Ng Sing King and Others v PSA International Pte Ltd and Others (No 2) [2005] SGHC 5

Case Number : OS 1022/2002, CWU 307/2003

Decision Date : 18 January 2005

Tribunal/Court : High Court

Coram : MPH Rubin J

Counsel Name(s) : Andre Maniam, Melvin Chan and Jaclyn Neo (Wong Partnership) for the plaintiffs; K Shanmugam SC, Stanley Lai and Esther Ling (Allen and Gledhill) for the first defendant; Thio Shen Yi, Collin Seah, Karen Teo and Teo Ai Wen (TSMP Law Corporation) for the second defendant

Parties : Ng Sing King; Lim Khoon Hock; Hong Jen Cien; Wong Ban Kwang; Ng Siew King; Lo Lain; P-Serv Pte Ltd — PSA International Pte Ltd; P and O Australia Ports Pty Ltd; Elogicity International Pte Ltd

Civil Procedure – Costs – Principles – Court finding in favour of first and second defendants – Whether costs should follow the event – Order 59 r 3 Rules of Court (Cap 322, R 5, 2004 Rev Ed)

Companies – Oppression – Whether majority shareholders involved in businesses in direct competition with company – Whether majority shareholders influencing board of directors to terminate first and second plaintiffs' employment – Whether majority shareholders influencing board of directors to downsize company to facilitate pursuit of similar businesses with other companies – Whether conduct of majority shareholders amounting to oppression – Whether court should order purchase of minority shareholders' shares by majority shareholders – Section 216 Companies Act (Cap 50, 1994 Rev Ed)

Companies – Winding up – Irretrievable breakdown in relationship amongst shareholders – Loss of substratum of company – Whether just and equitable to wind up company – Section 254(1)(i) Companies Act (Cap 50, 1994 Rev Ed)

18 January 2005 *Judgment reserved.*

MPH Rubin J:

1 There were two actions, Originating Summons No 1022 of 2002 and Winding Up Petition No 307 of 2003, concurrently heard before me. In the originating summons, the seven plaintiffs, who are minority shareholders of eLogicity International Pte Ltd ("eLogicity"), sought relief under s 216 of the Companies Act (Cap 50, 1994 Rev Ed), on the ground that the first and second defendants have conducted the affairs of eLogicity in an oppressive manner. The second defendant also petitioned for eLogicity to be wound up pursuant to s 254(1)(i) of the Companies Act.

Background facts

The parties

2 The plaintiffs are Ng Sing King, Lim Khoon Hock, Hong Jen Cien, Wong Ban Kwang, Ng Siew King, Lo Lain and P-Serv Pte Ltd. They collectively own 34.02% of eLogicity's shares. The first defendant is PSA International Pte Ltd ("PSAI"), a wholly-owned subsidiary of PSA Corporation ("PSA"). The second defendant is P&O Australia Pty Ltd ("POAP"), which is owned by P&O Ports Ltd ("P&O"). PSAI and POAP hold 32.8% and 33.18% of eLogicity's shares respectively. PSA and P&O were originally the third and fourth defendants in this originating summons. However, they were removed from these proceedings on 30 December 2002. I shall hereinafter refer to PSAI and POAP

collectively as "the strategic shareholders" of eLogicity.

The company

3 The company, eLogicity, was incorporated in 1992, with the first plaintiff, Ng Sing King ("Ng"), being the majority shareholder. The company was originally engaged in providing contract research and development services. In 1997, eLogicity developed the "eSeal". This was a wireless security device affixed onto cargo containers and designed to inform the container owner if the container had been tampered with. Thereafter, eLogicity concentrated on the provision of global "track and trace" solutions for the shipping logistics industry. This entailed tracing the movement of containers and vehicles by offering up-to-date information on their current location and condition.

4 In order to track any container, readers had to be installed at various key points along its route. When the container affixed with the eSeal passed any of these key points, the eSeal transmitted radio signals, which were picked up by the readers. The information was then uploaded onto eLogicity's system or website and could be retrieved by interested parties. Other radio frequency identification ("RFID") tags instead of the eSeal were utilised for the tracing of vehicles. The seals and tags were complemented by the use of "electronic data interchange" ("EDI"). EDI enabled the transmission of additional information from a port terminal to eLogicity's servers. In order to physically install the readers and set up an EDI with a port terminal operator, eLogicity had to enter into a Terminal Access Agreement ("TAA") with the port operator. In addition, eLogicity had to apply for radio licences in various countries before it could operate the eSeal and RFID tags.

5 In July 2000, Ng invited terminal operators, including PSA and P&O, to invest in eLogicity as shareholders. After much negotiation, PSA and P&O expressed interest in acquiring eLogicity's shares through their subsidiaries, PSAI and POAP. Accordingly, the plaintiffs, who were the existing shareholders of eLogicity, entered into a Shareholders' Agreement ("the Agreement") with the strategic shareholders on 29 September 2000. PSAI invested approximately $15m, while POAP invested about $17m and US$1.2m. Under the Agreement, each of the three groups of shareholders was entitled to nominate three directors to eLogicity's board of directors ("the Board"). The initial composition of the Board was as follows:

Shareholder group	**Name of nominee director**
PSAI	Kelvin Dee Latta ("Latta")
	Robert Yap Min Choy ("Yap")
	Henry Tan Kim Soon ("Tan")
POAP	Andrew Burgess ("Burgess")
	Colin John Childs ("Childs")
	Joseph Corcoran ("Corcoran")

Plaintiffs	Ng Sing King ("Ng")
	Lim Khoon Hock ("Lim")
	Hong Jen Cien ("Hong")

Ng was both the chairman of the Board as well as the company's Chief Executive Officer ("CEO") until 12 April 2002. Burgess was replaced by Jonathan Ladd ("Ladd") on or about 12 April 2001. Subsequently, Burgess was re-appointed as one of POAP's nominee directors in place of Corcoran. A total of ten board meetings were held between November 2000 and March 2003. The shareholders also formed an Executive Committee to assist the management of the company.

The present proceedings

6 Although eLogicity, supported by two major shipping companies, had a promising business concept, it was mired in incessant disputes and differences over a plethora of issues. These squabbles culminated in the plaintiffs' commencement of this originating summons on 24 July 2002, barely two years after the strategic shareholders' investment in the company. This was followed by POAP's filing of a petition to wind up the company on 15 December 2003. The proceedings before me spanned almost 30 days and the parties filed close to 10,000 pages of documents, which included extensive e-mail exchanges and various versions of the minutes of the Board meetings. In view of the numerous abbreviations and parties in this action, I have appended to my judgment a table listing the abbreviations in alphabetical order.

The pleadings in the originating summons

The plaintiffs' claim in the originating summons

7 The plaintiffs initially filed the required affidavits in support of the originating summons. Subsequently, the parties were given directions to file pleadings pursuant to O 28 r 8 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed). In the Statement of Claim, the plaintiffs prayed for the purchase of their shares by the strategic shareholders at a fair value, taking into account the effect of the oppressive and unfairly prejudicial conduct of the strategic shareholders, and without any discount arising from the fact that the plaintiffs' shareholding in eLogicity was a minority shareholding in a private company.

8 The plaintiffs averred that the affairs of eLogicity were conducted in an oppressive manner, in disregard of their interests as members and shareholders of the company. In particular, they alleged that the strategic shareholders and their parent companies had planned to collaborate with eLogicity's competitors to the exclusion of the plaintiffs, and had in fact been involved in matters that were in competition with eLogicity's business. They claimed that the strategic shareholders sought to usurp the role of eLogicity's management and to conduct the company's affairs in complete disregard of the plaintiffs' rights. Their final allegation was that the strategic shareholders sought to diminish the value of eLogicity and ultimately abandon it, in order to facilitate the pursuit of a similar business with other third parties, to the exclusion of the plaintiffs. The plaintiffs' averments in support of these allegations were broadly categorised under three headings in the Statement of Claim, which I will now summarise in turn.

The strategic shareholders' dealings with SAVI Technology Inc

9 SAVI Technology Inc ("SAVI"), an American company, was a competitor of eLogicity. The strategic shareholders and their parent companies had secretly negotiated with SAVI without informing the plaintiffs. When the plaintiffs asked for more information on the benefits of working with SAVI, the strategic shareholders refused to provide any information.

10 Moreover, the strategic shareholders sought to achieve their intended collaboration with SAVI by exercising their nominee directors' powers and usurping the role of the management. They passed resolutions that purported to delegate to the strategic shareholders the power to pursue alliances or partnerships with SAVI, to the exclusion of the plaintiffs. They also attempted to pass a resolution for a strategic alliance with SAVI on terms which effectively compromised the rights and interests of the plaintiffs. In addition, the strategic shareholders terminated Ng's and Lim's employment, and their parent companies subsequently proceeded to collaborate with SAVI to eLogicity's detriment.

Ladd's conduct in respect of the Port Information Exchange/the new eModal

11 Next, the plaintiffs deposed that the strategic shareholders' representatives became involved in matters that were in direct competition with eLogicity. Ng was informed that PSA, P&O, Hutchinson Ports and Logistics Information Network Enterprise ("HPH/LINE"), a wholly owned subsidiary of Hutchinson Ports, and Stevedoring Services of America ("SSA") had formed the Port Information Exchange ("PIE"), an organisation that linked major terminal operators. POAP's representatives had assured the plaintiffs in February 2001 that the PIE was "dead", but it later appeared that this was not so. During this time, eLogicity was seeking to work with HPH/LINE and SSA. Ladd, who was a director nominated by POAP, was tasked with securing a TAA with SSA. However, SSA and HPH/LINE subsequently declined to work with eLogicity. The plaintiffs discovered that P&O, HPH/LINE and SSA were considering investing in a new "eModal" (which was akin to the PIE), and that Ladd was negotiating this deal on behalf of P&O.

