Teo Chong Nghee Patrick and others *v* Han Cheng Fong and another appeal [2014] SGCA 29

Case Number	: Civil Appeal Nos 36 and 37 of 2013
Decision Date	: 23 May 2014
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Chan Kia Pheng, Tan Wei Ming and Neo Ming Wei Douglas (KhattarWong LLP) for the appellants in Civil Appeal Nos 36 and 37 of 2013; Lee Hwee Khiam Anthony and Pua Lee Siang (Bih Li & Lee) for the respondents in Civil Appeal Nos 36 and 37 of 2013.
Parties	: Teo Chong Nghee Patrick and others — Han Cheng Fong

COMPANIES – Directors – removal

TORT – Conspiracy

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2013] SGHC 51.]

23 May 2014

V K Rajah JA (delivering the grounds of decision of the court):

Introduction

1 These two appeals arose from a falling out between joint venture partners in respect of a project in Hangzhou, China, as a result of which one of the chief protagonists, Dr Han Cheng Fong ("Dr Han"), was removed, along with a key lieutenant, from his posts in the joint venture company. Aggrieved, Dr Han sued members of the other faction for wrongful removal and conspiracy; there was a counter-suit against Dr Han and other co-directors for breach of fiduciary duties and conspiracy.

2 Both suits were heard together before Tan Lee Meng J ("the Judge") over 27 days from July to October 2012. In Suit No 908 of 2010 ("Suit 908"), the Judge ruled that Dr Han was wrongfully dismissed and was entitled to damages for losses to be assessed. Key to the Judge's decision was his finding that a document signed on 1 March 2010 between the parties ("the 1 March document") constituted a binding shareholders' agreement that granted Dr Han an enforceable right to his positions in the joint venture company (see *Han Cheng Fong v Teo Chong Nghee Patrick and others* [2013] SGHC 51 ("[2013] SGHC 51")). In Suit No 266 of 2011 ("Suit 266"), the Judge dismissed the counter suit against Dr Han for conspiracy and breach of fiduciary duties (see *Cleantech Partners Hangzhou Pte Ltd and another v Han Cheng Fong and others* [2013] SGHC 52 ("[2013] SGHC 52")).

3 The appellants, the losing faction at trial, appealed against the decisions in both suits: Civil Appeal No 36 of 2013 ("CA 36") was the appeal in respect of Suit 908 and Civil Appeal No 37 of 2013 ("CA 37") was the appeal in respect of Suit 266. This losing faction comprised Teo Chong Nghee Patrick ("Patrick"), Lim Shih Hsi ("Richard") and Michael Heng Swee Hai ("Michael"), respectively the first three appellants in CA 36. Patrick, Richard and Michael were founder directors of Cleantech Partners Pte Ltd ("CTP"), the fourth appellant in CA 36 and the fifth appellant, Cleantech Partners Hangzhou Pte Ltd ("CTP-HZ") was the parties' joint-venture vehicle in respect of the Hangzhou

project.

4 CTP and CTP-HZ were also the appellants (and plaintiffs) in CA 37; the respondents therein were Dr Han, his lieutenant Liew Sok Kuan ("Christine") and Low Soo Chee ("Robin"), also a founder-director of CTP but who had chosen to throw in his lot with Dr Han. The fourth respondent in CA 37 was International Eco-City Pte Ltd ("IEC"), a company incorporated by Christine and Robin after relations between the parties had soured.

5 We heard submissions on both appeals on 5 September 2013 and allowed the appeal in CA 36 and dismissed CA 37. At the close of the hearing we gave brief oral grounds for our decision. With respect to CA 36, we were of the view that while there was no basis to alter or interfere with the Judge's findings of fact, it was clear that much turned on the legal effect of the 1 March document and for the reasons that follow, we disagreed with the Judge's finding that the 1 March document constituted a legally enforceable agreement. We were additionally of the view that Dr Han was unable to show that he had suffered any legally recoverable loss. As for CA 37, we were unable to see any basis whatsoever for overturning the factual findings of the Judge and therefore for allowing the appeal. These are the written grounds of our decisions in both appeals amplifying the oral reasons given at the conclusion of the hearing.

