

Australian Property Group Pte Ltd v H.A. & Chung Partnership and others
[2015] SGHC 147

Case Number : Suit No 517 of 2011
Decision Date : 29 May 2015
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : Adrian Tan, Yeoh Jean Wern (Stamford Law Corporation) for the plaintiff; Troy Yeo (Chye Legal Practice) for the second and third defendants.
Parties : Australian Property Group Pte Ltd — H.A. & Chung Partnership and others

Companies – directors – duties

29 May 2015

Judgment reserved.

Judith Prakash J:

Introduction

1 The plaintiff company, Australian Property Group Pte Ltd (“APG” or “the company”), was incorporated on 9 February 2009. On 21 March 2011, APG was placed under judicial management. This action was started by the judicial manager in July 2011 to recover moneys allegedly wrongfully paid to the defendants. The first defendant, a law firm, settled the claim against it but the second and third defendants, former directors and shareholders of APG, contested the action. This judgment concerns the claims against the second and third defendants only and any reference to “defendants” generally should be taken as a reference to the second and third defendants only.

Background of the plaintiff and defendants

2 The defendants are Sean Colville Niven (“Mr Niven”) and Wang Zijian who is also known as “James Wang” (“Mr Wang”).

3 APG was in the business of marketing and selling Australian real estate on behalf of Australian property developers. Typically, the property marketed would be land and premises with the premises being or about to be constructed. APG’s revenue was the commission paid by the property developers, whilst its expenses were related to rent, staff costs and costs incurred in marketing the real estate. The commission earned typically consisted of two components:

- (a) a commission upon the buyer signing the unconditional sale contract with the developer, with a 5% to 10% deposit to secure the property (“Front End Commission”); and
- (b) a commission upon completion of the sale and purchase (“Back End Commission”).

The Front End Commission was typically less than the Back End Commission. The Front End Commission was meant to cover APG’s operational costs in marketing the properties, while the Back End Commission was mainly profit for APG. A considerable period of time might elapse between the receipt of the Front End Commission and that of the Back End Commission as the completion of the sale and purchase did not take place until construction of the premises concerned had been finished.

4 Mr Niven has been involved in the business of marketing and selling Australian properties since 1989. He has much experience in dealing with the Australian property market and many connections with property developers there. Prior to December 2008, Mr Niven and Mr Wang worked together in a company called JL Property Group Pte Ltd ("JL Property") which was also in the business of selling property in Australia.

5 In December 2008, the defendants decided to start their own company to sell Australian properties. They resigned from JL Property and approached one Goh Cheng Liang ("Mr Goh"), the godfather of Mr Wang, for a loan of \$900,000 in order to obtain start-up capital for the new venture. As a condition of making the loan, Mr Goh insisted that his nominees become directors and shareholders of APG.

6 On incorporation, APG had the following directors and shareholders:

- (a) Mr Niven (360,000 ordinary shares);
- (b) Mr Wang (160,000 ordinary shares);
- (c) Gan Siong Teck ("Mr Gan") (40,000 ordinary shares);
- (d) Hou Junyu ("Mr Hou") (200,000 ordinary shares); and
- (e) Lee Jer Ren ("Mr Lee") (40,000 ordinary shares).

It is pertinent to note that although the shares were issued as fully paid-up, in fact they had not been paid for.

7 APG received the loan of \$900,000 pursuant to a loan agreement dated 11 March 2009 with Mr Goh. Mr Gan, Mr Hou and Mr Lee acted as non-executive directors of APG ("collectively the NEDs") to protect Mr Goh's interests while the defendants controlled the day-to-day operations of APG.

8 On 15 May 2009, one Lim Kay-Lin Kathlene ("Ms Lim") joined APG as its general manager. Ms Lim had come to know Mr Niven and Mr Wang while they were still working for JL Property as she had purchased Australian properties through that company.

9 After Ms Lim joined APG, the roles of the three principal employees were as follows:

- (a) Mr Niven was responsible for securing the rights to market various properties from Australian property developers as well as to manage the finances of APG;
- (b) Mr Wang was APG's sales manager; and
- (c) Ms Lim was in charge of APG's overall operations and of the sales team.

10 In November 2009, APG borrowed money from an Australian company, Ubertas Funds Management Pty Ltd ("Ubertas"), and used it to repay Mr Goh's loan. On 7 November 2009, the NEDs resigned and their shares in APG were subsequently transferred to Mr Niven. On 8 December 2009, Ms Lim was appointed as a director of APG. In January 2010, she became a shareholder of the company when she purchased 240,000 shares from Mr Niven for \$160,000.

APG's financial difficulties

11 In early 2010, APG faced financial difficulties. APG was unable to pay its rent, its advertising agencies or its staff salaries. APG's accounts were in a mess. APG engaged Firstwaters Consultants Pte Ltd ("Firstwaters") to reconstruct APG's accounts from 2009 and to maintain APG's day-to-day accounting. APG had engaged John Kennedy Stuart ("Mr Stuart"), a chartered accountant, to provide tax services and advice to APG's clients. Subsequently, Ms Lim also asked Mr Stuart to investigate and report on APG's financial situation. On 2 July 2010, Mr Stuart advised the directors of APG that, in his view, APG was technically insolvent.

12 Following discussions on the company's financial situation, Mr Niven, Mr Wang, Ms Lim and APG executed an agreement dated 6 September 2010 ("the September Agreement"). Under the September Agreement, Ms Lim agreed to capitalise the amount of \$175,000 owed by APG to her and inject a sum of \$150,000 into the company. In exchange, she would receive 325,000 new shares in APG. Further, Mr Niven acknowledged that he owed the company \$300,450.37 and it was agreed that the company would write-off 40% of this amount with Mr Niven paying the balance \$180,270.22 in two instalments: 50% was to be repaid by 31 December 2011 and the remaining 50% by 31 December 2012. The September Agreement also provided for the payment of the unpaid share capital. In this respect, the parties agreed that Mr Niven was liable for \$560,000, Mr Wang was liable for \$160,000 and Ms Lim for \$80,000. By cl 1.3, it was provided that the shareholders had to repay the company 10% of the outstanding capital each year for ten years.

13 On 6 October 2010, by a written directors' resolution signed by Mr Niven and Ms Lim, the company resolved that the appointment of Ferrier Hodgson Pte Ltd ("FH") to conduct a review of the company's accounts be approved. On 11 October 2010, FH sent the board its draft summary of findings from its preliminary review of its financial books and records. This review indicated that many of the company's payments, including to Mr Niven and Mr Wang, were not supported by vouchers, there was no clear indication of employees' and directors' benefits and entitlements and various professional fees had been paid without indicating any relevance to APG. Several payments had been made to Mr Niven in Australia by internet withdrawals and there had also been payments to an Australian company called "Australian Property Group (Vic) Pty Ltd". There were no documents to support these Australian transactions. Further, APG had paid for the personal expenses of Mr Niven.