12 The majority of eLogicity's Board agreed to seek legal advice concerning Ladd's actions. Drew & Napier LLC ("D&N") was appointed for this purpose. In its report, D&N opined that there was a serious possibility that Ladd's involvement in the new eModal amounted to a breach of his fiduciary duties to eLogicity. However, the report concluded that this breach did not cause any damage to eLogicity. The evidence suggested that Ladd did not influence HPH/LINE's decision not to enter into a TAA with eLogicity.

Removal of Ng and Lim from management and the subsequent downsizing of the company

13 It was further alleged by the plaintiffs that the strategic shareholders proceeded to systematically remove eLogicity's existing management to put in place a new management which would comply with their instructions. At the eighth board meeting on 12 April 2002, the Board passed a resolution to remove Ng as CEO. Lim was also promptly removed from management. After securing effective control of eLogicity and its management, the strategic shareholders' nominee directors decided on 17 May 2002 to "mothball" eLogicity and even liquidate it, in order to facilitate their pursuit of similar businesses with third parties. Consequently, eLogicity was ill-equipped to cope with the demands of existing projects.

PSAI's defence in the originating summons

14 PSAI had initially filed a counterclaim for damages caused by the plaintiffs' misrepresentations in their business plan, but withdrew it at the commencement of the hearing on 5 May 2004. In its defence, PSAI averred that Ng recognised the benefits of an alliance with SAVI. In fact, Ng had represented eLogicity in negotiations with SAVI, which commenced even before PSAI's investment in

eLogicity. However, the plaintiffs later became increasingly hostile to the possibility of an alliance with SAVI. On 8 February 2002, eLogicity received a proposal by SAVI for a joint application to the US Department of Transport for funding pursuant to the Container Security Initiative, launched in response to the terrorist attacks of 11 September 2001. As a result of the plaintiffs' opposition, eLogicity was unable to respond to SAVI promptly and lost the opportunity to obtain part of the funding.

15 It was further averred that the plaintiffs' role in the long-term strategic interest of eLogicity would naturally be reduced, given the plaintiffs' stated intention to dispose of their shareholding in December 2001. Notwithstanding their intention to leave the company, the plaintiffs were kept sufficiently informed of any discussions with SAVI and their views were duly taken into consideration. In any event, the strategic shareholders pursued the alliance with SAVI in order to benefit eLogicity and its shareholders, including the plaintiffs. PSAI also noted that the allegations of PSA's collaboration with SAVI were irrelevant, as there was no provision in the Agreement that prevented PSA, PSAI's parent company, from entering into a relationship with eLogicity's competitors.

16 PSAI also denied being involved in matters that were in direct competition with eLogicity's business. Its position was that Ng had confused the proposed PIE with a cargo reservation system known as "Cargo D2D", which was owned by PSA's subsidiary.

17 Concerning the plaintiffs' last allegation, PSAI deposed that the termination of Ng's and Lim's employment was a result of their poor performance. PSAI said that eLogicity was making huge losses of approximately $800,000 a month, and there was no viable plan to stem the loss. Ng and Lim were unable to produce accurate and viable budgets despite repeated requests from the Board. Moreover, Ng could not work with the strategic shareholders' representatives. Ng was therefore asked to resign as CEO. The subsequent decision to downsize eLogicity was duly made at a Board meeting, and was in the best interests of eLogicity.

POAP's defence in the originating summons

18 With regard to the SAVI issue, POAP claimed that Ng had already been discussing strategic alliances with various parties, including SAVI. The POAP directors were interested in exploring a collaboration with SAVI in view of eLogicity's poor performance under Ng's management. SAVI had contracts with the US Department of Defence and was perceived to be well-positioned to compete for the post-September 11 cargo security initiatives in the US. Despite the clear benefits, the plaintiffs attempted to obstruct any potential alliance. POAP stated that the resolutions passed by the Board were intended to empower the strategic shareholders' directors to represent eLogicity, not PSAI and POAP. POAP agreed to the resolutions since the plaintiffs appeared averse to the alliance and were already intent on disposing their shares. In any case, the final resolution to enter into the strategic alliance with SAVI was not carried. POAP denied the allegations of an alliance by its parent company, P&O, with SAVI.

19 POAP also denied the next complaint pertaining to the PIE. The PIE was effectively "dead" as the participants could not agree on the form of collaboration, and POAP was no longer involved in it. Ladd was involved in discussions on the new eModal as the representative of Peninsular and Oriental Steam Navigation Company ("POSN"), the ultimate holding company of POAP and P&O. However, it was Ladd's belief that eModal would complement and not compete with eLogicity. The new eModal was also a new and separate project, and not a continuation of the PIE. The plaintiffs' failure to obtain HPH/LINE's investment was not caused by Ladd's involvement in the proposed new eModal.

20 POAP then deposed that it was not because of the alleged collaboration with SAVI that Ng

and Lim were removed from management. Amongst other things, Ng was removed because of the poor performance of eLogicity, his inability to improve the company's performance and the inability of the strategic shareholders' directors to work with Ng. After Ng's removal, various other matters concerning Ng's mismanagement came to light. Finally, POAP averred that its directors supported the Board's final decision to "mothball" eLogicity as this was most beneficial to the shareholders in the prevailing circumstances.

The winding up petition

21 POAP prayed for the winding up of the company on two grounds:

Irretrievable breakdown in the relationship amongst the shareholders

22 POAP claimed that it was apparent that the mistrust and animosity amongst the shareholders precluded all reasonable hope of reconciliation or friendly co-operation by the shareholders for the company's benefit. Apart from the above allegations, the plaintiffs also alleged misconduct on the part of the strategic shareholders' nominated directors. Board meetings were acrimonious and there had been no agreement on the minutes of the last five out of ten meetings.

Loss of substratum of eLogicity, the non-viability of the company and the impossibility of the company carrying on business at a profit

23 Next, POAP stated that the financial performance of eLogicity had been poor. The company incurred expenses of $3.239m in 2002 but only earned a revenue of $80,000, suffering a loss of $3.387m. Despite the Board's resolution to downsize the company, no meaningful business opportunities had arisen. The future of eLogicity was bleak as prospective customers had been deterred by their concerns about the present proceedings. The company also faced various operational and technical difficulties. These include the failure to obtain licences to operate eSeals in important countries, the inability of the company's vehicle tracking system to work properly and the failure by eLogicity to enter into a contract for the supply of the mechanical portion of the eSeal over an appropriate period at a fixed price. It was eventually resolved during the tenth board meeting that eLogicity should continue to employ skeletal staff and minimise its business activities. The company was effectively dormant at the time of the trial.

The evidence

24 The plaintiffs' grievances will only be evident from a detailed description of the events that transpired. I shall therefore summarise the witnesses' testimony at some length.

The plaintiffs' evidence

25 Ng and Lim, who are the first two plaintiffs, testified on behalf of the seven plaintiffs.

Ng's testimony

26 The principal witness was Ng, who was the Chairman of eLogicity's board of directors as well as CEO till 12 April 2002. Ng first described the background to the strategic shareholders' entry into eLogicity. In July 2000, after eLogicity's venture capital company ceased providing funds, Ng approached several terminal operators and submitted a business plan to each potential investor. He presented a more detailed plan in subsequent discussions with PSA and P&O. During negotiations with eLogicity, PSA and P&O gave their commitment to eLogicity to provide the company with substantial

sales volume. PSA and P&O arranged for their own audit teams to inspect the original projections made by eLogicity. They then provided their own input on sales volumes and revenue projections, which were incorporated into eLogicity's budget. Ng requested Latta and Burgess to put PSA's and P&O's sales commitments in writing, but they declined to do so. Nonetheless, Ng was given the impression that PSA and P&O would make use of their huge customer bases to "drive" sales to eLogicity. The company's primary role, on the other hand, was to focus on delivering the desired solution to the customers. On or about end September 2000, PSA and P&O invested in eLogicity based on the amended business plan. The purchased shares were held by the companies' respective subsidiaries, PSAI and POAP. The Agreement was also entered into between the plaintiffs and the strategic shareholders. However, since Ng continued to deal with the representatives from PSA and P&O, he considered PSA and P&O to be the true shareholders of eLogicity.

27 Ng soon found that the strategic shareholders' directors were becoming increasingly disruptive and hampering the management in running the company. He provided more details pertaining to the above.

The strategic shareholders' dealings with SAVI

28 Ng perceived SAVI to be a competitive threat to eLogicity, as it also dealt with electronic seals and provided track and trace services. Ng had highlighted in his business plan that SAVI was a potential competitor. This issue was also raised and discussed by the Board at its second meeting held on 2 February 2001. Ng pointed out then that SAVI had been trying to model itself after eLogicity and informed the Board that SAVI would like to meet him the following week. During the meeting between Ng and SAVI on 26 March 2001, SAVI's Vice-President, Joseph Bauer ("Bauer"), informed Ng that PSAI had already been in talks with SAVI. Ng was surprised as the PSAI directors had assured him that they would not discuss such matters with SAVI without consulting the Board. When Ng raised his concerns at the third board meeting held on 12 April 2001, PSAI's nominee director, Latta, clarified that he had communicated with SAVI because PSA had a relationship with Ace Fusion, a company which subsequently merged with SAVI. The Board then agreed that Ng should be eLogicity's only channel of communication with SAVI in the future. Ng continued to maintain contact with Bauer, but he was told on 2 July 2001 that PSAI was still in active discussions with SAVI.