Background to the dispute

6 The facts were set out in sufficient detail in the judgments of the Judge below. We set out only those facts necessary for the present appeals.

7 In September 2009, Michael, Patrick, Richard and Robin decided to undertake a project to develop a low carbon eco-park in Hangzhou known as the Hangzhou Singapore Eco-Park Development Project. CTP was the company to be used for this purpose. CTP-HZ was a wholly owned subsidiary of CTP and was to be used as a special purpose vehicle, principally as a corporate vehicle in a funding arrangement with two Chinese partners: Hangzhou Vanwarm Holdings Group Ltd ("Vanwarm"), a Chinese company, and the Hangzhou Qianjiang Economic Development Area Management Committee ("HQEDA"), which had been set up to manage the development of the eco-park.

8 The four of them felt that they needed someone with particular expertise in the property market in China and invited Dr Han to participate. Dr Han was formerly chief executive officer of Fraser & Neave Ltd and deputy chairman of DBS Land and had much experience in the property sector. Dr Han agreed to be involved, and Christine was brought in at his request to assist him. They wanted the terms of their involvement recorded and the 1 March document, which was signed on 1 March 2010, was the result.

9 The 1 March document was headed with the name of CTP and was declared to be a "**DIRECTORS' RESOLUTION IN WRITING PASSED PURSUANT TO THE COMPANY'S ARTICLES OF ASSOCIATION**". Its terms in full are as follows:

> Resolved and confirmed the following number of ordinary shareholders, no of ordinary shares to be issued to each shareholder and the appointment of [Dr Han] and [Christine] as Company Directors, [Dr Han] as Deputy Chairman of CTP, CleanTech Ventures Asia Pte Ltd as Manager, is hereby accepted with effect from 1st March 2010.
>
> | **Name** | **Designation** | **Ordinary Shareholding** |
> |---|---|---|
> | [Patrick] | Chairman | 2 shares |

[Dr Han]	Deputy Chairman	2 shares
[Richard]	Managing Director	2 shares
[Robin]	Director	2 shares
[Michael]	Director	2 shares
[Christine]	Director	2 shares
CleanTech Ventures Asia Pte Ltd	Manager	4 shares
Total		16 shares

 # The directors will review the value of [CTP's] equity interest in Hangzhou-Singapore Eco-Park (HSEP) pursuant to the conclusion of all completion documents and independent valuation of the development site in HSEP to determine a more realistic share value of [CTP's] shares.

The Board of Directors also resolved that the following companies will be set up by [CTP]:

1. [CTP-HZ] as 100% subsidiary company of CTP and will be the Special Purpose Vehicle (SPV) for rolling out the Hangzhou Singapore Eco-Park Development Project in Hangzhou:

1.1 CTP-HZ Board of Directors will consist of all the six Directors of CTP and [Dr Han] as Chairman and [Christine] as CEO;

1.2 CTP-HZ Board of Directors has decided that the net income split between CTP-HZ and CTP will be 67% / 33% respectively.

1.3 It was also decided that of the remaining 67% held by CTP-HZ, 33% of the 67% is to be distributed to the CTP-HZ Board of Directors. The remaining 67% (ie 67% of 67%) is to be distributed to CTP-HZ Management headed by [Dr Han] and [Christine]. The distribution of the profit to the Management of CTP-HZ shall be decided by [Dr Han] at his sole discretion.

1.4 CTP-HZ will in due course enter into joint venture agreement to set up Hangzhou Singapore Eco-Park Investment & Development Co Ltd (HSEPID) in Hangzhou with the local partner [Vanwarm] where [Dr Han] will be appointed as Chairman and [Christine] will be appointed as CEO / GM respectively on the Board of Directors.