14 After receipt of the draft report, the three directors began discussions on parting ways. These resulted in a handwritten document which was signed by Mr Niven, Mr Wang and Ms Lim on 13 October 2010. This document will be referred to as the "October Agreement". The defendants rely on the provisions of the October Agreement as part of their defence to this case but APG contends, for various reasons, that the October Agreement is not valid and binding.

15 The October Agreement provided that Mr Niven and Mr Wang would resign as directors that very day and transfer all their shares, except for 10% in Mr Wang's hands, to Ms Lim. Ms Lim agreed to pay Mr Niven's outstanding expenses and commission in instalments. It was further agreed that Mr Niven and Mr Wang would have no liability to APG "from a compliance perspective upon settlement" and that they "will owe nothing to the company upon settlement, excluding any personal tax liabilities".

16 On 1 March 2011, Ms Lim applied to place APG under judicial management. Her application was granted on 21 March 2011 and Timothy James Reid ("Mr Reid") of FH was appointed judicial manager of APG. After his appointment, Mr Reid discovered that the defendants had not paid APG for their shares albeit these had been issued to them as fully paid up shares. He therefore called on them for payment. He also came across many payments made to Mr Niven after the company's incorporation which he considered to be unjustifiable due to a lack of documentary support.

The claim and the counterclaims

17 APG claims against the defendants that:

- (a) they, jointly and severally, give an account of the payments made by APG to them;
- (b) they, jointly and severally, pay APG the sum of \$1,559,980.97, being moneys paid by APG for Mr Niven's personal use;
- (c) they, jointly and severally, pay APG the sum of A\$184,266.68, being moneys paid by APG for Mr Niven's personal use;
- (d) Mr Wang pay APG the sum of \$160,000, being the unpaid capital due from him;
- (e) they, jointly and severally, pay APG damages to be assessed.

It can be seen from the above that although both defendants are asked to give an account of payments made to them, the payments which APG is unhappy about are payments made to Mr Niven alone. Further, the sum of \$1,559,980.97 which is the amount allegedly paid to Mr Niven for his personal use includes the sum of \$640,000 which is actually unpaid share capital.

18 The defendants do not appear to deny that APG's funds were used for Mr Niven's personal benefit. Their stand is that such use was authorised. In particular, the defendants plead that:

- (a) Cheque payments made from the time APG was incorporated until 7 November 2009 were authorised, approved or otherwise endorsed by Mr Niven, Mr Wang and at least one of the NEDs;
- (b) Cheque payments made from 8 December 2009 onwards had been signed and authorised or otherwise approved, by at least two out of three directors;
- (c) It does not matter whether those payments were for Mr Niven's personal expenses, as long as the payments were made with the knowledge and/or consent of APG's directors at the time of payment;
- (d) Payments for Mr Niven's personal expenses were permitted, authorised and/or otherwise approved by APG's directors and shareholders, as being part of Mr Niven's employment package or employment benefits ("the Oral Agreement");
- (e) Payments made to Mr Niven were authorised, approved, endorsed or otherwise accepted by APG's directors, and/or were made pursuant to a mode of practice which APG had put in place for the approval and authorisation of payments and/or use of APG's funds ("the Account Practice"); and
- (f) In any case, APG's claims against Mr Niven and/or Mr Wang were fully settled and accounted for in the September and October Agreements (hereafter collectively, "the Agreements").

19 The defendants further plead that to all intents and purposes, APG was regarded as Mr Niven's business, and it was up to him to run APG as he deemed fit.

20 Mr Niven counterclaims for:

(a) Pursuant to the September Agreement:

(i) \$75,000, being his unpaid monthly salary for five months from October 2010 to February 2011, plus a sum to be assessed for the incentives due to him from APG;

(ii) Damages to be assessed for the reimbursement of his mobile phone charges incurred for business purposes; and

(iii) \$106,944 or A\$83,550, being his share of the Back End Commission.

(b) An account of the payments of the Back End Commission under the September Agreement.

21 Mr Wang counterclaims for:

(a) Pursuant to the September Agreement:

(i) \$25,000, being his unpaid monthly salary for five months from October 2010 to February 2011, plus a sum to be assessed for the incentives from APG;

(ii) \$3,000, being the reimbursement of his mobile phone charges incurred for business purposes;

(iii) \$53,472 or A\$41,775, being his share of the Back End Commission; and

(b) An account of the payments of the Back End Commission under the September Agreement.

The issues

22 In its closing submissions, APG formulated the following as the two key issues for the court's determination:

(a) Whether the defendants, in using APG's funds for their personal benefit, were acting in breach of their duties as directors of APG; and

(b) Whether the defendants are entitled to rely on the Agreements as a defence to their liability to APG. Such liability would of course include the defendants' obligation to pay up the unpaid share capital.

23 The defendants did not formulate any issues in their closing submissions. Instead, they set out their case in 55 paragraphs. It can, however, be discerned from the defendants' case that they consider the following issues to be relevant:

(a) Whether APG was insolvent at the respective dates on which the Agreements were concluded;

(b) Whether the parties had reached an agreement under which the defendants would give up their directorships and shares in APG and in exchange there would be a full and final settlement of all claims and liabilities owing by the defendants to APG, and in this connection whether the Agreements are valid and enforceable;

(c) Whether there was a course of business practice or oral agreement between the shareholders for APG to pay the personal expenses of the directors;

(d) Whether it was in APG's interest to pay Mr Niven well and take care of all his allowances and expenses since he was a "rain- maker" who brought millions of dollars-worth of business to APG;

(e) Whether the Agreements and the subsequent judicial management of APG were part of a master plan by Ms Lim to take over control of APG and to remove the defendants as directors and shareholders.

24 To determine the issues formulated by APG, I would also have to deal with the issues in [23] above, apart from the final issue which is the allegation that the events of September 2010 to March 2011 were all part of a Machiavellian plan on the part of Ms Lim to oust the defendants and take over a profitable and solvent business for her own benefit. I consider that in determining whether APG was indeed solvent in September 2010 and whether the various payments made to Mr Niven, were authorised expenses of the company, I would also be able to settle the issue of whether all the events were set in motion by an evil scheme concocted by Ms Lim and that I probably would not need to deal with this directly. I should point out that if the defendants had indeed acted in breach of fiduciary duty to APG by taking money from it to which they were not entitled, Ms Lim's motivation could not adversely affect the company's right to recover the funds which had been wrongfully paid out.

Description of the claims

25 APG's claims against the defendants fall into two categories. The more straightforward category comprises its claims against both of them as shareholders for the capital sums which should have been paid by them for the shares to which they subscribed initially and, in the case of Mr Niven, those additional shares that he purchased from the NEDs. The defendants' position is that these claims were settled or waived by APG pursuant to the Agreements. I will deal with this issue later in this judgment.