29 During the fifth board meeting on 26 October 2001, the possibility of an alliance with SAVI was raised. It appeared to Ng, from the nature of the discussions, that the strategic shareholders' directors were already in contact with SAVI. However, when asked whether they had recently contacted SAVI, the strategic shareholders' directors said they had not. POAP's nominee director, Burgess, later told Ng privately that the strategic shareholders' directors had actually attended a meeting with SAVI on 25 October 2001. It thus appeared to Ng that the strategic shareholders were bypassing the Board and keeping the plaintiffs in the dark about the true nature of their discussions with SAVI. In the months following this board meeting, the directors repeatedly requested that eLogicity collaborate with SAVI. Ng stated that he did not see any value in working with SAVI. At the sixth board meeting held on 14 December 2001, Ng highlighted SAVI's weaknesses. In his view, SAVI's electronic seals were not successful and SAVI did not have TAAs with commercial operators. SAVI also had a high burn rate and its technology was wanting. Further, Ng had specifically asked if SAVI had access rights to 300 access points as it claimed, but he did not obtain an answer. Without such rights, SAVI could not provide any benefit to eLogicity in terms of achieving global connectivity. As such, Ng could not understand the strategic shareholders' eagerness to form an alliance with SAVI. He requested the strategic shareholders' directors to provide more information on the benefits of collaborating with SAVI, but his requests were ignored.

30 In 2001 the US Department of Transport launched the US Container Security Initiative ("CSI") and was offering grants to applicants to develop appropriate systems involving electronic seals and readers. On 8 February 2002, Vikram Verma ("Verma"), CEO of SAVI, proposed a strategic partnership with eLogicity in conjunction with a possible joint application for funding. This proposal was discussed at the seventh board meeting held on 22 February 2002. Ng recognised the possibility of working with SAVI on specific projects, but he also highlighted to the Board that eLogicity was working with other parties like Transcore. Following the discussion, Burgess proposed the following resolution ("the first SAVI resolution"):

> That the [company's management] and P&O/PSA simultaneously engage in discussion with SAVI to achieve mutually beneficial outcomes in relation to, in the case of management, specific projects and a technology/operational issues and, in the case of P&O/PSA, a possible long term strategic alliance.

31 The resolution was passed by a majority of six to three, with the plaintiffs being outvoted. Ng felt that the strategic shareholders were purporting to delegate to themselves the power to pursue such an alliance to the exclusion of the plaintiffs. The plaintiffs objected as this issue should have been put to the shareholders pursuant to cl 5.04 of the Agreement, which provided that the approval of all three shareholder groups was needed before a joint venture was entered into.

32 On 6 March 2002, Ng received an e-mail from Tan (nominee director of PSAI) informing him that SAVI had invited eLogicity to participate in a joint proposal for "electronic seal/track and trace solutions" to the US Department of Transport, and stating that the strategic shareholders would like to explore a long-term strategic alliance with SAVI. Ng immediately replied to request for further information on the project. Tan sent a report and an excerpt from a communication from Verma, which seemed to be a follow-up to prior discussions to which the plaintiffs were not privy. Ng asked for the complete copy of this excerpt, but Tan refused to provide it, stating that the information given met the reasonable test for completeness of information and that he was confident that Ng would no longer delay the process. Ng subsequently e-mailed the other directors to ask if any of them was visiting SAVI. Childs, POAP's nominee director, said that he and Ladd were intending to visit SAVI on 11 or 12 March 2002. Ng then asked Childs to provide the Board with an update of their discussions with SAVI at the scheduled adjourned seventh board meeting on 15 March 2002. At this meeting, Ng said that he did not object to an alliance with SAVI as long as a paper was tabled by the Board to justify it. During a break, Burgess and Tan told Ng that the strategic shareholders wished to remove Ng as CEO. After the break, Childs did not get to present his update on the meeting with SAVI, and the meeting was adjourned.

33 On 19 March 2002, the plaintiffs received a faxed "Notice of Adjourned seventh Board Meeting", purporting to fix the meeting on 22 March 2002. Ng was surprised as he had scheduled a business trip to the US on 21 March 2002. Lim also left for Malaysia on 20 March 2002 because his mother was critically ill. Ng suggested holding a meeting between 2 and 5 April 2002, but he received no response to his suggestion. On the evening of 20 March 2002, Ng wrote to request for a response. Latta, on the evening of 21 March 2002, sent an e-mail, proposing that the following resolution be passed at the meeting the next day ("the second SAVI resolution"):

> 1. That further to the Board resolution of February 22nd and the mandate attached thereto the Board of Directors of eLogicity do hereby delegate to POAP and PSAI the authority to engage in further discussions with SAVI to jointly explore container security initiatives and other matters related thereto.
>
> 2. That each of the Directors named in the Mandate be and are hereby authorised to do all

acts and things as they may consider necessary or expedient to give effect to the above resolution, including entering into an agreement with SAVI on behalf of eLogicity on such terms as the Directors may in their sole discretion deem to be appropriate.

34 Ng did not read this e-mail till the afternoon of 22 March 2002, when he had reached the US. He was informed that the meeting had proceeded and the resolutions had been passed. He thought that these resolutions purported to delegate to the strategic shareholders the authority to deal with SAVI on specific projects to the exclusion of the plaintiffs. They also authorised the strategic shareholders' directors to enter into agreements with SAVI, contrary to cl 5.04 of the Agreement. Thereafter, Ng continued to ask for an update from Childs on his meeting with SAVI, but it was to no avail. Ng therefore concluded that the strategic shareholders were intent on forming an alliance with SAVI without regard to the views or interests of the plaintiffs. His views were reinforced by a letter from POAP directors on 25 March 2002, in which they reminded Ng that he was not to do anything in his involvement with the ISO/TC 104 Standards Committee ("TC 104") which might jeopardise the prospects of a relationship between eLogicity and SAVI. TC 104 is an international committee relating to the development of a standard for radio frequency communication protocol for electronic seals and had representatives from SAVI.

35 During the eighth board meeting on 12 April 2002, Latta reported that SAVI was prepared to align itself with eLogicity provided eLogicity ceded its technology to SAVI, and the plaintiffs were completely removed as shareholders of eLogicity. The Board then voted to terminate Ng's appointment as CEO. Ng asked if any financial projections had been prepared on the effect of this alliance, and Latta said this was unnecessary. Ng felt that eLogicity was giving up its competitive advantages to a competitor without knowledge of any tangible benefit in return. However, the strategic shareholders proceeded to propose the following resolution:

That subject only to detailed documentation eLogicity will enter into an agreement with SAVI incorporating the terms and conditions set out above.

36 The Board noted that this resolution required the approval of all three shareholder groups. Ng proposed an interim measure, *ie*, a resolution that SAVI was to sign a non-disclosure agreement. On 15 April 2002, Latta wrote to the plaintiffs to ask them to reconsider their position. Ng replied the next day, indicating that they were not in favour of an alliance, given the limited information made available to them. SAVI subsequently indicated that it was no longer interested in the alliance.

37 Ng later became aware of a press release by SAVI on 29 April 2002, which described SAVI's business concept in similar terms as eLogicity's business. There was another press release from SAVI on the formation of a Strategic Council on Security Technology by representatives from SAVI, PSA and P&O. Shortly after, on 10 May 2002, there was a *Business Times* report that PSA was in talks with SAVI to introduce new transportation security software. Ng also received information from various sources that PSA and P&O were indeed working with SAVI. Subsequently, Ng also became aware that SAVI was working with PSA and had received PSA's support in obtaining a $6.9m grant for a CSI-related project from the Singapore Economic Development Board ("EDB") in June 2002. Further, a *Business Times* article on 19 June 2002 contained comments by SAVI's CEO which confirmed Ng's suspicions that PSA was working with SAVI to the exclusion of eLogicity. Another article in the *Lloyd's List* publication reported that PSA, P&O and HPH/LINE were working together with SAVI on Smart and Secure Tradelanes ("SST"), a programme to track and monitor containers. Ng therefore believed that the strategic shareholders had been in discussions with SAVI from an early stage and had deliberately kept the plaintiffs in the dark. Notwithstanding that SAVI was a competitor, the strategic shareholders were prepared to cede eLogicity's technology and competitive advantages to SAVI, and enter into a partnership in complete disregard of eLogicity's interests and the plaintiffs' rights.

Ladd's actions in respect of the PIE/the new eModal

38 PSAI's Yap mentioned at the first board meeting that PSA's Portnet (PSA's e-commerce business) could make use of eLogicity's cargo reservation system module. On 9 February 2001, PSAI suggested that PSA's cargo reservation system module be packaged as part of eLogicity's services. Ng replied that eLogicity had to be independent of any one shipper and had to work with as many parties as possible. He also refused to provide eLogicity's track and trace services exclusively to PSA's Portnet. In view of this, Yap then said that PSAI would also not work exclusively with eLogicity. He added that PSA was working with five shipping lines on a Cargo Reservation System solution termed "Newco" which would involve other track and trace service providers. Ng was surprised as Newco would be in direct competition with eLogicity's business, and the strategic shareholders were intending to use a competitor's solution (SAVI) for the proposed Newco. Subsequently Ng was informed by Corcoran that PSA, P&O, HPH/LINE and SSA had formed the PIE. According to Ng's understanding, the PIE would offer global track and trace services, which were similar to eLogicity's business. During the 13 February 2001 meeting, Ladd assured Ng that the PIE was "dead" and that P&O would not invest in Newco if it was contrary to the Agreement. Childs reiterated during the third board meeting that the PIE was dead.