2. CTP Technology Pte Ltd (CTPT) as 100% subsidiary company of CTP and will function as the clean technology aggregator and integrator of CTP to deploy cleantech in the HSEP Development Project in Hangzhou and other potential projects in China and in the region;

2.1 CTPT Board of Directors will consist of [Robin], [Patrick], [Dr Han], [Richard] and [Michael] and [Robin] as Chairman & CEO; CTPT Board of Directors has decided that the net income split between CTPT and CTP will be 67% / 33%.

3. CTP will participate 25% equity stake in CTV Asset Management Pte Ltd (CTVAM), the Management Company of Shelterwood Eco-Venture Fund and Shelterwood Venture Accelerator Fund. CTVAM will be chaired by [Patrick] and its Board of Directors structure will be finalized when CTVAM is set up.

4. Any change to the above Resolutions shall require unanimous decision of the Board of Directors of CTP.

[emphasis added in original]

10 On 31 May 2010 CTP-HZ entered into a collaboration agreement with Vanwarm and a third party in respect of the Hangzhou project. Hangzhou Vanwarm Cleantech Company Ltd ("HVC") was set up as their joint venture vehicle. The salient term of the collaboration agreement was that CTP-HZ would be guaranteed a profit of RMB$130 million from the project in return for a paid up capital of 40% of HVC's registered capital of US$15 million; we note here that it was this guaranteed profit that Dr Han claimed he had lost as a result of his wrongful removal. However it was not disputed that the collaboration agreement was never registered with the Chinese authorities and was therefore unenforceable under Chinese law.

11 Disputes developed between the parties for various reasons that were not relevant to the determination of these appeals. The cracks had appeared as early as April 2010 and the relationships between them deteriorated to such an extent that on 12 October 2010, an extraordinary meeting of CTP-HZ was called by Patrick for the purpose of removing Dr Han and Christine as directors of that company. Dr Han was not given any notice of the meeting and the resolutions were duly passed. Despite some attempts at reconciliation, the entire project subsequently unravelled; on 2 February 2011 Vanwarm terminated the collaboration agreement on the grounds of internal problems at CTP. By then, Suit 908 had been filed.

12 The Hangzhou project was also interesting a Japanese party and a series of meetings were held between HQEDA, Japanese parties, Vanwarm, as well as Dr Han, Christine and Robin. It seems that no project eventuated, but Patrick, Michael and Richard claimed that the potential for such a project was a business opportunity that should have belonged to CTP and CTP-HZ and was hijacked by Dr Han, Christine and Robin, as well as their corporate vehicle IEC, in breach of their fiduciary duties. This was one of the main complaints in Suit 266; the other was that the three of them had conspired to file Suit 908 in order to force the eviction of CTP-HZ from the Hangzhou project.

The decisions below

13 The Judge found that the 1 March document was a shareholders' agreement that gave Dr Han a right or at the very least a legitimate expectation to be appointed as the chairman and a director of CTP-HZ and to remain in those positions unless it could be shown that he was justifiably dismissed. The Judge also agreed with Dr Han that Patrick and Richard had conspired to use unlawful means to remove him from his positions in CTP-HZ by way of a scheme to sell CTP shares to a Malaysian company and thereafter diluting Dr Han's and Christine's shares in the company.

14 In their defence, Patrick and Richard (it seemed that by this time Michael was no longer much involved) said the dismissal was legitimate because Dr Han had, among other things, failed to provide real estate contacts and access to private equity funds, had failed to procure CTP-HZ's involvement in a residential project that was part of the Hangzhou development, and had also wrongfully tried to hijack control of CTP-HZ at a board meeting in September 2010. There were a number of other allegations as well; the Judge found that none of them could hold water as legitimate reasons for Dr Han's dismissal.

15 The Judge therefore held that Dr Han was entitled to damages for losses to be assessed and also ordered CTP and CTP-HZ to be wound up under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act") on the grounds that it was just and equitable to do so.

16 As for the claim in Suit 266, the Judge found that the defendants did not breach their duties as directors of CTP-HZ and there was no evidence that they had diverted the opportunity to work with the Japanese parties to IEC in breach of their fiduciary duties.

