that this is a case that is further on the spectrum than the *DHN Food Distributors* case in two respects. First, there were only 2 shareholders and directors in each of the companies – Fine Arts, BVI, HK Ltd and Contemporary. They each held the same proportion of shares in each of these companies. The same two shareholders and directors are also in IPL except that Lim holds only 1 share and is a director as a nominee of Ms Chan. Secondly the one in absolute control in all these companies is Ms Chan. She has the absolute power, authority and discretion to call the shots on every major decision, even on the relatively minor ones like the renewal of a credit card terminal and whether a customer can get more than an 8% discount on his purchase. She decided which sale got allocated to which entity and which item of expense was borne by which entity. This was therefore more than a case of "the subsidiaries [being] bound hand and foot to the parent company and must do just what the parent company says.." Ms Chan *is* the directing mind and will behind all the entities.

134 In *New Line Productions Inc v. Aglow Video Pte Ltd* [2005] 3 SLR 660, a case involving copyright infringement of some films, Tay Yong Kwang J treated all the companies in the TS Group as one on the grounds that they were really little pieces of mosaic forming a complete mural, glued together by four directing minds behind the group. The 19 defendants in one of the actions were Singapore companies engaged in the retail of films and video format and carrying business under the name and style "TS Group". They all had a common registered office, another defendant outside the 19 acted as a central purchasing agent for all the members of the TS Group. The 20 defendants had common directors and shareholders in the sense that in any one of these companies, at least two of the persons, also defendants in the action, would be directors and/or shareholders. He made the following findings at [98]:

The business cards of these four persons intimated that TS Laser Pte Ltd was the parent or nerve centre and all the listed outlets were merely the offspring. In two newspaper articles, Joseph Toh was described as the group marketing manager for the TS Group. He described himself in his affidavit of evidence-in-chief as sales manager without specifying the company which employs him. The group also had a privilege card scheme applicable to all the outlets. All the outlets bore the initials "TS", a trademark owned by TS Video Centre Pte Ltd. The plastic carrier bag used by them listed the chain of outlets. The companies in the group shared many common directors and shareholders, and took instructions from Clement Lau, who appeared to be the beneficial owner of practically all of the companies. The headquarters of the group was in Lam Leong Building in Geylang Lorong 17, which also served as the warehouse and was owned by several of the companies in the group.

135 BVI's address is not in the British Virgin Islands, it is at Ruttonjee House, Duddell Street, Hong Kong. It is almost certainly just the address of a registered office provided by a service provider or solicitors supplying BVI companies as they have here in Singapore. Ms Chan agreed that all the BVI documents and papers are in the Fine Arts office in Singapore, Ms Chan and Lim are resident in Singapore and decisions with regard to BVI are made in Singapore or wherever Ms Chan may happen to be when a decision is required. There is no doubt on the evidence that excess monies of the various entities are kept in BVI's accounts. Until 2008, the excess profits were not retained in Fine Arts, Contemporary, IPL or HK Ltd. This is also clearly seen from the accounts. As noted above, from BVI's current account with Clariden Leu, there are large sums of money in there. In addition there are fixed deposits not reflected in the current account unless there is a transaction that causes it to pass through the current account. This has been referred to above. I am therefore unable to ascertain the amounts there other than my observation that, on balance, there must have been at least S$4.5 to S$5 million in the BVI Clariden Leu account for Ms Chan to have made the withdrawals in 2008. Hence the removal of funds which belong to Fine Arts, Contemporary, HK Ltd or even IPL will affect these Singapore companies.