26 The second category of claims concerns the payment of various sums to Mr Niven. APG's position is that Mr Niven and Mr Wang made these payments in breach of fiduciary duty and therefore are both liable to repay them to the company. The defendants' position is that these payments were authorised and due to Mr Niven.

Details of payments made

27 APG alleges that it made the following payments to or on behalf of Mr Niven which it is entitled to recover from him as being unauthorised payments/payments in breach of fiduciary duty:

Sr No	Item	Amount (S\$)	Amount (A\$)
1	American Express credit card expenses	326,944.34	–
2	Payment of Mr Niven's personal legal expenses by the company to HW Litigation and Butcher Paul & Calder	48,994.47	1,987.42
3	Payment to Mr Niven without proper supporting documents	264,746.96	90,191.25
4	Payment of Mr Niven's and his family's travel expenses	33,328.37	–

5	Payment to third parties on behalf of Mr Niven	245,966.83	6,088.43
6	Payment of an invoice issued by APG into Mr Niven's personal bank account maintained with the Commonwealth Bank of Australia	–	86,000.00
	Total:	919,980.97	184,266.68

Full details of each category of payments are set out in the Appendices to the statement of claim.

28 APG's position is that the appropriation of a company's funds for a director's personal use constitutes a *prima facie* abuse of funds and a consequent breach of the director's duties to the company. This is the legal proposition established in *Creanovate Pte Ltd v Firstlink Energy Pte Ltd* [2007] 4 SLR(R) 780 at [41]. The defendants do not quarrel with the proposition as such but say that some of these funds were not for Mr Niven's personal expenses and, in any case, the payments were authorised by the directors and shareholders pursuant to the Account Practice and the Oral Agreement and therefore were proper.

29 The defences filed by the defendants do not set out which of the expenses paid by APG were not Mr Niven's personal expenses and were payments made in respect of expenses incurred by Mr Niven on the company's behalf and/or in the course of business. Technically therefore, the defendants are not entitled to contend that any of these expenses were properly paid by APG. I will, however, consider the strength of that contention as I go through the various categories of payments made as set out in the table above.

30 The first category comprises payments made to American Express Inc on behalf of Mr Niven ("Amex Card bills"). When he came to court, Mr Niven alleged that APG paid only for the business-related expenses in his Amex Card bills. However, as APG submits, the documentary evidence establishes that APG paid the full amounts charged to Mr Niven's Amex Card each month and no documents were produced to support Mr Niven's assertion that the expenses charged to his Amex Card were purely business expenses.

31 The Amex Card bills reflect various payments that were clearly personal expenses. Among these are petrol bills, department store bills, supermarket bills and restaurant bills. One particularly interesting charge, on Mr Niven's bill of 29 March 2010, was for \$11,743.70 at "Boss Selection Singapore". Mr Niven asserted that this payment was for clothing for Mr Wang and himself and that he was entitled to charge this expense to APG under his employment package. He said that his recollection of discussions with the NEDs was that they agreed that the executive directors, *ie*, Mr Wang and himself, would be entitled to buy suits at the expense of APG and the amount that they could spend was not specified. There is no documentary evidence of such a discussion which allegedly took place at a board meeting and I do not accept the truth of Mr Niven's evidence in this respect. While it may be that some of the Amex Card bills for dining and hotel expenses were incurred on behalf of APG in the course of business, there are no vouchers which indicate why these expenses were incurred and who Mr Niven was dining and dining. The onus must fall on Mr Niven, the director in charge of accounts, to justify these expenses as having been incurred properly on behalf of the company rather than being his personal expenses. So far he has not discharged that onus.

32 As can be seen from the table above, APG also spent \$48,994.47 and A\$1,987.42 in legal fees. These legal fees, the second category of payments in the table, were incurred in relation to Suit No 170 of 2009 which was brought by JL Property against Mr Niven, Mr Wang and 17 others in connection with their prior employment by JL Property. APG was not a party to this action but the

defendants caused APG to pay their legal fees incurred in defending JL Property's claim. In court, the defendants agreed that the suit was subsequently settled and that Mr Niven had received some money from JL Property as part of the settlement. However, Mr Niven also agreed that he did not pay any part of the settlement money to APG. He said this was because there had been a discussion and agreement with the shareholders and the NEDs that no money recovered from the suit need be paid to APG. However, whilst any money Mr Niven received from the JL Property suit did belong to him, he had an obligation to reimburse APG with any amount that it had paid on his behalf as legal fees for that suit unless the other shareholders and directors agreed otherwise. It is significant that the defendants did not call any of the NEDs to corroborate their story that the NEDs had known about and agreed that APG would pay these fees while Mr Niven was free to keep all amounts recovered. Mr Niven's liability to repay these fees must, however, be reduced to the extent that APG has already recovered the same from the first defendant.

33 The third category of payments comprises those made without proper supporting documents. Some of these have no description whatsoever. Others have minimal description such as "furniture" or "artwork" whilst a few are described as "payment for Niven IRAS – loans" or "Niven's loan account" or "commission". These payments were made directly to Mr Niven and he did not produce any evidence that showed the purpose of these payments or that it was in APG's interest to make them. Where the payments were described as "loans", obviously they must have been intended to be repaid by Mr Niven. As for the payments marked "commission" and "sales incentives – Niven will provide details on 9 March" totalling \$31,000, Mr Niven again has the burden of showing what transactions these payments were made in respect of and why he was entitled to them. He has not discharged his burden.

34 The fourth category of expenses comprises payment of Mr Niven's and his family's travel expenses. As listed in Appendix D to the statement of claim, the category contains payments made for air travel undertaken by Mr Niven, his wife and children, and even the family's domestic helper. No documentary evidence was produced to indicate that APG was legally obliged to pay for the travel expenses of Mr Niven's family and employee. As for Mr Niven's own travel expenses, in so far as he made business trips, APG would have to pay for them. However, the only travel expense incurred by Mr Niven himself included in this Appendix is in respect of a trip made to France with his wife in August 2009. There is no evidence that this trip had anything to do with APG's business. *Prima facie* therefore, APG should not have paid the travel expenses in Appendix D and Mr Niven has to repay them.

35 The next category, payment made to third parties on behalf of Mr Niven, comprises all sorts of miscellaneous payments including telephone charges for Mr Niven and his children, his children's school fees, rental and leasing of furniture. The defendants have not produced any documentary evidence that Mr Niven was entitled to the payment of these expenses as part of his employment contract or that otherwise the expenses were incurred in APG's interest or for APG's benefit.

36 The last item in the table relates to a payment made by a company called Ubertas 350 William Street Pty Ltd ("Ubertas 350"). In February 2010, APG carried out a marketing campaign for a property being developed by Ubertas 350. On 22 February 2010, APG raised an invoice to Ubertas 350 for the sum of A\$86,000 to cover the marketing funds for the campaign. Mr Niven signed the invoice and inserted instructions on it for the funds to be paid to his personal bank account in Australia. In due course, Ubertas 350 paid A\$86,000 to Mr Niven's account.