The parties' cases on appeal

17 The appellants in CA 36 said that the Judge erred in finding that the 1 March document was a binding shareholders' agreement because it was not sufficiently certain, was expressed to be a shareholders' resolution, and in any event had been disregarded by the respondents. Even if it was a shareholders' agreement, it had not been breached because Dr Han's removal from office was proper and legitimate.

18 Further, there was no conspiracy as the allegedly unlawful acts were never carried out.

19 Finally, the appellants in CA 36 said that any alleged conspiracy or breach did not cause Dr Han's loss as the loss of the Hangzhou project was due to internal disputes precipitated by Dr Han himself.

20 The appellants in CA 37, CTP and CTP-HZ asserted that Dr Han, Christine and Robin had breached their fiduciary duties by telling Vanwarm of CTP-HZ's internal issues and thereby causing the failure of the Hangzhou project, as well as by incorporating IEC to take up a business opportunity (with the Japanese parties) that rightly should have belonged to CTP-HZ.

Our decision in CA 36

21 It seemed to us that the Judge was correct in his findings of fact. There was no basis therefore for us to interfere in that respect. In our view the key issue to be decided was the legal effect of the 1 March document (see above at [9]) and the consequences flowing from our decision on this issue.

The 1 March document

22 We were unable to agree with the Judge that the 1 March document was in effect a shareholders' agreement that gave Dr Han the right not to be removed from his posts in CTP-HZ without a unanimous vote of the persons listed in the document. The Judge gave the following reasons for his finding:

(a) The 1 March document had been prepared following a request made by Christine for a shareholders' agreement governing the relationship between the parties;

(b) It was labelled a directors' resolution rather than a shareholders' agreement but this was not determinative of the matter;

(c) Clause 4 of the 1 March document provided for unanimous approval of any amendment but this contradicted the Articles of Association of CTP which had provided for board decisions to be taken by way of a majority vote;

(d) It was also signed by three persons, namely Dr Han, Christine and a company, who were not then directors of CTP;

(e) The appellants' contention that vital terms such as governing law and jurisdiction clauses were missing so that the agreement was too uncertain was incorrect because such terms were

not necessary in shareholders' agreements.

23 It seemed to us that the Judge's reasoning proceeded on the assumption that the 1 March document had to be *either* a shareholders' agreement *or* a directors' resolution; and as it was not the latter it had to be the former. In our view, there was a third possibility which was that the 1 March document was, objectively construed and notwithstanding the intentions of the parties, a piece of legal nonsense devoid of any binding effect.

24 The 1 March document was certainly not framed as an agreement, but was cast and drafted as a resolution. We agreed that for the reasons advanced by the Judge, it could not be a proper directors' resolution, but it certainly did not follow that it had to be a shareholders' agreement. We agreed with the Judge's factual finding that the 1 March document had been prepared following Christine's request for a shareholders' agreement; however we were of the view that it did not necessarily follow that whatever document that was proffered as a result had to be a shareholders' agreement. It was entirely possible that the parties could have chosen to proceed on the basis of a very wide variety of arrangements, including by way of a directors' resolution.

25 We were further told by Mr Anthony Lee ("Mr Lee"), counsel for the respondents in CA 36 and CA 37, that the 1 March document had been prepared without the benefit of legal advice. In fact, in an email in February 2010, it was stated that it was Richard who had prepared the 1 March document as a resolution: see [2013] SGHC 51 at [39]. The lack of legal input was apparent: in our view whatever the subjective intention of the parties to regulate their relationships on some kind of legal footing, the substance of what they might have had in mind never crystallised into the proper form. Construing the 1 March document objectively, we were therefore none the wiser as to what the agreement, if any, between the parties was.