136 The papers and documents of BVI are kept in Fine Art's office in Singapore. The staff that service BVI and, to some extent, HK Ltd, are paid by Fine Arts and work from Fine Art's office/gallery in Singapore. Given my findings and conclusions, on the facts of this case, Ms Chan's acts with regard to BVI and to a much lesser extent in HK Ltd, also impact upon and affect the Singapore companies, Fine Arts, Contemporary and IPL. For example, there are clearly transactions where sales are booked through BVI but expenses therefor are borne by the Singapore companies. These are not just freight and handling charges, but also promotional expenses. Just as an example (at 4 AB 3177), there are sales related to the exhibition funded by HK Ltd but invoiced by BVI. Ms Chan's evidence is that she had always wanted to sort this out, the entity that sold the art piece should bear the expenses. If this is to be accepted, then the excess money in BVI must belong in part to those Singapore companies that bore the expenses for the sales of art pieces made through BVI. BVI must be holding such monies on trust for the Singapore companies. Also the excess monies there may also be preventing the Singapore companies from declaring dividends.

Is the Continuance of this Action an Abuse of Process in view of Ms Chan's Offer to Buy-out Lim?

137 After some preliminary exchange of correspondence between the lawyers for a buy-out, Ms Chan's lawyers made the following buy-out offer on 24 June 2009:

(a) Ms Chan will purchase Lim's 40% shareholding in Fine Arts, Contemporary, BVI and HK Ltd at a fair value. The valuation will be determined on a pro-rata basis, without any discount for the shares being a minority shareholding;

(b) The valuation will be determined by an independent valuer, who is to be appointed by agreement between the parties, failing which the Court will make the appointment;

(c) The costs of the independent valuer is to be shared by both parties equally;

(d) The independent valuer will investigate whether there has been a misuse of any finds in each company and, if so, he would report on the same and make appropriate adjustments to his valuation to account for any such misuse of funds. Parties will be entitled to make submissions to the independent valuer before he delivers his report;

(e) The independent valuer is to act as an expert, whose decision shall be final and binding, save in the case of manifest error; and

(f) Each party is to bear his own costs.

This was unacceptable to Lim, he was claiming an entitlement to IPL, he was complaining about the withdrawals in relation to IPL, he was claiming for dividends, etc. Ms Chan's lawyer countered with leaving discrete issues for the court to decide and offered to pay Lim's costs, to be agreed or taxed, up to the trial of the action, and for each party to bear its own costs of the trial. This too was not acceptable to Lim.

138 An action for oppression is unsustainable and is an abuse of the process of the court, in the face of a reasonable buyout: see *O'Neill v Phillips* [1999] 1 WLR 1092 and *Lim Swee Khiang v Borden Co (Pte) Ltd and others* [2005] 4 SLR 141. Prakash J in *Lim Swee Khiang v Borden Co (Pte) Ltd and others* [2005] 4 SLR 141 at [97] held:

> 97 It is clear from the House of Lords case of O'Neill v Phillips [1999] 1 WLR 1092, that where there is a reasonable offer to purchase the allegedly oppressed party's shares, then an action for oppression cannot be sustained.
>
> …Lord Hoffmann [in *O'Neill*] then set out the guidelines to assist shareholders in determining what would be a reasonable offer. There were five points. *First, the offer must be to purchase the shares at a fair value. Second, the value if not agreed, should be determined by a competent expert. Third, the offer should be to have the value determined by the expert as an expert. Fourth, the offer should provide for equality of arms between the parties. Fifth, the question of costs would have to be considered. The offer should take into account the plaintiffs' costs although this need not always be payable by the defendants as in cases where the defendants have not been given a chance to make an offer before the action was launched*.
>
> [emphasis added]

In allowing the appeal in *Lim Swee Khiang and Anor v Borden Co (Pte) Ltd* [2006] 4 SLR 745 at [9], the Court of Appeal noted that it had earlier on dismissed the application to strike out the appellants' appeal on the ground that the buyout offer was not reasonable in that it did not include the damages claimed by the appellants arising from the oppressive acts of the respondents. Applying the requirements of a reasonable offer in *Lim Swee Khiang's* case, there were a number of fundamental issues that had to proceed to a hearing, e.g., the offer did not cover IPL, Ms Chan's loans to BVI were disputed. Further it cannot be denied that Ms Chan was economical with and not exactly forthcoming in her answers when Lim was pressing for information in relation to the withdrawal of monies and issues in relation to the loans, back invoicing, etc. However given the modified offers, they may be relevant on the issue of costs.