39 In July 2001, HPH/LINE expressed interest in investing in eLogicity. During the fourth board meeting on 3 August 2001, POAP nominated Ladd as their representative to formulate the HPH/LINE deal. Ng also asked Ladd to secure terminal access with SSA. At this juncture, Ng received disturbing news that P&O was to invest in a new company that was similar to the supposedly abandoned PIE. On 23 August 2001, he found out that HPH/LINE rejected any investment in eLogicity. However, eLogicity continued its efforts to get terminal operators to sign TAAs with it and HPH/LINE eventually agreed to work with eLogicity on or about 19 October 2001. Ng then asked Corcoran to work with Ladd to secure a TAA with SSA.

40 Ladd only updated the Board during the sixth board meeting on 14 December 2001, saying that he had not made progress with SSA on the TAA. On 25 January 2002, eLogicity received a reply from SSA indicating that it had decided not to work with eLogicity for the time being. When Corcoran spoke to HPH/LINE later, he found that HPH/LINE's commitment was being held up due to a potential conflict between HPH/LINE's investment in a new eModal ("the new eModal") and eLogicity. The new eModal, akin to the PIE, would be able to replicate eLogicity's track and trace services. Ng received a copy of an e-mail between Ladd and HPH/LINE dated 28 December 2001, which suggested that Ladd, on behalf of P&O, had been negotiating with HPH/LINE and SSA in respect of the new eModal; in fact, draft terms had been produced. Ng felt that Ladd was acting contrary to his obligations as a director of eLogicity, and that P&O was acting against eLogicity's interest. He thus contacted Burgess and asked for an explanation for Ladd's and P&O's conduct. As no explanation was forthcoming, Ng raised this issue at the next board meeting on 21 February 2002, proposing to investigate the matter further. He faced much resistance from POAP. PSAI's directors, on the other hand, seemed disinterested. The meeting was adjourned to the next day as the strategic shareholders' directors took issue with the presence of M/s Lee & Lee (the company secretary) and Ng's suggestion to tape record the meeting.

41 On 22 February 2002, Ladd declined to address the allegations made against him. At the next adjourned meeting on 15 March 2002, a resolution was passed that eLogicity should seek legal advice in relation to Ladd's actions. After a protracted exchange of correspondence between the plaintiffs, Latta and Childs, it was agreed that D&N would be appointed to look into the matter. There was another round of debate concerning the contents of the legal brief to be sent to D&N. Throughout the exchanges, Ladd chose not to respond to the matters discussed, when a simple clarification could have resolved the matters in dispute. There also was considerable resistance from POAP. For

instance, Latta and Childs refused to allow eLogicity to extend a copy of the Agreement to D&N, and there was difficulty in arranging interviews between D&N and Latta and Burgess.

The replacement of eLogicity's management and the subsequent downsizing of eLogicity

42 At the adjourned meeting on 15 March 2002, the Board discussed the budget at length and questioned Ng extensively on his CEO's report. During the break, Burgess and Tan approached Ng, suggesting that if he did not resign as CEO, they would terminate his employment. Ng found out that the strategic shareholders had also decided that Lim's employment would be terminated.

43 Between this time and March 2002, there were discussions on the details of Ng's termination. Ng noticed that there was a simultaneous increase in activity on the part of the strategic shareholders in their pursuit of a long-term strategic alliance with SAVI. The POAP directors were also questioning eLogicity's authority to work with Transcore and other parties on specific projects. On the other hand, they were delegating to themselves the authority to enter into talks with SAVI and even to enter into agreements with SAVI. Eventually, at the eighth board meeting held on 12 April 2002, a resolution was passed that Ng be removed as CEO. A further resolution was proposed that Corcoran, a nominee director from POAP, would assume the position of Acting CEO. Ng did not support this resolution as Corcoran was unable to generate sales even as Chief Operating Officer. The resolution was ultimately passed, after which the Board proceeded to discuss the strategic alliance with SAVI.

44 Immediately after the meeting, Corcoran handed Lim a letter informing him that his employment was also terminated. Lim was told that the strategic shareholders wanted him to leave the premises on the same day. On that evening, Iaspire.net Pte Ltd, an information technology management service provider linked to PSA, was purportedly instructed by the strategic shareholders' directors to access, reconfigure and re-route eLogicity's network and e-mail server. The staff of eLogicity raised various concerns on the scope and extent of the access given. One of the staff also noted that there had been an intrusion into the company's information technology ("IT") system to enable the sharing of files and information.

45 Ng realised that the incidents in the past few months were geared towards his removal as CEO. An example was the strategic shareholders' response to eLogicity's Employee Share Option Scheme ("ESOS"). This was a staff benefit scheme. The strategic shareholders' directors raised the possibility of replacing ESOS with an alternate scheme at the first board meeting. Lim prepared several proposals, but on each occasion Tan and Childs asked for further revisions. On 3 April 2002, the strategic shareholders wanted to conduct an audit for the purpose of deciding on the ESOS issue. Ng found it strange that they wanted to conduct an audit at this stage as the company's external auditors had just conducted an audit. After Ng's removal on 12 April 2002, Corcoran wrote to the directors, stating that the strategic shareholders requested an audit, which would involve third parties. Ng expressed his concern that there was a risk that proprietary and confidential information might be compromised. He asked for the scope and purpose of the audit, as well as the identity of the third parties. Corcoran simply replied that the strategic shareholders were exercising their rights under the Agreement.

46 After Ng's and Lim's employment contracts were terminated, the strategic shareholders effectively usurped the role of the company's management and bypassed the Board. Corcoran appointed two of PSAI's secondees without obtaining the Board's approval. Similarly, access to the company's IT systems was granted on the direction of the strategic shareholders without notice being given to the plaintiffs' directors. At the ninth board meeting, Childs referred to the audit report prepared by the strategic shareholders' joint audit team. The report was not cleared with the company's management, and contained several unfounded allegations against Ng. Ng demanded that

the reports be withdrawn within seven days, which was not acceded to. All these events demonstrated that the strategic shareholders had effectively usurped the management of the company. They increasingly took the position that they could do whatever they wished since they controlled more than 60% of the Board. This was contrary to the parties' expectations when the plaintiffs invited PSA and P&O to invest in eLogicity.

47 During the ninth board meeting held on 17 May 2002, Corcoran presented the Board with three scenarios for the company. Under the third scenario, eLogicity would effectively be "mothballed" with zero sales while it searched for business opportunities. Ng realised from the discussions that the strategic shareholders' directors were already intent on downsizing the company. One prime consideration was that they did not want to pay eLogicity the remaining $5.5m which they owed. A resolution was duly passed to implement the third scenario. Another resolution was passed to consider the merits of liquidating eLogicity, though the plan to liquidate eLogicity eventually did not materialise. Ng was concerned that the strategic shareholders had not provided sufficiently for the company's recovery. In addition, many of eLogicity's existing commitments were not met. Ng believed that this option would inevitably destroy the company's business.

48 In view of the frustration faced by the plaintiffs, they felt it was in the interest of all parties to sell their shares and make a clean exit from eLogicity. They had first made their intention known to the strategic shareholders on 14 December 2001. At that point in time, they felt that they were not getting support to make eLogicity a success and were facing constant baseless criticism by the strategic shareholders' directors. Subsequently, after the plaintiffs were apprised of Ladd's actions, there were more discussions between Hong (on behalf of the plaintiffs) and Tan of PSAI on the possible sale of shares to the strategic shareholders or a third party. The strategic shareholders offered to buy the shares at approximately US$2m, but Hong indicated that their shares should be valued at US$17m, as the company's valuation was US$50m based on the shareholders' agreement. Hong then offered to sell their shares for US$13.4m, but this offer was rejected. On 5 July 2002, the plaintiffs, through their solicitors, indicated that they were still amenable to selling their shares at a fair value, which was a valuation of the company at not less than US$50m. PSAI's solicitors disputed the plaintiffs' valuation of eLogicity, and stated that PSAI was prepared to purchase the shares at a fair value, to be determined by an independent expert. Ng felt that this was unfair to the plaintiffs as the actions of the strategic shareholders had diminished the value of eLogicity.

Lim's testimony

49 In his affidavit of evidence-in-chief, Lim addressed allegations by POAP that the management had placed eLogicity's viability at risk by failing to conclude a contract with EJ Brooks ("EJB") on the supply of eSeals. He averred that he had been negotiating with EJB on the terms of a draft manufacturing and assembly agreement. After he was removed from management, Lim offered to effect a proper handover of this duty, but Corcoran refused the offer. Lim noted that the new management failed to follow up on this matter. While Lim agreed that the possibility of EJB stopping supplies would be adverse to the company, he pointed out that at no time did EJB indicate that they would cease supplying the eSeals to eLogicity.

50 Lim then refuted POAP's allegation that the patent application for the eSeal was rejected. The initial rejection by the US Patent Office was actually disclosed to the strategic shareholders in the documents provided to them for their due diligence exercise. Also, eLogicity and EJB had agreed that the "electronic", "mechanical" and "electro-mechanical" portions of the eSeal would be under eLogicity's, EJB's and their joint applications respectively. After eLogicity's application for the electronic portion was rejected, the company again applied for a patent for a new version of eSeal. This application was still pending when Lim was removed from the company. EJB, on the other hand,

had applied for a patent for the mechanical and electro-mechanical portions of the eSeal. Lim discussed with EJB to file an amendment so as to include eLogicity in this application. These discussions were still ongoing when Lim was removed from management.