26 Clause 4 of the 1 March document exemplified the issues that we had with construing this as a shareholders' agreement. This clause stated that "[a]ny change to the above Resolutions shall require unanimous decision of the Board of Directors of CTP". There were seven signatories to the document: Patrick, Dr Han, Richard, Robin, Michael, Christine and a company, CleanTech Ventures Asia Pte Ltd ("CTVA") signed for here by Richard. All seven were shareholders of CTP. But the incongruous result was that the document was expressed to require, for the purposes of any amendment to its term, the unanimous approval of the first six persons who were directors and shareholders of CTP; but the seventh person, CTVA, which was a signatory as well as shareholder of CTP, did not have the power to participate in any amendment because it was not also a director of CTP. Mr Lee said that there was an implied term that Patrick, representing CTVA, would automatically agree to any changes; but in our view this was not entirely convincing because it was Richard rather than Patrick who had signed for CTVA in the 1 March document. Mr Lee said in further reply that both Richard and Patrick were the controllers of CTVA and the only two directors thereof, but the essential point was that we were being asked to undertake substantial surgery on the document in order to make it work as an agreement and in our view this rather militated against any such finding.

27 There were a number of other issues that made it unclear as to the obligations and rights that the shareholders had taken on *inter se*. Three more examples will suffice. The first is that while there were positions ascribed to individuals, did this create any obligation on them to remain in those positions, and to carry out any specific duties in those capacities? These things were left completely unspecified; in any event, Dr Han himself did not take up the posts of director or deputy chairman of CTP. The second is the issue of distribution of CTP-HZ's income or profits. Clauses 1.3 and 1.4 of the 1 March document stipulated for such income to be distributed in a specified way; but there was nothing said about the means by which CTP-HZ would be funded or how the costs of meeting disbursements would be apportioned; and this was important because profits are calculated by way of

taking costs off from revenue.

28 A third issue we had was that contrary to clauses 2 and 3 of the 1 March document, the companies named therein were never set up. Clause 2 stated that CTP Technology Pte Ltd, said to be a 100% subsidiary of CTP and to function as a "clean technology aggregator and integrator of CTP", was to be constituted and its board of directors was to include Robin, Patrick, Dr Han, Richard, and Michael, with Robin as chairman and CEO. None of this was ever done. Clause 3 specified that CTP would take a 25% stake in CTV Asset Management Pte Ltd, a company to be chaired by Patrick; again, this was never done. [note: 1]

29 To some of these issues a number of solutions were suggested to us by Mr Lee but these required the implication of a very great number of terms so as to be able to construct a workable shareholders' agreement and we were of the view that this was a step too far. In *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 we said that (at [100]):

> [T]he threshold for implying a term is necessarily a high one. The law remains that a term will only be implied if it is necessary.

In our view, it was not necessary for us to do so, simply to create a workable agreement out of the 1 March document.

30 Finally, it seemed that there was a lack of consistency in the way that the parties themselves treated the 1 March document and it seemed that even Dr Han, Robin and Christine did not see it as a shareholders' agreement. On 16 August 2010 there was a meeting of the directors of CTP-HZ at which Dr Han, Patrick, Richard, Robin and Christine were present. The minutes [note: 2] recorded that the chairman, Dr Han:

> [R]eferred to a signed document on March 1 2010, which a CTP convened meeting had recorded as a resolution to the formalization of CTPHZ, appointment of its directors, and the distribution of CTPHZ income when received. The Chairman asked that the meeting regard the document as a formal document of CTPHZ.

31 On 29 September 2010, Dr Han, Robin and Christine convened a meeting of the directors of CTP-HZ. [note: 3] According to the minutes of the meeting, they resolved among other things to change the company secretary and its registered office, and also confirmed the terms of the 1 March document as an "agreement by shareholders of [CTP] *Pursuant to CTP Board Minutes dated 1 March 2010* [emphasis added]". The terms as set out in minutes of the 29 September 2010 meeting mirrored that of the 1 March document, but differed in that clause 4 was recast as requiring the unanimous decision of the board of directors of CTP-HZ instead of CTP as was stated in the 1 March document.