139 The plaintiff relies on *North Holdings Ltd v Southern Tropics Ltd* [1999] BCC 746 at 766-770 and *Paul Isaacs, Peter Harrisson v Belfield Furnishings Ltd, Paul Millership, Michael Brandt, Terence Keely, Robert Stone* ("*Belfield Furnishings*") [2006] EWHC 183 (Ch) for the proposition that the matter ought to proceed to court where there is an issue as to misconduct of the oppressor as regards misuse of assets. This may be a relevant factor in determining whether there would be a risk that the valuer will ignore such complaints. I do not find that this is a relevant factor here.

140 For issue (v) at [23], I therefore do not find that Lim's action is an abuse of the process as the offer, reasonable as it was, did not cover all the entities and did not address some of the contested. However it may be a relevant factor in the award of costs.

Accounting for Sales Made Through Consultants & Consultants HK

141 In view of my findings, as to issue (vi) at [23], I hold that Ms Chan does not have to account for the sales of artworks through Consultants and Consultants HK.

Whether the Court Can and If So Whether the Court Should Order a Buy-Out and Upon What Terms

142 Lim asks for a buy-out of his shares. It is clear he has no interest in the business other than to get the maximum value for his shares. Ms Chan's AEIC evidence, which I accept, is that in or around October 2006, when a hedge fund was considering buying them out, Lim was all in favour of it so that he could have the money to lead the life of a "beach boy." That is why Lim will clamour for a maximum dividend payout and not accept withholding any profits for the longer term, *eg*, staying power for an extended downturn or potential benefit of buying art pieces at a low price. I also accept Rex Chan's evidence on his meeting with Lim in September 2008 when Lim told Rex that his strategy was to bid high and settle for a lower figure.

143 Given the history of how Ms Chan and Lim got together and the total breakdown in their relationship today, their continuing as shareholders is not at all an option. The problem is whether I have jurisdiction to order Ms Chan to buy-out Lim's share in BVI and HK Ltd. On the authorities set out above, and on the basis that Lim and Ms Chan are before me *in personam* I am of the view that I have the power to order the buy-out on such terms as I think fair. Importantly, without making any order in relation to the foreign companies, BVI and HK Ltd themselves, I am of the view that I can order Lim and Ms Chan in their capacity as shareholders to make documents and records in the foreign companies available.

144 Bearing these authorities in mind, I am of the following view that in the special circumstances before me and given the situation these two parties are in, it cannot be the case that the Court only has power to solve half or a part of the problem and leave the parties to take their dispute to the British Virgin Islands and Hong Kong to re-litigate the same issues and resolve the rest of the same problem by expending so much more time, energy, aggravation and expense. Whilst I have no jurisdiction to make any orders against or issue any directions to BVI or HK Ltd, the only two shareholders of all the disputed entities are before the Court and the Court does have *in personam* jurisdiction over Lim and Ms Chan. The relevant facts took place in Singapore and the acts complained of by Lim also took place in Singapore. Both parties are resident in Singapore. Coupled with that, it cannot be gainsaid that section 216 confers a broad jurisdiction on the court once it is proved to its satisfaction that the affairs of the company are being conducted in a manner oppressive or unfairly prejudicial to a member. Under section 216(2):

> If on such application the Court is of the opinion that either of such grounds is established *the*

Court may, with a view to bringing an end or remedying the matters complained of, make such orders as it thinks fit and, without prejudice to the generality of the foregoing, the order may …

[emphasis added]

The observations as to the width of section 216 can be seen from passages from the judgements cited above, *viz*:

(a) "..the section warrants the court looking at the business realities of a situation, and does not confine them to a narrow, legalistic views..": per Ralph Gibson LJ in *Nicholas* at [91] above;

(b) "..the expression 'the affairs of the company' is one of the widest import which can include the affairs of a subsidiary..": per Sir Martin Nourse in *Board of Trade* at [92] above;

(c) "..it may in certain cases be possible to say that conduct of the affairs of one company also constitute conduct of the affairs of another when the first company is controlled by or has control of the other..": per Sir Donald Rattee in *Grandactual* at [93] above although Sir Donald Rattee did go on to say that common directors having control over another company did not make the affairs of one company the affairs of the other; and

(d) "There is some learning on the question of whether the affairs of one company can count as the affairs of another. There is no absolute rule that the affairs of one company cannot count as the affairs of another; but the question is fact-sensitive. In looking at the facts, the court must look at the business realities and must not adopt a narrow, legalistic view": per Lewinson J in *Hawkes* at [94] above.

Reference has already made to what author Walter Woon calls the leading monograph on section 216, Margaret Chew's *Minority Shareholders' Rights and Remedies*, where the latter's statement that section 216 confers on the courts a flexible jurisdiction to do justice and to address unfairness and inequity in corporate affairs has been approved by the Court of Appeal. Section 216(2) provides that a court may, "..*with a view to bringing to an end or remedying the matters complained of*, make such order as it thinks fit.." *Walter Woon on Company Law*, states at [5.96]:

Section 216(2) gives the court the power to 'make such order as it thinks fit', a wide discretion that allows the court to tailor the order to remedy the mischief complained of. The order must be made with a view to bringing an end or remedying the matters rightly complained of. Subject to this limitation, the jurisdiction to make an order is very wide: *Kumagai Gumi Co Ltd v Zenecon Pte Ltd*.

145 Ms Chan and Lim are before me *in personam*, as parties to this action. They appear before me as shareholders of all the companies, which are separate legal entities and all of which are named as parties in the writ although BVI and HK Ltd have not been served. In *Corbett v. Corbett & Ors*. [1998] BCC 93, there was a deadlock between two brothers and a sister, (who tended to side with one brother), in a holding company of a small group of companies held by the family; motions were taken out to keep the status quo in a minority oppression petition. Two of the respondents had been using company funds for the legal fees which included representing them and the companies and the petitioner sought an order that they do not do so going forward and for all sums already drawn to be returned to the company. In the course of his judgement, Judge Howarth (sitting as a judge of the High Court) said, at p.100D

It seems to me that the company in this regard has no position at all which it could seek to

advantage or defend by taking any part in these proceedings beyond giving discovery, beyond listening to the judgment and beyond being involved actively if need be in the form of relief which may be thought to be appropriate when the court comes to consider the form of relief in this case. **If the form of relief is simply that A buys out B's shares it is of no interest to the company**. If however there is a suggestion of the company being ordered to buy a party's shares, the company has every reason to want to be involved at that stage.

[emphasis added]

Mr Melvin Lum for the companies did just that on day one of the hearing. He asked to be excused as it really involved the shareholders, there was no reason for his attendance during trial and quite correctly, did not want to escalate the costs.

146 If I order that Ms Chan buys out Lim in Fine Arts and Contemporary, I am not bringing an end or remedying the matters complained of. I am solving only a smaller part of the problem between these two shareholders and leaving the far larger problem unresolved because the excess funds are in BVI. I have no doubt that because the parties are before me *in personam* I can order the parties to ensure all the relevant books, ledgers, documents and financial records of all the companies, including those of the foreign companies, are made available for the purposes of valuing the buy-out in the Singapore companies. For the avoidance of doubt, I so order. That is because I am remedying the wrong and matters complained of with respect to the Singapore companies and that cannot be done without inspecting the books, ledgers, documents and financial records of the foreign companies including the bank accounts and the complete Clariden Leu statements and records. My power rests in section 216 and Lim has proved how the affairs of BVI and HK Ltd are affecting and impacting on the conduct and affairs of Fine Arts and Contemporary. It is extremely artificial, with Ms Chan being a party before me to say my orders are only effective insofar as she is a shareholder of Fine Arts and Contemporary. Ms Chan *is* Fine Arts, Ms Chan *is* Contemporary, Ms Chan *is* BVI, Ms Chan *is* HK Ltd and Ms Chan *is* IPL. That is the reality and truth on the special facts of this case. Ms Chan is resident in Singapore, she runs the companies from Singapore and the books and records of BVI are in Singapore.