PSAI's evidence

51 PSAI had initially filed affidavits of evidence-of-chief from three nominee directors, Latta, Tan and Yap. However, at the opening of its case, counsel for PSAI informed the court that Tan would not be appearing in court. At an advanced stage of the trial, when cross-examination of Latta had already commenced, PSAI further indicated that Yap would also not be testifying.

Breakdown in the parties' relationship

52 Latta, PSAI's sole witness, contended that the present state of affairs was brought about by Ng's conduct and the plaintiffs' inability to agree with the strategic shareholders on many issues. PSAI had taken a very reasonable stance by making an open offer to purchase the plaintiffs' shares at the outset of the proceedings. Notwithstanding the offer, the plaintiffs had persisted with the present proceedings.

53 PSAI decided to invest in eLogicity on the basis of the plaintiffs' projections in their business plan. The plaintiffs' sales pitch included claims that the company was capable of obtaining a profit of US$30.381m in 2001, and that it had 20 "beta" and "initial" customers. (According to Ng's definitions, "beta" customers were potential customers who had indicated that they were willing to do a Proof of Concept with eLogicity, while "initial" customers were those who had indicated interest in eLogicity's product.) Contrary to what Ng testified, PSAI did not prepare any further projections which were incorporated into the revised projections. There were only informal meetings held with the plaintiffs to discuss the business plan, and a limited due diligence exercise carried out on the company. There was no obligation on PSAI's part to provide sales to eLogicity. As with all companies, the responsibility for bringing in sales lay on the management, not the shareholders.

54 The breakdown in the relationship between the parties was not a result of the strategic shareholders' collusion with eLogicity's competitors, as it made no sense for PSAI, which had invested approximately $10.472m in eLogicity, to seek to ruin it. Rather, the plaintiffs' mismanagement resulted in eLogicity being in desperate financial straits. There were various matters that exacerbated the breakdown in the relationship. First, the technology for the eSeal was flawed and the plaintiffs failed to rectify it. Even as late as September 2002, the eSeal failed in a trial for a potential customer. The second factor was the financial failings of eLogicity. There was a stark difference between the financial projections of the plaintiffs and the actual performance of the company. While the plaintiffs claimed they could generate sales of US$30m in 2001 without the strategic shareholders' capital injection, they only generated $223,000 in sales. The forecast in 2001 had to be dramatically altered from a profit of $1.62m to a loss of $6.192m. The plaintiffs sought to evade their failure to generate sales by falsely alleging that the strategic shareholders undertook responsibility to bring in business. There were also few TAAs concluded, apart from the ones with the strategic shareholders. In addition, PSAI found out that there was no contract between EJB and eLogicity to supply the eSeal. Only the patent to the mechanical portion of the eSeal was registered, and it was owned by EJB. By the last quarter of 2001, PSAI realised that the management failed to come reasonably close to the projected sales target, failed to keep costs in control, caused the company to make huge losses with no prospect of recovery and had not developed technology for a commercially viable product. PSAI was very concerned that the downward spiral should not continue. It was at this time, in December 2001, that Ng first conveyed the plaintiffs' desire to exit eLogicity. In all likelihood, the plaintiffs recognised their failure of management and wished to exit whilst the company still had value.

Removal of Ng from management

55 The change in the company's management was driven by commercial necessity, as the initial projections by the plaintiffs of the company's sales and profits were very far removed from the actual figures. The plaintiffs failed to produce accurate business and financial projections. When PSAI realised that the projections in the business plan could not be achieved, it requested the plaintiffs to provide a more realistic budget for the year 2001. There were two re-forecasts which the Board was unable to approve of. The third re-forecast showed a drop in revenue. When the Board questioned the management on this significant reduction in sales, Ng wrongly blamed it on PSAI's failure to bring in sales. When it became clear to Latta in January 2001 that there were no beta clients ready to sign a contract, he told Ng to consider a sales forecast of zero for 2001. He felt that the management, by insisting on unrealistic and unobtainable forecasts, had overspent and dedicated resources to non-productive activities. In January 2002, there was still no proper budget or forecast for 2002. PSAI sent a letter to the first three plaintiffs to ask for a budget to be presented at the next board meeting. Despite this directive, the management failed to present a budget for approval until the time Ng and Lim left the Board in April 2002.

56 By September 2001, PSAI realised that they had to re-think the management of the company. At an Executive Committee meeting, PSAI proposed that David Owen ("Owen"), who was seconded by POAP, direct all backroom activities while Ng focused on new business development. However, Ng refused to acknowledge the concerns raised, and started shouting at Corcoran and Latta. The following day, he sent a letter to PSA's president, attacking various aspects of Latta's conduct. He also made serious and unsubstantiated allegations against Owen, claiming that he had committed criminal offences. As a result of Ng's actions, the Executive Committee was dissolved and reconstituted in March, comprising Tan, Burgess and Ng. In addition, Ng blocked the appointment of the strategic shareholders' nominees to management positions.

57 By the time of the seventh board meeting, the relationship between the parties had deteriorated considerably. When the plaintiffs brought Lee & Lee (the company secretary as well as the plaintiffs' solicitors) to the meeting without giving notice to PSAI, the strategic shareholders naturally felt uncomfortable. The strategic shareholders' directors also disagreed with Ng's proposition to have the meeting tape recorded. The Board then spent eight hours debating the power to remove Lee & Lee as company secretary, before a motion was finally passed to ask Lee & Lee to leave. During the eighth board meeting, Latta led a lengthy discussion on Ng's performance as CEO, pointing out that Ng had failed to prepare a balanced budget, had failed to produce tangible results in the company's performance and was unable to work with the Board. Following the meeting, Lim's services were also terminated. Given that the termination of Lim and Ng took place under unhappy circumstances, PSAI was concerned that eLogicity ought to secure its computer system to prevent unauthorised access. Corcoran, the acting CEO, therefore hired Iaspire.net Pte Ltd to assist in this matter. Latta later discovered that Lim had entered the company's premises and was taking photographs of the premises.

58 The audit that was later called by the strategic shareholders was not precipitated by the ESOS, as Ng portrayed it. Instead, it was a result of the management's persistent failure to put forward a credible budget or business plan. PSAI intended to obtain an independent view of the company's financial details. Latta was surprised that Ng strongly opposed the audit, given that the Agreement expressly provided for the rights of shareholders to inspect the company's documents. Latta also denied that the strategic shareholders usurped the management of the company and bypassed the Board. The secondment of personnel from PSAI as senior vice-presidents was within the scope of management and did not require Board approval.

59 Finally, the decision to downsize the company was made after Corcoran presented the Board with three options. The third option of "mothballing" the company would give the shareholders a chance to re-position eLogicity with the least amount of losses. The option of liquidating the company was raised, but not proceeded upon after further consideration.

SAVI

60 SAVI operated in the same industry as eLogicity. The US Department of Transport, in response to the terrorist threats post-September 11 2001, launched the CSI to ensure the security of sea containers entering US ports. SAVI had a long-term relationship with the US Department of Defence and was strategically positioned to take the lead in participating in the CSI. To survive in the industry, eLogicity had to play a part in CSI. In this regard, it had a very good opportunity to ally itself with SAVI to make a joint application for funding. However, the plaintiffs refused to work with SAVI.

61 SAVI had long engaged eLogicity in negotiations, and the plaintiffs were aware of this. In mid-2000, even before the strategic shareholders' investment, an alliance was being considered. Ng was tasked to enter into further discussions with SAVI in October 2000. The Board then decided at the second board meeting that Ng should continue his discussion with SAVI. Some time in March 2001, Latta had a social lunch with two of SAVI's officers. The subject of an alliance was raised and Latta was glad to hear that SAVI was prepared to work with eLogicity in a new business model. He then put SAVI's officers in contact with Ng. Although Ng was tasked to continue discussions with SAVI, nothing came out of his efforts. At the third board meeting, Ng pushed to be the sole spokesperson of eLogicity in respect to negotiations with SAVI and PSAI did not oppose this. Still, Ng was unable to make any progress. PSAI continued to keep in touch with SAVI on an informal basis, because its pre-existing contract with Ace Fusion (which merged with SAVI in April 2001 to form SAVI Asia) required Latta to have occasional contact with SAVI. The discussions on a possible alliance between eLogicity and SAVI was left to Ng.

62 By October 2001, the relationship between the parties had deteriorated badly. The Executive Committee was dissolved due to Ng's belligerence and Ng terminated Owen's directorship on allegations that he had committed criminal offences. PSAI discovered that Ng had, around this time, been asking SAVI to purchase the plaintiffs' shares. At the fifth board meeting, Ng conducted the meeting in an emotional and aggressive manner, demanding to know if the strategic shareholders had contacted SAVI recently. The strategic shareholders' directors were fed up with Ng's antics and no one really answered him. There was in fact an introductory meeting fixed in Singapore between SAVI and the strategic shareholders on 25 October 2001. Latta felt that this was only an introductory meeting, and it was only fair that the strategic shareholders met SAVI themselves given that all negotiations thus far had been handled by Ng. A few days after the fifth board meeting, Ng proceeded to discuss the alliance with Ladd and Tan on 2 November 2001. It was suggested by Ng himself that Tan should approach SAVI through Temasek Holdings, SAVI's shareholder. Tan duly followed up on this agreed move. However, Ng again caused problems by complaining that he had heard a rumour that SAVI Asia was working with eLogicity to offer global track and trace services. The strategic shareholders promptly informed him that they knew of no such rumour. Still, Ng persisted with this point, claiming that PSAI had provided SAVI with some privileged information and also alleging that the strategic shareholders had established some agreement with SAVI. Ng backed down after PSAI demanded an explanation of the serious allegations made. He then claimed he was unavailable to meet SAVI with Ladd, giving no reason for his unavailability.