32 Pertinently, the minutes of these two meetings suggested that Dr Han and Christine did not regard the 1 March document as a shareholders' agreement giving rise to rights and obligations as between the shareholders. Further evidence if required can be found in an email written by Christine on 14 February 2011 in which she said: [note: 4]

> ***The 1st March 2010 document as a resolution is not binding on me as I was not a director of CTP, unless of course you now want to consider it an agreement*** . Are you now saying that the 1st March 2010 document is an agreement? [emphasis added]

33 For these reasons we were unable to accept that the 1 March document was a shareholders'

agreement for the purposes of the case that was presented to us, *viz*, whether Dr Han had any legal claim to remain in his positions in CTP-HZ. The only thing the 1 March document dealt with in any detail was the apportionment of profits realised from the Hangzhou project. Hypothetically, if the project had come to fruition and those profits once realised had not been distributed according to the terms of the 1 March document, a claim might have been brought on the basis of some form of estoppel. But this was not the case that was presented to us.

Dr Han's legitimate expectations

34 We turn now to the Judge's alternative ruling, that the circumstances under which Dr Han had participated in the project with CTP gave rise to a legitimate expectation that he be allowed to retain his posts in CTP-HZ. In our judgment, this was unsustainable given the nature of the relationship between the parties.

35 The doctrine of legitimate expectations arises in the context of a relationship of trust and mutual confidence – a quasi-partnership, in other words – such that equity would intervene to suspend the otherwise oppressive exercise of legal rights: see our decision in *Over & Over Ltd v Bonvests Holdings Ltd and another* [2010] 2 SLR 776 at [78]–[80]. The present case was not such an association: this was not a case of persons who had a close relationship of mutual trust who had come together on the basis of informal understandings and expectations. The undisputed evidence was that the appellants had brought Dr Han in because he had expertise in projects of such nature. There was no room for the operation of any doctrine of legitimate expectations and it followed that Dr Han was not wrongfully dismissed on this basis.

36 There was a further issue in relation to this point. The Judge found ([2013] SGHC 51 at [52] and [118]) that Dr Han was entitled to damages for losses suffered as a result of his wrongful dismissal. No doubt, if there was a shareholders' agreement and that agreement was breached Dr Han could claim damages on the basis of a breach of contract. But in our view it was questionable whether it was open for Dr Han to claim damages for losses suffered for a breach of legitimate expectations. For the doctrine of legitimate expectations was developed in the context of an action for minority oppression or for a just and equitable winding up of a company: see *Ebrahimi v Westbourne Galleries Ltd and Others* [1973] AC 360. Section 216(2) of the Companies Act gives the court a very wide power to "make such order as it thinks fit" but this power is circumscribed by two qualifications. First, an order under s 216 may be granted only if the court is satisfied that either of the grounds in s 216(1) has been made out. We noted that in this case the Judge had not explicitly made any finding as to which, if any, of the grounds in s 216(1) was made out on the facts but in our view it was necessary to do because the doctrine of legitimate expectations is not a freestanding right but instead one that operates narrowly within the context of (in this case) actions for minority oppression.

37 The second qualification is that such relief as may be ordered under s 216(2) has to be done "with a view to bringing to an end or remedying the matters complained of": see *Kumagai Gumi Co Ltd v Zenecon Pte Ltd and others and other appeals* [1995] 2 SLR(R) 304 at [71]. In *Yeo Hung Khiang v Dickson Investment (Singapore) Pte Ltd and others* [1999] 1 SLR(R) 773 ("*Yeo Hung Khiang*") at [35], we doubted, relying on the Irish case of *Irish Press plc v Ingersoll Irish Publications Ltd* [1995] 2 ILRM 270, whether it was open to a party claiming relief under s 216 to seek damages:

> As the Irish Supreme Court pointed out, an award of damages is a purely common law remedy for a tort, breach of statutory duty or breach of contract, and acts of oppression would not come within any of these categories. Further, if Parliament had intended to include the remedy of damages as one of the reliefs which could have been granted, it would have done so.