37 In court, Mr Niven did not deny that the A\$86,000 had been paid into his account. He alleged that Ubertas 350 had required that the payment be made to him personally and that the money had been spent exclusively on the marketing campaign. As a result of the campaign, 27 sales were made

and APG became entitled to commission. Therefore, Mr Niven asserted, the payment was beneficial to APG. What was telling in his answer was that when he was asked whether he was saying that Ubertas 350 would rather pay him personally instead of APG, his reply was:

Yes, Your Honour. They saw me as APG. They didn't see anybody else, but APG is me.

Mr Niven clearly identified the company as his own personal fiefdom and did not see any distinction between himself and APG. It was a significant piece of evidence which explained a lot about Mr Niven's behaviour while he was running APG.

38 Mr Niven also testified that as he was running the marketing events in Melbourne, it was more practicable that the money went to him rather than being paid to Singapore and then being returned to him in Melbourne. He asserted that it was "agreed by all shareholders and partners to do it this way" (a reiteration of an assertion that he made repeatedly in respect of payments to him but without producing corroborative evidence). He then went on to say that not only had the money been paid exclusively on Ubertas 350's project but he had spent a further A\$13,000 on the project and had reclaimed that sum from APG. When Mr Niven was asked whether he had any documentary evidence to account for how he had spent A\$86,000, he replied that yes all the information had been passed to the Accounts Department because his assistant Ms Vanessa Foo ("Ms Foo") had been with him and she had collected all the receipts and passed them to the Accounts Department. Mr Niven did not call Ms Foo to give evidence and when queried about that he said that he did not see any need to involve her in this matter. However, APG asserted that it did not have any of these receipts in its files.

39 If indeed Mr Niven did spend the sum of A\$86,000 in relation to marketing events for the Ubertas 350 project, then such expenditure was in APG's interest and cannot be recovered by the company. Since Mr Niven received the money, however, *prima facie* he has a duty to account for it and to show exactly how he spent it. If he cannot do this, then he will have to repay the money to APG because he has not established that it was spent in the course of APG's business and for its benefit.

40 I am satisfied that *prima facie* Mr Niven is liable to repay all of the sums claimed by APG as set out in the table, less any amount recovered from the first defendant, subject to the general defences which I consider below.

Unpaid share capital

41 When APG was incorporated, Mr Niven was allotted 360,000 ordinary shares while Mr Wang received 160,000 shares. Mr Wang admitted in court that he never paid for those shares. Mr Niven, however, took the position that he had paid for his shares by way of payment injections into the company as well as through commissions owing to him from APG. Subsequently, after lengthy questioning he agreed that if he disregarded his contributions to the company and nothing that the company owed him was set off against the share capital, he would be liable for the unpaid share capital.

42 Whilst none of these alleged payments were pleaded, in their closing submissions the defendants said that the following payments represented Mr Niven's share payments:

- (a) \$490,000 to APG on 1 December 2009;
- (b) \$300,000 to APG on 17 December 2009; and

(c) \$320,000 to Ms Lim on 17 December 2009.

The defendants' submissions do not identify the documents supporting the payments. However, they appear to be referring to three cheques drawn by Mr Niven, viz, OCBC cheque No 771893 dated 17 November 2009 for the sum of \$320,000 to Ms Lim, OCBC cheque No 771397 also dated 17 November 2009 for the sum of \$300,000 to APG and OCBC cheque No 771399 dated 1 December 2009 for the sum of \$490,000 to APG. There are no cheques dated 17 December 2009.

43 The three cheques were produced by Mr Wang, not Mr Niven, at the start of the second tranche of the trial in October 2014, some one and a half years after the first tranche. Mr Wang had no personal knowledge of the cheques and could not give evidence on them. Mr Niven was not present at the second tranche of the trial although at the previous hearing he had given evidence and produced his OCBC statement of account for November 2009 which reflected the withdrawals made through the cheques. When giving evidence on the statement of account, Mr Niven was unclear as to the purpose of the two cheques in favour of APG:

Court: Why did you make two cheques?

Witness: It seems to me it's the---the reason I can only think of would be, er, because we were making payments for the purposes of, er, paying the Goh Loan. It's unclear to me at this stage, but maybe one of those cheques was paid directly to the Goh's to pay out the 900,000, but again, until I see the actual cheque, I can't confirm that.

Court: Yes.

Witness: The sixth entry, there's an amount of one---er, sorry, on page 3, is a statement, erm, dated the 1st of December, and halfway down the page, there's an amount deposited into my account from Ms Kay-Lim, same entry T/T SGD 177,089.91. And then the seventh and last payment, which was a cheque from my account, again I'm fairly certain to APG on the 2nd of December on the last page, three-quarters of the way down, cheque number 771399, for 490,000. When I'm shown the bank statements, I'm a little surprised why the judicial manager hasn't got these, but at this point, they haven't been tendered, *so my conclusion is that those amounts less the 450,000 received, which was the company's funds received via Ubertas, the net amount was my funds towards the company.*

[emphasis added]

44 From the above, it can be seen that at least as far as \$490,000 cheque was concerned, at least A\$450,000 of that was actually the company's own money, being the loan proceeds from the Ubertas loan. This was subsequently confirmed by Mr Niven who agreed that part of the Ubertas loan had been deposited into his own account in Australia and he had then made payment in Singapore dollars to APG. He also agreed later that the loan of A\$450,000 was encompassed in the two cheques of \$490,000 and \$300,000 he had drawn in favour of the company and the third cheque of \$320,000 drawn in favour of Ms Lim. In fact, it had been his intention to use the Ubertas loan as paid up capital but he was subsequently given legal advice that this could not be done. It should also be noted that there were various payments passing between Ms Lim and Mr Niven at the material time and therefore it is not at all clear what the \$320,000 payment was intended for. In any case, a payment to Ms Lim cannot on its face constitute payment to the company of share capital.

45 Mr Niven has not established, on the balance of probabilities, that the payments he made to APG in November 2009 were intended towards payment up of his unpaid share capital or even what part of the same could have been so applied, given that he had to transmit the Ubertas loan funds to the company. In any case, these payments were not pleaded and were never put to APG's witnesses. The documents supporting the payments were not disclosed in discovery by the defendants and Mr Niven was not in court to answer questions on the three cheques. It is also relevant that in the September Agreement Mr Niven accepted liability to pay APG unpaid capital amounting to \$560,000. He would not have done this had he been sure that he had actually paid up his capital.

46 I now turn to the question of how much Mr Niven has to pay in respect of his shares. As I stated above, Mr Niven's initial shareholding amounted to 360,000 shares. In December 2009, after taking over the NEDs' shares, his shareholding increased to 640,000 shares. The NEDs had not paid up the capital due on their shares either. Thereafter, on 22 January 2010, Mr Niven sold and transferred 240,000 shares to Ms Lim in return for payment of \$160,000 directly to him. The transfer form stated that the shares being transferred were "fully paid up". APG contends that Mr Niven remains responsible to pay \$640,000 and it had, according, made a call on him for this amount. In my opinion, APG's claim is overstated.