63 The plaintiffs informed the strategic shareholders in December 2001 that they wished to exit the company. This indicated that their role in terms of the long-term strategy for the future of

eLogicity would be reduced. SAVI sent eLogicity a formal proposal for a strategic partnership on 8 February 2002, which was discussed at the seventh board meeting of 22 February 2002. The meeting was extremely hostile and antagonistic. Timing for eLogicity's response to SAVI was critical, as the deadline to apply for funding was 27 March 2002. However, the company's response was delayed by the Board's debating of other "management" issues. Also, instead of sending a positive response, Ng sent an e-mail to SAVI's Verma, stating that eLogicity did not need SAVI's technology, and that he was not sure what form of strategic partnership SAVI had in mind. Since this was a completely wrong message to send, the strategic shareholders' directors prepared a draft response to SAVI, which was sent to the plaintiffs for their execution. Ng responded by asking PSAI's Tan for more information on the project, which Tan duly sent on the same day. Ng then complained about the information provided and the tone of Tan's response. In particular, he was upset about not being given details of the meetings fixed with SAVI. However, there had been no prior detailed discussion which the plaintiffs were unaware of. Eventually, an amended response was sent by Ng to SAVI. Against the strategic shareholders' wishes, Ng deleted references to the strategic shareholders and deliberately left a typographical error in Verma's name. Not surprisingly, the response did not go down well with SAVI.

64 Later, the strategic shareholders met SAVI's representatives in the US on 11 and 12 March 2002. They kept Ng informed of their discussions. At the adjourned seventh board meeting, which was hostile and long-drawn, no proper discussion on the SAVI alliance could take place. Ng asked for a "justification paper" on SAVI to be provided, which was puzzling as he had been talking to SAVI for one and a half years and should have known enough about SAVI. The adjourned meeting had to be resumed soon as the 27 March 2002 deadline was approaching. However, both Lim and Ng proposed dates in early April, well after the deadline. The strategic shareholders' directors suggested the date of 22 March 2002. Ng claimed that he was unable to attend it as he was travelling on 21 March 2002 to the US. This made no sense as he could have delayed his flight and it was also possible to attend the meeting by telephone. Latta attempted to explain the urgency of this meeting to him in an e-mail, but Ng left the country without bothering to check if the meeting was proceeding or not.

65 The strategic alliance with SAVI eventually fell through because eLogicity was not able to provide SAVI with a decision. The opportunity to obtain a slice of the US$93m fund from the CSI programme was lost. There were indications from Verma's e-mails that SAVI was unhappy with the delay, and that SAVI was also not happy to work with the plaintiffs.

66 Ng complained that PSA worked with SAVI in relation to CSI, but PSA was not a shareholder in eLogicity. It was in PSA's interest to participate in CSI and PSAI on its own part did not act in an oppressive manner. The plaintiffs were invited again and again to an alliance with SAVI, but the alliance fell apart due to Ng's actions. It was not in good faith for the plaintiffs to now claim that other parties were collaborating with SAVI in a manner prejudicial to eLogicity.

67 Latta thought that the present state eLogicity was in was a result of the plaintiffs' poor management and inability to formulate a viable business plan. There was really no reason for PSAI to invest millions of dollars in eLogicity, only to seek to "destroy" the company later on.

POAP's evidence

68 POAP called five witnesses – Childs, Ladd, Burgess, Owen and Tracee White ("White"). The main witness was Childs, who testified on the salient events. Ladd's affidavits addressed the PIE incident. Owen was called to testify on his secondment to eLogicity and his subsequent removal by Ng. Burgess, a director of eLogicity, gave evidence regarding the removal of Owen and Ladd's conduct. Finally, White, who had the responsibility of marketing eLogicity's system of tracking

vehicles, deposed in her affidavit that eLogicity's system was not working well. Since there is considerable overlap between these witnesses' evidence, I will summarise their evidence collectively.

The company's performance

69 The company's performance under Ng's management had been poor. It only generated total revenues of $451,000 between January 2001 and April 2002, but incurred expenses totalling $13.314m. The lack of revenue was due to poor sales. However, POAP had never made a representation that it would provide sales opportunities to eLogicity. Corcoran and White only attended an informal meeting to discuss the motor vehicle clients handled by both strategic shareholders. White was also requested by Ng to give estimates on the projected volume of vehicles which could be tracked. While there were some discussions to verify the original projections, Childs decided that POAP could not rely on them and should prepare its own projections. Yet, all this was done for the purpose of Childs' preparation of a report on POAP's investment in eLogicity and not for the purpose of POAP making any undertaking. Childs' understanding was that Ng and his management team had the responsibility to generate sales and revenue. Ng appeared to have the same understanding, as he had stated in his e-mails that he would expand the sales team and have more sales representatives. It was also made clear at the third board meeting on 12 April 2001 that POAP did not consider itself under any obligation to generate sales and that eLogicity itself had this responsibility. Ng reported at the next board meeting that sales were his first priority. However, up to the time he was terminated, eLogicity's revenues were negligible, despite the fact that POAP had introduced numerous sales leads to it. POAP was shocked when Ng presented his third budget forecast, under which eLogicity's projected revenue for 2001 would only be $339,000 (compared to a projected revenue of $9.241m in his second forecast). This forecast called into question the future viability of eLogicity.

The Owen incident and the Executive Committee

70 Following the drastic reduction in eLogicity's projected revenue in Ng's third re-forecast, POAP proposed that Owen should be Chief Financial Officer of eLogicity. Before Owen started work in June 2001, he discussed his strategy for TAAs with Ng on the telephone. Ng asked him to put his thoughts in writing, which Owen did in an e-mail. However, Ng expressed his unhappiness, claiming that Owen was digressing and venturing into areas outside his scope of work. Although Owen sought to explain himself, Ng still remained displeased and even suggested that Owen should not start work as scheduled. He only relented after Childs talked to him. On 28 September 2001, Owen discovered that Ng had confiscated his laptop computer for "security" reasons. Owen was also asked to take a few days off and his office keys were taken away. Childs e-mailed Ng to seek an explanation, but Ng did not reply. On 29 September 2001, Burgess was told by Ng that there would be a police investigation against Owen. Corcoran and Burgess then met Lim and Ng in Singapore. They were not given the information which Ng claimed he had against Owen and it was not clear to them what unlawful act Owen had committed. Nevertheless, in order to preserve their relationship with the plaintiffs, POAP agreed that Owen would leave eLogicity. This incident marked the steady deterioration of the relationship between the plaintiffs and POAP. Ng also could not work with Latta of PSAI. Childs heard that he sent a letter to the PSA group president to make serious allegations against Latta. It was later agreed that the original Executive Committee, which included Latta, would be dissolved because of Ng's tensions with Latta.

The plaintiffs' attempt to sell their shares

71 The plaintiffs told Corcoran on 10 December 2001 that they wanted to sell their shares in eLogicity. During an informal shareholders' meeting, the plaintiffs said that they wanted to exit

eLogicity within a time frame of three to six months. The strategic shareholders were prepared to agree to the sale of shares, provided that future discussions on long-term strategic alliances with other entities should be conducted by the strategic shareholders' nominee directors. The discussions on the sale of shares continued up to May 2002, in the midst of allegations against Ladd and the unhappiness over a potential alliance with SAVI. No agreement was reached. The plaintiffs failed to disclose that even before December 2001, Ng had approached Verma of SAVI to ask if SAVI was interested in buying his shareholding in eLogicity.

SAVI

72 On 25 October 2001, at the invitation of Latta, the POAP directors attended a meeting with SAVI's representatives, in which SAVI gave a general presentation on its business. There was no discussion on an alliance at this stage. It was only after the concerns arising from Ng's third re-forecast that it appeared to POAP that eLogicity might have difficulty progressing on its own. At the fifth board meeting, Ng himself raised the possibility of forming a strategic alliance to increase sales. He informed the Board that he was in direct discussions with five parties, including SAVI. When Ng asked if any of the directors had met SAVI directly, Burgess told him that POAP had met SAVI the night before in a purely exploratory meeting. The Board then agreed that Ng would provide more information about SAVI to the strategic shareholders' directors. Thereafter, Ladd had a discussion with Ng, and a general consensus was reached that Tan should approach Temasek Holdings, one of the shareholders of SAVI, about an alliance.

73 On 12 November 2001, Ng sent an e-mail, alleging that he was told that SAVI Asia was working with eLogicity to provide global track and trace services. He also demanded to know if The strategic shareholders had any privileged information which Ng did not know of. Burgess and Tan replied in the negative. Ng continued to make an issue of the rumour, suggesting in another e-mail that there were discussions between the strategic shareholders and SAVI which were not made known to him. In the meantime, there were discussions on a proposed meeting between eLogicity and SAVI. Burgess proposed two dates, and Ng replied that he could not make it on one of the dates. No alternative meeting date was suggested. Ladd decided to visit SAVI while in the US on 1 December 2001, which was when Ng could not make it. Ng, upon being notified, told him not to meet SAVI and requested that Ladd refrain from discussing eLogicity with SAVI. Ladd merely paid a courtesy call on that day and did not engage in any discussions about eLogicity.