147 Do I have the power to order Ms Chan to buy out Lim's shares in BVI and HK Ltd? It is not without some hesitation that I say yes. Whilst my power to order a buy out on terms that are just in the circumstances comes from section 216 in relation to shareholders of Singapore companies, there is no section 216 as far as shareholdings in the foreign companies are concerned.

148 I am of the view that my power rests on an implied term in law in the contract that exists between Ms Chan and Lim as shareholders of a foreign company. There can be no doubt that a contract exists between each member of a company. Walter Woon on Company Law (Rev 3rd Ed, 2009) at [4.36] and [4.37] says the memorandum and articles constitute a contract between the company and its members *and among the members inter se*; this contract is deemed to contain covenants on the part of each member to observe all the provisions of the memorandum and articles; the contract that is constituted by the articles is a contract between a member and every other member and the contract is deemed to contain covenants that each member will observe all the provisions of memorandum and articles of association. Therefore every member has a personal right to have the terms of the memorandum and articles observed. This contract is unique because the articles may be altered by the vote of a prescribed majority and a member may be bound by terms he did not agree to. The contract is also special because the memorandum and articles and the contract between Ms Chan and Lim are subject to the company law of the domicile. There is equivalent companies act legislation in both the British Virgin Islands and Hong Kong. Both these jurisdictions have equivalent minority oppression provisions and both provisions also cater for a buy out of a party's shares. But it is a contract nonetheless and can it be doubted that a member can have the

provisions of the memorandum and articles observed by injunction, whether mandatory and prohibitive? Surely not: see Walter Woon on Company Law (Rev 3rd Ed, 2009) at [4.38]. Moreover, a member can bring such proceedings for a mandatory or prohibitive injunction directly against another member without involving the company. Suppose A and B, resident in Singapore, set up a company in BVI, but they run the company from here, there is no office or place of business in the British Virgin Islands, but they have an office here, their papers are here, their staff are here and they only keep a registered office at a service provider in Hong Kong from whom they bought the shelf company. A files an action in Singapore against B *in personam*, and seeks an injunction against B because he alleges B has removed money from the BVI bank account. A Singapore court would have jurisdiction and if A makes out his case, issue an injunction against B.

149 The parties are before me *in personam*. There is a contract existing between them as shareholders of BVI and HK Ltd. BVI may be domiciled in the British Virgin Islands and HK Ltd in Hong Kong, but in truth and in reality, for the reasons set out above, their residence is in Singapore. The directing mind and will behind both BVI and HK Ltd resides in Singapore and is a party in these proceedings. The other shareholder and director is also domiciled and resident in Singapore and a party to these proceedings. With which country does their contract as shareholders have the closest and most real connection? There can be no doubt that the answer is Singapore. I therefore am of the view that I can order a buy out as between the shareholders of BVI and HK Ltd in the special circumstances of this case.