47 It is clear that, subject to the defences considered below, Mr Niven must pay \$400,000 for the shares which he is still holding being the 340,000 shares which he subscribed to initially and another 40,000 shares he acquired from the NEDs. However, in respect of the \$240,000 shares that he sold to Ms Lim, he is not liable to pay any calls on the same. Calls on unpaid share capital can only be made on the registered holder of the relevant shares at the time of the call. In the case of the 240,000 shares, that holder would be Ms Lim and she bears the liability for the capital due on those shares. Mr Niven's wrongful representation to her that the shares were fully paid might possibly form the basis of an indemnity claim by Ms Lim against him for any capital she has to pay APG but it does not transfer the liability *vis-a-vis* APG back to Mr Niven.

48 The legal position I have stated is not only the general law but is also reflected in APG's articles, specifically Arts 17, 19, 20, 32, 34 and 36. These Articles provide for the directors of APG to make calls on the *members* in respect of any money unpaid *on their shares*, provide for joint holders of a share to be jointly and severally liable to pay all calls in respect thereof (this is significant as showing that the liability attaches to the holder of the shares) and set out the procedure by which APG can forfeit a member's shares if the member does not meet the call. Article 36 states that a person whose shares are forfeited ceases to be a member "*but shall, notwithstanding, remain liable to pay to the Company all the money*" which he had to pay at the date of the termination. This specific provision for liability to continue notwithstanding termination of membership shows the relationship between the two. If the rule was once a member always liable, no such provision would have been required. There is no doubt from the Articles that liability to pay unpaid capital in respect of any issued share passes with that share. The fact that Mr Niven held an additional 240,000 shares between December 2009 and 22 January 2010 does not entitle APG to recover the unpaid capital on those shares from him now. Mr Niven was not the registered shareholder of those shares in March 2011 when the call was made.

49 There is no complication in respect of Mr Wang. He holds 160,000 shares and must pay the call of \$160,000, subject to the defences which I consider below.

Defences

The payments to Mr Niven were in the interests of APG

50 The defendants submit that all payments made to Mr Niven were in APG's interest because:

- (a) Mr Niven was the "rain-maker" and had brought in millions of dollars-worth of business and therefore it was in APG's interest to pay him well and take care of his allowances;
- (b) It was important for Mr Niven to dress well and therefore his expensive suits had to be paid for;
- (c) As he was an expatriate, it was not unusual for his children to attend foreign schools and for him to take trips to France with his family; and
- (d) There was an oral agreement among APG's directors that Mr Niven would be entitled to be reimbursed expenses which he "felt he was entitled to claim".

51 Essentially therefore, the defendants are saying that because of Mr Niven's vital role in APG, APG's interests had to be equated with Mr Niven's interests and whatever was in his interest was also in APG's interest. This proposition is not, however, supported by the law. As stated above in [28], the appropriation of a company's funds for a director's personal use constitutes a *prima facie* abuse of funds and a breach of the director's duties to the company. The question here is not whether Mr Wang and Mr Niven subjectively believed that the payments were in APG's interests because of Mr Niven's contribution, but whether an honest and diligent man in their position could, in the circumstances, have reasonably believed that the transactions were for APG's benefit (see *Ho Kang Peng v Scintronix Corp Ltd* (2014) 3 SLR 329 at [38]).

52 In itself, the fact that Mr Niven may have been the main producer of business for APG does not establish that it was in APG's interest to pay all his expenses. As APG submits, rain-making directors of companies are held to the same standards as all other standards. Generally, companies have written remuneration agreements with their directors which specify remuneration and prerequisites. The defendants say that the Oral Agreement provided that Mr Niven would be entitled to be reimbursed expenses which he "felt he was entitled to claim". This submission shows that the defendants did not apply an objective test when they authorised the payments to Mr Niven. Instead, they relied on Mr Niven's subjective view as to when he was entitled to make claims. Therefore, what Mr Niven said and claimed was the only consideration that mattered and no objective thinking was applied to his claims. The defendants themselves are the only persons who claim that the Oral Agreement to pay Mr Niven whatever he thought he should get existed. No independent evidence of its existence was adduced.

53 Since the defendants' only basis for asserting that the payments to Mr Niven were in APG's interest is their contention that whatever was in Mr Niven's interest was in the company's interest, they have not succeeded displacing the *prima facie* conclusion that the payment of funds to Mr Niven for his personal use was an abuse of those funds.

The Account Practice and the Oral Agreement authorising the use of the funds

54 Each of the defendants pleaded in their respective defences that the payments made were authorised by APG's directors. This authorisation arose in two ways:

- (a) The Account Practice in APG whereby for all payments made from APG's funds, vouchers would be drawn and approved by at least one director and the cheque would be signed by two directors and such approval and signature would constitute due approval of the payment; and

(b) The Oral Agreement among APG's directors that Mr Niven would be entitled to various benefits, such as having APG pay for his rent, travel expenses and children's school fees, as part of his employment package.

55 In their closing submissions, the defendants repeat:

(a) The payments were authorised through the Account Practice;

(b) Ms Lim authorised the payment of \$35,000 for Mr Niven's Amex Card bill. This represented a "course of business practice or oral agreement to pay for such expenses". Such payments were not unauthorised as it was clear that such reimbursements had been the practice of the directors and shareholders;

(c) Mr Niven's status as an expatriate made it usual for his children to attend foreign schools and make foreign trips;

(d) It was the Oral Agreement between APG and its directors that Mr Niven would be entitled to be reimbursed expenses which he felt that he was entitled to claim;

(e) The disbursements and expenses which Mr Niven had claimed for his family and himself were nothing unusual and to be expected of an "expatriate key appointment holder's remuneration package"; and

(f) The payments were "approved, authorised and subject to the Management Practice/Team".

56 As for the Account Practice, the defendants did not produce any evidence to substantiate its existence. They could have (a) produced examples of the duly signed payment vouchers; or (b) called the NEDs or former staff members of APG who dealt with the accounts to testify to their existence. Neither of these steps was taken. Mr Niven's excuse was that he was out of the company and he did not have any copies of the documents. However, at the discovery stage, he could have asked for the production of all such documents and insisted on inspecting the company's books to verify their existence. APG's position is that no such signed payment vouchers existed.

57 There were payment vouchers in evidence which were reconstructed by Firstwaters when it was engaged to reconstruct APG's accounts from 2009 onwards. In the course of its work, Firstwaters found that most of the payments made by APG had been made without any supporting documentation and therefore reconstructed vouchers for payments where it could infer the purpose of the payment. In court, Mr Niven did not deny that the payment vouchers in evidence were reconstructed and were not original contemporaneous vouchers prepared at the time the payments were made.