74 Ng received a partnership proposal from SAVI on 8 February 2002. This proposal was discussed at the second session of the seventh board meeting, by which time the finances of eLogicity had deteriorated further. In POAP's opinion, the future of eLogicity seemed to lie in the post-September 11 cargo security initiatives in the US. POAP increasingly perceived an alliance with SAVI as the best way for eLogicity to remain viable. Although Ng repeatedly stated that eLogicity was working with Transcore, he did not provide any documentation in this respect.

75 The first SAVI resolution was proposed by Burgess, nominee director of POAP. What he meant was that the strategic shareholders would engage in discussions as directors, and not as shareholders. He believed that it was clear from the discussions that all the directors understood the resolution to have such a meaning. The POAP directors supported this since Ng no longer seemed keen to pursue the alliance with SAVI. They were also of the view that discussions on alliances should be controlled by the strategic shareholders, since the plaintiffs already intended to sell their shares and had no long-term interest in eLogicity. POAP was also concerned that the plaintiffs' reluctance to explore the alliance was another attempt to pressure POAP into buying their shares.

76 After the US Department of Transport announced CSI, SAVI on 6 March 2002 invited

eLogicity to participate in a joint proposal for CSI. Time was of the essence as a deadline of 27 March 2002 had been set for the submission of proposals. Tan therefore urged Lim to reply to SAVI in the form of his prepared draft. However, the plaintiffs made attempts to obstruct any potential alliance. They complained about the lack of information on the potential benefits. The benefit was, however, clear to POAP – eLogicity would eventually run out of cash and had nothing to lose from collaborating with SAVI, which could improve its financial position. Ng claimed that eLogicity was already working with Transcore, but no proposal on this alliance was produced and Ng provided little useful information on this. Furthermore, Ng was reluctant to help POAP meet Transcore. He refused to arrange a meeting between POAP and Transcore, citing the excuse that the strategic shareholders were usurping the powers of the Board.

77 Latta, Ladd and Childs met SAVI representatives in the US on 12 March 2002, and informed the Board of their discussions. It was hoped that on the resumption of the seventh board meeting on 15 March 2002, the formalisation of a collaboration with SAVI would be agreed upon. Unfortunately, the opportunity to discuss it did not arise. SAVI became concerned when eLogicity could give no confirmation. Under these circumstances, the strategic shareholders' directors proposed for the adjourned seventh board meeting to be held on 22 March 2002. Ng wrote to say that he, Lim and Hong could not make it. Latta tried to accommodate them by arranging for a meeting via telephone conference. He also gave advanced notice of the proposed resolutions. Despite these efforts, the first three plaintiffs did not participate in the meeting. Despite the second SAVI resolutions passed on 22 March 2002, no commitment was actually made in terms of an alliance. POAP understood that this resolution also meant that it would be the strategic shareholders' directors, not the strategic shareholders, who would be delegated the authority to engage in further discussions with SAVI.

78 After the 27 March 2002 deadline expired, SAVI still remained interested in pursuing an alliance, but more so with the strategic shareholders than with eLogicity. This was partly due to SAVI's lack of trust in the eLogicity management. In its e-mail of 12 April 2002, SAVI listed the terms upon which it was prepared to form an alliance with eLogicity. The plaintiffs did not agree to these terms at the eighth board meeting. It was only resolved that a non-disclosure agreement be signed with SAVI to ascertain the merits of an alliance. This was unacceptable to SAVI and consequently, all attempts to form an alliance with SAVI came to an end. Concerning Ng's allegation of POAP's subsequent collaboration with SAVI, POAP's evidence was that none of the members of the P&O group had worked with SAVI. The Strategic Council on Security Technology which Ng referred to was merely an industry group organised with SAVI's assistance to explore various matters. The P&O group participated to keep in touch with industry developments.

The PIE incident

79 POAP was not involved in the meeting between Ng and PSAI on 9 February 2001, in which Ng allegedly found out that PSA was working with five shipping lines on a container reservation system solution. PSA's community system, Portnet, had invited P&O Nedlloyd, a shipping line of the P&O group, to participate in Cargo D2D, but neither POAP nor P&O was involved. Ladd was involved in the project since he was Chief Information Officer of POSN, the ultimate holding company of the P&O group companies. In any event, P&O Nedlloyd declined PSA's invitation.

80 POAP's position was that it had never breached the Agreement. POAP did not intend to invest in the new eModal. It was SSA which conceived the idea of the P&O group investing in new eModal. Ladd was engaged in these discussions as Chief Information Officer of POSN, and he was not a director of POAP until July 2002. At the seventh board meeting, Ladd was reluctant to discuss the matter as he was bound by a non-disclosure agreement. He told Ng about this at the meeting and Ng acknowledged that he should not discuss the new eModal issue. However, Ladd explained at the

meeting that the new eModal would complement and not compete with eLogicity, and that discussion of the new eModal had come to an end. In his affidavit, Ladd referred to his statement made to D&N. He added that what was contemplated in this new eModal was not an entity that was capable of competing with eLogicity, but a community system similar to PSA's Portnet. Community systems were actually important business partners of eLogicity, as eLogicity's track and trace system could not detect certain information that had to be obtained via EDI from the community systems. As for the PIE, it was effectively "dead" by April 2001, when differences between the participants emerged. The PIE was openly discussed at the fourth board meeting and the first three plaintiffs raised no objections then. Ng even agreed to use Ladd's contacts established through the PIE to resolve some issues with HPH/LINE.

81 In his affidavit, Ladd further deposed that Ng was misconceived to suggest that HPH/LINE did not want to enter into any TAA with eLogicity because of Ladd's involvement in the new eModal. He noted that HPH/LINE did not want to enter into TAAs with eLogicity regardless of P&O's involvement in the new eModal. After the P&O group was no longer involved in the new eModal, HPH/LINE was still prepared to enter into an exclusive arrangement with the new eModal that still precluded eLogicity. Even if eLogicity had signed a TAA with HPH/LINE and gained access to the Hong Kong terminals, eLogicity would not be able to use the eSeal in Hong Kong as it only had a demonstration radio licence. Similarly, Ladd's involvement in the new eModal did not cause SSA to refuse to enter into TAAs with eLogicity. SSA had never been keen to work with eLogicity as it could not see any benefit. The reason for SSA's refusal to enter into TAAs with eLogicity appeared to be the new eModal's requirement for exclusivity, and not anything done by the P&O group or Ladd.

82 In February 2002, the plaintiffs' solicitors sent POAP a letter alleging that they were in breach of the Agreement. Prior to this letter, Ng and Lim met Burgess in Singapore and made these accusations against POAP, as well as indicated that they wanted to sell their shares. Childs also discussed the sale of shares with the third plaintiff, Hong. Childs then told the solicitors that the best way to resolve the conflict was for the plaintiffs to focus on the sale of their shares. Though the solicitors agreed, Childs later received a call from the first three plaintiffs. They emphasised the strength of their legal case against POAP, and left POAP with the choice of either buying their shares or facing legal action. Subsequently, the plaintiffs did not pursue their claim.

83 When the seventh board meeting commenced on 21 February 2002, the new eModal incident was on the agenda. However, there were heated debates over the presence of Lee & Lee, the use of a tape recorder and the veracity of Lim's draft minutes of the fifth board meeting. It was only towards the late afternoon that a resolution was made for Lee & Lee to leave. There was then insufficient time to discuss the new eModal incident. There was only a brief discussion on the alliance with SAVI, before the POAP directors had to leave to catch their flight back to Sydney. It was apparent that the discussions on the new eModal were not prematurely terminated because POAP directors left the meeting, but because of various other delays.

Termination of Ng's employment as CEO

84 The issue of removing Ng as CEO was first broached at the seventh board meeting on 15 March 2002, when the new eModal issue was briefly discussed. During a break, Burgess and Tan asked Ng if he wanted to resign as CEO while remaining as Chairman of the Board. Ng burst into tears, but did not say that he refused to resign. His main concern was with the terms of resignation, and the rest of the meeting was spent discussing that matter.

85 The POAP directors supported the resolution to terminate Ng's employment during the eighth board meeting for various reasons. First, the dismal performance of eLogicity continued in the year

2002. Second, there was also no approved budget for the year. The five-year-plan presented by Ng was discussed during the fifth board meeting but was not approved. The strategic shareholders' directors felt that it contained too much "blue sky" and only catered to the "best case" scenario. Lim, however, recorded in his draft minutes that this plan was approved. Ng maintained that he considered that the Board approved it because no one expressly disapproved of it. The POAP directors disagreed with this contention. Third, eLogicity's high expenses compared to its negligible revenues and depleting cash reserves was of concern to the POAP directors. It was also apparent that Ng was unable to work with the strategic shareholders' directors since there was little, if any, trust between them. Another area of concern was Ng's continued failure to take responsibility as CEO for eLogicity's dismal performance. Ng blamed the strategic shareholders for failing to provide revenue and deliver sales volume. He continued to do so up till the eighth board meeting, despite it having been made clear at the third board meeting that eLogicity itself had the responsibility to generate revenue.