38 While it might be open to the court to grant limited relief in the form of enhancing the value to be attributed to the shares of the company in a buyout order, it is quite another thing to say that there is a general right to compensation for loss resulting from oppression: see *Yeo Hung Khiang* at [70]. But as this was not raised by the parties or discussed by the Judge below we say no more about this.

Whether Dr Han suffered any loss

39 In any case, we were of the view that Dr Han was unable to prove that he had suffered any loss even if the appellants had breached either the shareholders' agreement (supposing it was one) or any legitimate expectations Dr Han may have had.

40 It was not disputed that Dr Han's loss centred on a claim of a loss of chance to benefit from the profit sharing agreement outlined in the 1 March document. But we were of the view that the opportunity supposedly forgone was too speculative to be able to support any legal remedy. We noted that clause 1.4 of the 1 March document provided that CTP-HZ was to enter into agreements with the Chinese parties "in due course". Those agreements were signed in March and May 2010, after the 1 March document came into being. The point is that at the time the 1 March document was signed, there was no legal entitlement to any profits simply because there had not yet been any agreement with the Chinese parties and whether an agreement could be reached and on what terms therefore depended on their cooperation. In any case, it was also not disputed that the Chinese parties' commitment to provide a guarantee of profit of RMB$130 million (see above at [10]) had not been registered with the relevant authorities as required under Chinese law and was therefore unenforceable there. If so, the profit guarantee was doubly contingent on the Chinese parties' goodwill.

41 It followed that Dr Han's loss of chance was not a chance to enjoy a legally enforceable right, but an entirely speculative chance that the Chinese parties, whether out of goodwill or trust or honesty, would come through with their commitment. There was no authority provided to us that in such circumstances this was a recoverable head of damages that could even be assessed. In our view, there was a line to be drawn between a chance of enforcing a binding obligation and a chance of persuading a third party in effect to exercise goodwill and in the circumstances we did not think that Dr Han had proved his case.

Our decision in CA 37

42 The appellants, CTP and CTP-HZ, made a large number of allegations against Dr Han, Christine and Robin: that they had breached their duties of care skill and diligence; that they had breached their fiduciary duties in diverting the Hangzhou project to IEC and hijacking the potential for cooperating with the Japanese parties; and that they had conspired to institute Suit 908, thus giving Vanwarm a reason to terminate the collaboration agreement with CTP-HZ.

43 We agreed for the reasons advanced by the Judge that as a matter of fact there was no basis to any of these allegations. In our view the appeal was entirely unmeritorious and we therefore dismissed it.

Conclusion and costs

44 As regards CA 36, it was clear to us that Dr Han and Christine had participated in the Hangzhou venture on the basis of some kind of understanding; but the question on the case as pleaded and presented to us was whether there was a legally enforceable agreement, specifically in the form of

the 1 March document, that would prevent Dr Han's and Christine's removal from their posts in CTP-HZ. For the reasons above we did not think that the 1 March document was a legally enforceable agreement and further that Dr Han's possible claim in damages was a claim in relation to a profit guarantee which was not legally enforceable. We were doubtful that this was a recoverable head of damage.

45 As regards CA 37, having accepted the Judge's findings of fact, there was therefore no reason to overturn his decision.

46 Therefore we allowed CA 36 and dismissed CA 37.

47 On the issue of costs, while Dr Han and Christine were largely vindicated on the factual issues, their case failed on the legal issue in Suit 908 which was the effect of the 1 March document. CTP-HZ and CTP, however, commenced the counter suit (Suit 266) which in our view was entirely misconceived but which consumed a substantial amount of the court's time in trial. CA 37 was as we have said entirely unmeritorious.

48 Therefore we exercised our discretion and made no order as to costs for both appeals. We did not disturb the order of costs for Suit 908 in favour of Dr Han and we made no order as to costs for Suit 266. We also ordered that costs already paid in respect of Suit 266 were to be refunded within 14 days of our decision with no attendant interest so long as it was refunded within that period of time.

[note: 1] Appellant's Case, p 19

[note: 2] RA vol III (ptr 12) p 293

[note: 3] CB vol II p 35

[note: 4] CB vol II p 45