58 Mr Niven did assert that in accordance with the Account Practice, contemporaneous payment vouchers were made for all payments and blamed APG and/or Ms Lim for their non-production in court. He insinuated that the original payment vouchers had disappeared after he resigned as a director and was denied access to APG's office. He said it was clear that there was "a master plan in place for all this to be where we are today". When it was put to Mr Niven that he had never asked for discovery of any of the original payment vouchers that he claimed existed, he gave a completely *non sequitur* answer: "It's completely false."

59 I am satisfied that no contemporaneous payment vouchers existed and that therefore there

was no Account Practice as asserted by the defendants. The insinuation that the original payment vouchers were destroyed or hidden by Ms Lim or the judicial manager is baseless and scandalous. The Firstwaters report was drawn up before the parties fell out and Firstwaters was not able to find the contemporaneous vouchers when it was doing its work. That was why Firstwaters had to re-construct vouchers. The defendants did not adduce a shred of evidence that the original vouchers had ever existed.

60 As for the Oral Agreement, no evidence was produced to substantiate its existence or its precise terms. The assertion was that the Oral Agreement had been made with the NEDs directors but not one of these gentlemen was called to testify as to its existence. Further, the defendants were not able to provide any particulars in relation to the Oral Agreement, not even a date when it was concluded. In Mr Niven's Further and Better Particulars, in response to APG's request for "the date(s) and location(s) when the director(s) and shareholder(s) allegedly permitted authorised or approved [Mr Niven's] various items of expenditure as being part of his employment package or employment benefits", Mr Niven's answer was "the dates would be apparent from the payment vouchers which are not in the possession of [Mr Wang], but in the possession of [APG]". Thus, this was a search that led in a circle: the Oral Agreement was to be found in the Account Practice and the Account Practice resulted from the Oral Agreement. On this basis, since the Account Practice could not be established, the Oral Agreement must also fail.

61 It should also be observed that the Oral Agreement was inconsistent with what the NEDs actually did when they were directors of the company. Mr Niven agreed in court that the NEDs conducted business formally. Based on the evidence before me, they appeared to have been careful businessmen who conducted business in a formal manner and documented important decisions. They passed a specific resolution on 6 March 2009 ratifying APG's purchase of a vehicle under Mr Niven's name and this resolution required Mr Niven to execute an acknowledgment of trust accepting that he held the vehicle on trust for APG. Further, in August 2009 when the defendants were negotiating with the NEDs to buy the latter's shares in APG, most of the discussions and decisions were documented by e-mail sent out by the NEDs.

62 Mr Niven alleged that the Oral Agreement had been reached among APG's directors about the time that the company was incorporated. This assertion is contradicted by two documents. First, cl 5 of the loan agreement which APG signed with Mr Goh, provides that until the loan had been fully repaid, APG was not to make payment of any director's fees, remuneration or any benefits to any director, save and except for salaries payable in the ordinary course to the defendants in their capacity as executive directors. In court, Mr Niven agreed that this clause was inconsistent with the Account Practice and the Oral Agreement. Second, on 4 April 2014, the NEDs' solicitors wrote to the defendants' solicitors denying the existence of the Oral Agreement. Whilst this document is hearsay, the fact that such an assertion was made and none of the NEDs was challenged on it in court is of some weight considering how important the existence of the Oral Agreement is to the defence.

Whether the Agreements relieve the defendants from liability

63 The defendants submit that APG was solvent and in good financial shape with receivables of at least A\$4m at the time when they entered into the September Agreement and subsequently the October Agreement. The defendants entered into the Agreements to give Ms Lim a free hand in APG in consideration of her and APG providing assurances to them in respect of their shares in the Back End Commission due to APG and, additionally, discharging the defendants from all obligations to APG except for tax. These liabilities included outstanding moneys owed to APG and unpaid share capital. Based on the Agreements, the defendants resigned their directorships but thereafter Ms Lim and APG failed to perform their respective obligations under the Agreements.

64 The defendants do not accept that any of the parties believed at the time the Agreements were concluded that APG was in dire financial straits. Ms Lim had been involved in APG's operations since 2009 and if there was such an issue she would not have taken over its management. Ms Lim's intention in concluding the Agreements was to make them agree to resign as directors, take over control of APG and "emasculate the two defendants from mounting any challenges against her" (a rather stereotypical male response to a challenging woman). Further, at the time the Agreements were made, Ms Lim had advice from FH and there was no mention of any irregularity or impropriety then. The Agreements are effective: the defendants gave Ms Lim control of APG and in return all their outstanding liabilities were absolved.

65 APG's position is that the Agreements are not valid and binding for the following reasons:

- (a) The Agreements were made when APG was insolvent or near insolvency, and the Agreements are not in the best interests of APG's creditors;
- (b) The October Agreement was "subject to contract" and was not intended to create binding legal relations between the parties; and
- (c) In any event, Mr Niven and Mr Wang repudiated the Agreements and their repudiatory breach was accepted by APG. APG was thus absolved from all future performance of its obligations under the Agreements.

66 The second and third arguments of APG set out above are not reflected in their pleadings. APG filed three sets of pleadings on 21 February 2013, in response to the respective defences and counterclaims filed by the defendants, being:

- (a) Reply and Defence to Counterclaim to 2nd Defendant's Defence and Counterclaim (Amendment No 1);
- (b) Reply to 3rd Defendant's Defence and Counterclaim (Amendment No 1); and
- (c) Defence to the Counterclaim of the 3rd Defendant (Amendment No 1).

67 Each of those pleadings had to deal with the defendants' reliance on the Agreements as a defence to APG's claim as well as a basis for each defendant's counterclaim against APG. In refuting the averments of the defendants, APG relied only on its insolvency to nullify the effect of the Agreements. It did not plead that the October Agreement was subject to contract or that the defendants had repudiated the Agreements and were therefore not entitled to rely on them. As an example of APG's pleading, the following paragraphs from the "Reply and Defence to Counterclaim to 2nd Defendant's Defence and Counterclaim (Amendment No 1)" state:

2A In respect of paragraph 63 of the Defence, the Shareholders Agreement dated 6 September 2010 and the Settlement Agreement dated 13 October 2010 (the "Agreements") are not binding on the Plaintiff. The Plaintiff was insolvent at the time the Agreements were made, in the sense that the Plaintiff was unable to pay its debts as and when the respective debts fell due.

...

7 Paragraph 132 of the Counterclaim is denied save that it is admitted that Lim Kay-Lin Kathlene, the Plaintiff, the 2nd Defendant and the 3rd Defendant signed a document titled "Shareholders Agreement" dated 6 September 2010. The "Shareholders Agreement" dated 6

September 2010 is not binding on the Plaintiff. The Plaintiff was insolvent as of 2 July 2010, in the sense that the Plaintiff was unable to pay its debts as and when the respective debts fell due.