The Terms of the Order for the Buy-Out

150 On the basis that I have jurisdiction *in personam* over Ms Chan and Lim who are before me today with their disputes, and my orders hereunder do not involve any orders in relation to BVI or HK Ltd as separate legal entities, distinct from their shareholders, and taking into account all the facts of his case, I hereby make the following orders:

(i) Ms Chan will purchase Lim's 40% shareholding in Fine Arts, Contemporary, BVI and HK Ltd at a fair value. The valuation will be discounted to reflect a minority shareholding; The discounted valuation shall be as of 9 October 2008, the date the writ was filed;

(ii) The valuation will be determined by an independent valuer, who is to be appointed by agreement between the parties, failing which the Court will make the appointment; both parties are to make available to the valuer all relevant records, bank statements, ledgers, accounts, papers and any other documents required by the valuer including those of IPL, Consultants, Consultants HK and Nexart;

(iii) The costs of the independent valuer is to be shared by both parties equally;

(iv) In valuing the shares, the independent valuer will:

(a) investigate whether there has been a misuse of any funds in each company and, if so, he would report on the same and make appropriate adjustments to his valuation to account for any such misuse of funds;

(b) all and any consignment agreements entered into by IPL and the other entities shall not take effect in any way before 1 May 2008; for the avoidance of doubt, if a consignment agreement is to take effect before 1 July 2009, all sales by the entity before 1 May 2008 shall remain as entered into the books and shall not be disturbed, but any art work sold from 1 May 2008 shall take effect in accordance with the relevant consignment agreement;

(c) all invoicing by IPL to the other entities for commission upon sale of art pieces shall only be valid or issued for sales of art pieces that take place on or after 1 May 2008, a sale of an art piece will be deemed to take place when a contract comes into being between the selling entity and the customer, irrespective of when the invoice to the customer is raised; all invoices raised or dated on or after 1 May 2008 in respect of sales of art pieces before 1 May 2008 or to be raised by IPL for commission for sale of art pieces before 1 May 2008 and back charged to the entities shall be set aside; for the avoidance of doubt, invoices by raised by IPL to the entities for commission on sale of art pieces by the entities prior to 1 May 2008 shall stand;

(d) the valuer shall take as proved that Ms Chan made loans of HK$603,436, S$1,186,202.29 in November 2005 and S$1,582,941.34 in November 2006 to BVI;

(e) there shall only be credit/debit adjustments made inter-entity where there has been a sale of an art piece by one entity but there are freight, handling, insurance or storage charges in relation to that particular art piece which reach or exceed S$10,000 and borne by another entity; there shall be no adjustments made for any freight, handling, insurance or storage charges below S$10,000 for any art piece and for the avoidance of doubt, all exhibition and other promotional expenses, including production of brochures or books, advertisement, rental of exhibition space or expenses in relation thereto and the like, shall stand as attributed in the accounts;

(f) the valuer is to take into account my findings of fact and decision on the issues set out in this judgement;

(g) in the event the valuer has any doubts on any of the above issues, the valuer shall have liberty to contact the solicitors of the parties to seek agreement, failing agreement there shall be liberty to apply to the court for a ruling; and

(h) provide a draft report to the parties who will then be entitled to make submissions within a reasonable time, to be agreed between the solicitors, to the independent valuer before he finalises and delivers his report;

(v) The independent valuer is to act as an expert, whose decision shall be final and binding, save in the case of manifest error;

(vi) In the event the valuer is unable to fix a value but suggests a range, then, in accordance with *Walter Woon on Company Law* (Revised 3rd Ed, 2009) at [5.100], the parties may apply to court for directions.

(vii) Prayers (1) – (8), (10) – (11) and (13) of the plaintiff's statement of claim are dismissed;

(viii) No order is made in relation to prayer (9) of the plaintiff's statement of claim as the parties have reached a private agreement.

151 I will hear the parties on costs.

[note: 1] Transcript 11 September 2009 pages 99-100.

[note: 2]Transcript 11 September 2009 pages 98-99.

[note: 3]See Transcript, 3 September 2009, pages 59 to 61, and 103

[note: 4]See Transcript, 3 September 2009 at page 54

[note: 5]See Transcript, 3 September 2009 at page 96

[note: 6]See Transcript, 3 September 2009 at pages 62 and 65 and Ms Chan's AEIC, para.104