[emphasis in original]

68 Allegations that the parties have agreed that a particular written agreement is not immediately enforceable but “subject to contract” and that parties to a contract have repudiated it and are not entitled to rely on it are not simply allegations of law but allegations of mixed fact and law. Accordingly, they have to be pleaded so that the opposing party has the opportunity to respond and to adduce evidence in rebuttal. In view of the failure of APG to plead these allegations, the only point I can consider in relation to the alleged invalidity of the Agreements is the point relating to its insolvency on the dates when the Agreements were signed.

69 The reason why APG is attacking the validity of the Agreements on the basis of its own allegedly insolvent position is that when a company is insolvent, the interests of its creditors become a dominant factor in what constitutes the benefit of the company as a whole, and the directors then owe duties to the company’s creditors (see *Chip Thye Enterprises Pte Ltd (in liquidation) v Phay Gi Mo* [2004] 1 SLR(R) 434 at [13] (“*Chip Thye*”); *Federal Express Pacific Inc v Meglis Airfreight Pte Ltd* [1998] SGHC 417 at [17]). These principles were elaborated by the Court of Appeal in *Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd* [2010] 4 SLR 1089 (“*Progen Engineering*”). At [48] of its judgment, the court said:

It is trite that directors have a duty to act in the best interest of the company as a whole. When a company is solvent, the company’s directors owe no duty to creditors. ... However, it is now also settled law that when a company is insolvent, or even in a parlous financial position, directors have a fiduciary duty to take into account the interests of the company’s creditors when making decisions for the company. This fiduciary duty requires directors to ensure that the company’s assets are not dissipated or exploited for their own benefit to the prejudice of creditors’ interests. ...

The Court had also observed (at [47]) that where it is established that directors have disregarded their duties, the court should be wary of transactions that appear to undermine the liquidation process.

70 There is no single test for insolvency. The court has to take into account all the evidence that appears to be relevant to the question of insolvency (see *Chip Thye* at [20]) and that the question which this evidence has to answer is “when was the company unable to pay its debts as they fell due?” Where directors have contracted with their own company in breach of their fiduciary duties, such contracts are voidable at the instance of the company. This principle was applied in *Chip Thye* itself where the court refused to allow to stand transactions involving an agreement to write off debts owed by one director, and payment of various sums owed to both its directors because the company was insolvent at the time these transactions were approved.

71 I now turn to consider the facts relating to APG’s financial position.

72 As described earlier, APG’s operations were initially funded by an interest-free loan of \$900,000 from Mr Goh. This loan was not repayable until 6 August 2010 but in December 2009 APG borrowed A\$900,000 from Ubertas to repay Mr Goh. The new loan was repayable by monthly instalments of A\$40,000 each. In November 2010, Ms Lim repaid the Ubertas loan and obtained an assignment of the outstanding amount. Ms Lim’s evidence was that she did this because she did not want Ubertas to call on its loan as, if it had done so, given APG’s poor cash flow, APG might have had to be wound up.

This evidence was not challenged by the defendants. So in November 2010, APG was unable to meet its current liabilities.

73 As also stated earlier, on 2 July 2010, Mr Stuart had sent an e-mail to the three directors of APG setting out his findings on APG's financial situation. He stated, *inter alia*:

With [*sic*] my chartered accounting hat is still on; we are all aware of the cash flow difficulties APG is experiencing, but looking at what we have already committed to, plus pending financial commitments (operationally or loan commitments), against cash flow expected to be received (debtors), as at *today* APG is technically insolvent. [emphasis in original]

74 Mr Niven received this e-mail and sent a response in which he seemed to accept the analysis as not only being correct but something which all the directors should have been aware of. His e-mail stated, *inter alia*:

There is nothing in [Mr Stuart's] email that should come as a shock to [Ms Lim] or any other shareholder as the creditors report has been visible for all of us for the last 6 months at least and so has the revenue report. There is nothing new in either the creditors' report or [Mr Stuart's] email summarising the current cash flow and creditors' position.

75 Subsequently, in an e-mail dated 18 July 2010, Mr Niven placed the blame for the difficult cash flow position which APG faced on its repayment of the loan to Mr Goh and its subsequent commitment to repay A\$40,000 to Ubertas every month. He noted that there had not been a month since Mr Goh's loan was paid back that APG had not been under financial pressure. In court, Mr Niven tried to wiggle out of the implications of his e-mail but his explanation of why the e-mail was incorrect was not coherent. He said:

Witness: This email was written at this specific date, it doesn't have the benefit of-of foresight. Where we are now, in respect to what the cash flow of the company moving forward, after the date of this email.

Court: Are you saying that you believed this to be the position when you wrote the email, but that in fact, it was not the position?

Witness: Yes, correct, Your Honour.

76 Mr Niven produced no evidence that APG was not facing cash flow issues at the time or that sufficient money subsequently came in to ameliorate it. In fact, Ms Lim had to put in a cash injection of \$25,000 in July 2010 to help the company fund a marketing event.

77 Other evidence adduced in relation to APG's financial position was that in May 2010 it had difficulty paying its rent, and on 18 May 2010 its landlord alleged that it was more than three months in arrears of rent. Mr Niven subsequently e-mailed the landlord asking for its understanding as "as with many new businesses we have had some struggles with cash flow!" Further, on 24 June 2010, APG received a demand from its advertising agency to pay an outstanding amount of \$59,502.92 by 4 July 2010. On 16 July 2010, the agency informed APG that if the payment was not received by Monday, 19 July 2010, legal action would be taken against it. Subsequently, the agency agreed to payment in two instalments – \$20,000 by 20 July 2010 and the balance by 30 July 2010.

78 From the evidence, it is apparent that in July 2010 APG had significant cash flow problems and was being pressed by various creditors for payment with legal action being threatened. The

defendants say that the company was not insolvent because there were commissions due to it amounting to at least A\$4m. However, these were Back End Commissions which would not be payable for a few years and in the meantime APG had to pay its staff and landlord. Thus, such receivables could not solve the immediate cash flow crunch.

79 APG submits that there is no evidence before the court which suggests that its financial position changed significantly between July 2010 and September/October 2010. Therefore, on the balance of probabilities it is more likely than not that APG was insolvent, or at least near insolvency, in September/October 2010. I accept the submission.

80 On this basis, when the Agreements were made, APG's directors were under a duty to act in the best interests of APG's creditors. As APG submits, the terms of the Agreements are obviously not in its creditors' interests. The Agreements provide specifically:

- (a) Under cl 2.2 of the September Agreement, APG would have to write off 40% of the debt owed by Mr Niven (*ie*, \$120,180.15);
- (b) Under cl 8.2 of the September Agreement and cl 6 of the October Agreement, APG would have to pay 50% of Mr Niven's debt to the NEDs (*ie*, \$82,500);
- (c) Under cl 10 of the October Agreement, APG would effectively have to write off all debts owed by Mr Niven and Mr Wang to APG;
- (d) Under cl 1.2 of the September Agreement, the shareholders' liability for unpaid capital was re-arranged with Ms Lim being liable for only \$80,000 instead of \$240,000; and
- (e) Under cl 1.3.1 of the September Agreement, the unpaid share capital (which the parties agreed totalled \$800,000 (cl 1.1)) was to be paid in instalments of 10% yearly for ten years.

81 Neither of the Agreements gave any reason why the indebtedness of the directors to APG should be reduced or absorbed by APG or why the liabilities in respect of unpaid share capital should be re-arranged and postponed over a period of ten years when APG needed money urgently. The terms of the Agreements effectively required APG to waive substantial debts owed by the defendant for no consideration. Further, APG was taking on the additional liability of paying half of Mr Niven's personal debt to the NEDs.

82 The Agreements had the effect of reducing APG's assets that should have been available for the discharge of its liabilities to its creditors. The Agreements were not in APG's creditors' interests but were for the benefit of the directors, in particular the defendants. In entering into the Agreements with APG, all the directors, including Ms Lim, were thus acting in breach of their duties to APG. The interests of the defendants and the interests of APG were in conflict in relation to the Agreements. None of the directors should have been a party to them. This applies to Ms Lim as well because she should have considered objectively whether the Agreements were in APG's interests albeit they enabled her to take over control of the company and her intentions may have been to revive it. However, she had a higher duty to the creditors not to agree to terms that reduced the assets available to pay them. Having said that, the fact that Ms Lim was also in breach of her fiduciary duty cannot rescue the Agreements for the benefit of the defendants. I am satisfied that the Agreements were voidable in the circumstances in which they were entered and should be set aside.

83 Accordingly, the Agreements afford the defendants no defence to APG's claim.

Ms Lim's alleged wrongdoings

84 In their closing submissions, the defendants devote paragraphs to trying to show that Ms Lim acted badly and has liabilities to APG. Among their allegations are that in late 2010 she caused APG to fail to pay its rent and to vacate its premises, and that she used "questionable" reasons for her application to place APG under judicial management. Further, she had "surreptitiously" taken over APG's debt to Ubertas thus making herself APG's biggest creditor and has started another company to compete with APG. In addition, Ms Lim herself had received payments from APG which were similar to those made to Mr Niven.

85 I have set out some of the defendants' allegations regarding Ms Lim above. I do not make any findings on those allegations or any others because Ms Lim's liability and conduct were not in issue before me. I have to consider the defendants' conduct and liability only in this action since it is an action by the company against them alone. It is not an action by APG against Ms Lim nor an action by Ms Lim against the defendants. If the defendants have breached their duties to APG, they cannot be absolved from liability simply because Ms Lim may have committed similar breaches.

The counterclaims

86 The defendants' counterclaims are based on the validity of the September Agreement. Since I have found that this Agreement is not valid, the counterclaims must fail.

Mr Wang's position and the defendants' duty to account

87 In his reply submissions, Mr Wang submits that it would be an error to presume that any liability imposed upon Mr Niven would, by implication, be imposed on him as well. None of the expenses alleged to be unauthorised had in fact been incurred or otherwise spent by Mr Wang personally. He was merely one of three directors, the others being Ms Lim and Mr Niven himself, who had voted or otherwise approved the expenses together with the rest of the directors. Further, from May 2010 Mr Wang had been in Malaysia and had no longer been involved in the daily operations or management matters of APG. Therefore, the responsibility, if at all, for these expenses should be with Ms Lim and Mr Niven but certainly not with the first defendant.

88 It is correct that there is no allegation that Mr Wang benefited from any of the unauthorised payments. That, however, does not mean that he cannot be made responsible for such payments. He was a director of APG and owed it a fiduciary duty to ensure that its money was only paid out for proper purposes in its interests. To the extent that he facilitated or was involved in any of the improper payments to Mr Niven, he would be liable to account for the same. There is evidence of this which imposes a duty to account on Mr Wang as well as on Mr Niven.

89 The evidence presented to the court was that initially when the NEDs were non-executive directors, any cheques drawn on APG's bank account would require two signatures: Mr Niven's and that of either Mr Gan or Mr Lee. Ms Lim's evidence was that Mr Niven told her that this procedure made it very inconvenient for him to draw funds from APG: regular trips had to be made to the NEDs' offices to get their signatures on the cheques.

90 In February 2009, the defendants had set up a joint current account with UOB Bank Ltd, Account No 339xxx ("the defendants' joint account"). Copies of the monthly bank statements for the defendants' joint account for the period from 6 February 2009 to 31 May 2009 were adduced in evidence. These statements revealed that funds were regularly transferred from APG's bank account to the defendants' joint account. Thereafter, the defendants were free to use the moneys in their

joint account without having to explain their use to the NEDs. This procedure allowed them to sidestep the signing requirements imposed for APG's cheques. However, they both remained and are still liable to account to APG for how money received in their joint account was spent.

91 By 8 December 2009, the NEDs were out of the picture and the new board consisted of the defendants and Ms Lim. On that date, they passed a directors' resolution to allow cheques drawn on APG's bank account to be signed by a single signatory, being either Mr Niven or Ms Lim. After the passing of this resolution Mr Niven was able to sign all APG cheques on his own. According to Ms Lim, Mr Niven held on to APG's cheque books and apart from him only his personal assistant, Ms Foo, had access to the cheque books, bank tokens and bank balances.

92 In these circumstances, I conclude that Mr Wang's responsibility can only be to account for those payments from APG that were paid into the defendants' joint account. He had no control otherwise over payments made by APG and is not directly responsible for any cheques drawn by Mr Niven in his own favour or to pay his own expenses. No doubt, as a director of APG, he should have ensured that there were proper accounting systems in place but the thrust of APG's claim is the recovery of moneys wrongfully utilised for the defendants' personal use. The statement of claim does not contain a claim for general damages for breach of any duty to organise and implement and monitor a proper accounting system so as to ensure that moneys were not paid to directors or on their behalf without proper verification. Tagging on a general claim for damages amongst the reliefs claimed does not amount to such a pleading.

Conclusion

93 For the reasons given above and in view of the various findings I have made, I grant judgment to the plaintiff against the defendants as follows:

- (a) The second defendant shall pay the plaintiff the sum of \$400,000 in respect of his unpaid share capital;
- (b) The third defendant shall pay the plaintiff the sum of \$160,000 in respect of his unpaid share capital;
- (c) The second defendant shall pay the plaintiff the sums of \$919,980.97 and A\$184,264.10 (less any amounts recovered from the first defendant) being moneys paid by or on behalf of the plaintiff for his personal use;
- (d) The second and third defendants shall jointly and severally account to the plaintiff for all sums of money paid into the defendants' joint account by the plaintiff and, to the extent that they cannot establish that such sums were used for the plaintiff's purposes, they shall jointly and severally repay the same to the plaintiff;
- (e) All amounts payable hereunder shall carry interest at the court rate from the date of the writ until date of payment.
- (f) The defendants shall pay the plaintiff's costs as taxed if not agreed.

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