86 After Ng's employment was terminated and Corcoran was appointed as acting CEO, several other matters came to light. The first issue was the absence of radio licences in various countries. Without approval being granted for a radio licence, the eSeal could not be used and eLogicity's track and trace system was prevented from being used worldwide. Corcoran only discovered in late April 2002 that eLogicity had no radio licence in Japan. Hong Kong was also an important country for eLogicity because of the large volume of cargo passing through. Yet, eLogicity only had a demonstration licence which required the company to notify the Hong Kong authorities each time a single eSeal was tested. The second area of concern was eLogicity's relationship with EJB, the manufacturer and supplier of the mechanical part of the eSeal. EJB owned the patent for the mechanical portion of the eSeal. Childs also found out during meetings with EJB that there was no contract with eLogicity requiring EJB to supply eSeals. EJB told him that it would not be difficult to find someone else to supply the radio transmitting electronics so that EJB could sell eSeals themselves.

87 Third, eLogicity's system for tracing vehicles did not work well. White provided more details on the operational problems. Third party suppliers had to be engaged to provide RFID tags to be attached to the vehicles as the eSeal could not be used for vehicle tracking and tracing. However, even with these tags, the system failed various trials conducted at the factory premises of Ford, which was an important potential customer. The system was also not fully automated. The portable readers had to be driven onto vessels and manually moved to the spot where the loading was, after which the data read had to manually uploaded via the Internet to eLogicity's computer system. Fourth, there were technical problems with the eSeal. The tamper alert signal failed to be triggered in a trial with a customer. This failure would affect the credibility of eLogicity's track and trace system. Finally, there were other irregularities uncovered by the strategic shareholders when they conducted an audit of the company's finances after Ng's employment was terminated. These included the payment of personal income taxes of Ng and a senior vice-president by the US subsidiary of eLogicity out of the company's funds, and the payment of consultancy fees for two projects. The audit report was circulated at the ninth board meeting and Ng was given a chance to explain the findings. Ng offered no explanation and only said that the report contained serious unfounded allegations which should be withdrawn.

Downsizing of eLogicity

88 After Corcoran became acting CEO, he reported that the cash balance up to May 2002 was expected to be only $100,000. He presented a business plan at the ninth board meeting, and outlined three possible scenarios for eLogicity. Under all scenarios, the company would operate at a loss at the end of 2003. Under the first two scenarios, eLogicity's cash would be substantially utilised by the end of 2003. However, under the third scenario, there would be a cash balance of $6.161m at the

end of 2003. Potential revenue from cargo security initiatives in the US was not expected to materialise for some time. In these circumstances, the POAP directors voted in favour of implementing the third scenario. Burgess proposed a resolution to consider the merits of liquidation, as he felt that this option would enable the shareholders to receive their share of eLogicity's assets. Otherwise, even under the third scenario, there would be nothing left for the shareholders.

89 After this meeting, Corcoran circulated a report in September 2002 highlighting various problems faced by eLogicity, and asking for all the directors to revert within the next seven days concerning their views on the viability of eLogicity. The first three plaintiffs did not provide their views, but merely stated that the acts of the strategic shareholders caused eLogicity to suffer and that liquidation would not properly reflect the true value of the plaintiffs' shareholding. Childs proposed giving serious consideration to liquidation as almost all the $4.2m sales projected for 2003 were yet to be contracted, and there was a possibility of greater cash outflow than what was initially projected. At a subsequent board meeting, Corcoran recommended that eLogicity be voluntarily liquidated because of the lack of commercial support for eLogicity's products, the continuing disputes between the shareholders, the financial woes of the company and the technological problems faced in the eSeal. The other alternative was to reduce all activities to the minimum level. A motion was passed for the company to minimise its business activities. The first three plaintiffs did not object to minimising eLogicity's activities, but disagreed with doing so without a plan in hand. They then proposed another resolution to this effect. Childs was later surprised to receive an e-mail from Ng which alleged that the resolution required the approval of each of the strategic shareholders and a majority of the plaintiffs, according to cl 5.04(c) of the Agreement.

90 Despite having to work in a difficult environment, Corcoran was still able to secure various contracts. However, new issues such as the uncertainty over the supply of the eSeals from EJB and further hardware or software defects were potential threats to the future of eLogicity. After Corcoran ceased to be acting CEO in May 2003, eLogicity had no more employees. A former employee was engaged on a part-time basis to deal with administrative matters.

The issues

91 In my view, these are the pertinent issues to be determined:

(a) Liability under s 216 of the Companies Act:

(i) Whether the strategic shareholders' conduct in relation to SAVI was oppressive to the plaintiffs;

(ii) Whether there was exclusion of the plaintiffs from the management and "mothballing" of eLogicity and, if so, whether that was oppressive; and

(iii) Whether the strategic shareholders' conduct with respect to the PIE and the new eModal was oppressive to the plaintiffs.

(b) Whether POAP's petition to wind up the company under s 254 of the Companies Act should be granted.

I turn now to consider issue (a).

Whether liability has been established under s 216

The law on s 216

92 I will first briefly survey the legal principles underpinning s 216 of the Companies Act, which provides that:

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

93 There appear to be three alternative bases for establishing liability under s 216 – oppression, disregard of a member's interest and unfair discrimination or prejudice. However, it is now recognised that there should be no minute distinction between these individual terms, and that the common thread underlying the entire section is the element of unfairness: *Tong Keng Meng v Inno-Pacific Holdings Ltd* [2001] 4 SLR 485. The Court of Appeal in *Low Peng Boon v Low Janie* [1999] 1 SLR 761 adopted this stance by construing s 216 broadly and using "fair dealings" as the litmus test. The quintessential litmus test in s 216 is therefore as Lord Wilberforce aptly put it in the seminal case of *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 at 229, in relation to the Malaysian equivalent of our s 216:

> [T]here *must be a visible departure from the standards of fair dealing* and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made (*Elder v Elder & Watson Ltd* [1952 SC 49]): their Lordships would place the emphasis on "visible". [emphasis added]

In a similar vein, Buckley LJ, in delivering the judgment of the English Court of Appeal in *Re Jermyn Street Turkish Baths Ltd* [1971] 3 All ER 184, defined oppression in the following manner at 199:

> In our judgment, oppression occurs when shareholders, having a dominant power in a company, either (1) exercise that power to procure that something is done or not done in the conduct of the company's affairs or (2) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company's affairs; and when such conduct is *unfair* … to the other members of the company or some of them, and *lacks that degree of probity which they are entitled to expect in the conduct of the company's affairs* ... [emphasis added]

94 The crucial question I have to consider is whether there was such lack of probity on the strategic shareholders' part. There is a fine distinction, in this regard, between the legitimate rule of the majority, and tyranny of the majority. As Lord Wilberforce elaborated in *Re Kong Thai Sawmill (Miri) Sdn Bhd*, the mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions with which the

complainant does not agree, is not enough. I fully concur, as majority rule is now the norm in many companies and the exercise of this majority power will inevitably cause dissatisfaction amongst the minority shareholders. The court cannot intervene in the face of mere disagreement amongst the shareholders, for it does not act as a supervisory board over the decisions made by shareholders: *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821. Section 216 should therefore not be invoked by the court to interfere with the internal management of a company by directors who are acting honestly and not seeking to advance their interests or the interests of others at the expense of the company or contrary to the shareholders' interests: *Re Bright Pine Mills Pty Ltd* [1969] VR 1002. This principle is of particular relevance to the present facts. The plaintiffs might understandably feel aggrieved or even feel that they have been treated unfairly. Nonetheless, that sentiment alone is an insufficient basis for a successful application under s 216.

95 What constitutes unfair behaviour on the strategic shareholders' part is ultimately a pure question of fact to be determined on the particular facts: *per* Willmer LJ in *Re H R Harmer, Ltd* [1958] 3 All ER 689 at 708. The court, in assessing all the relevant facts, may consider whether the legitimate expectations of the plaintiffs have been disregarded, as was done in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 and *Re a company* [1986] BCLC 376. "Legitimate expectations" may arise from informal or implied understandings between shareholders. It must be recognised, however, that the legitimate expectations in a quasi-partnership or family company would vastly differ from those in any other company. Warner J in *Re Elgindata Ltd* [1991] BCLC 959 at 985 acknowledged that even in the absence of a quasi-partnership, the interests of a member are not necessarily confined to his legal rights. Yet he qualified that members of a company do not normally have legitimate expectations going beyond the constitution of the company. He further held at 985:

> Where, however, the acquisition of shares in a company is one of the results of a complex set of formal written agreements it is a question of construction of those agreements whether any such superimposed legitimate expectations can arise.

In *Re a company (No 005685 of 1988), ex parte Schwarcz (No 2)* [1989] BCLC 427, Peter Gibson J expressed similar sentiments. He noted at 440 that the parties had spelt out in detailed agreements all matters which were to govern their relationship, and thus rejected the petitioners' claim that their legitimate expectations were not limited to their rights under a written service agreement. In the facts before me, the parties dealing at arms' length had entered into the Agreement, which comprehensively laid down the rights of each shareholder. To my mind, it is difficult to find that any legitimate expectations apart from those contained in the Agreement were created.

96 It does not necessarily follow, however, that breach of any expectations enshrined in the Agreement is tantamount to oppressive conduct. Admittedly, breach of these terms would disappoint the shareholders' expectations. Nonetheless, many other factors have to be considered to ascertain whether the breach resulted in unfairness, such as whether the breach was deliberate, whether it was a significant breach in disregard of a major expectation and whether any detriment was caused to the aggrieved shareholder. Above all, the plaintiffs have the onus of showing that the breach prejudiced their interest in some way. In this respect, Jonathan Parker J in *Re Blackwood Hodge plc* [1997] 2 BCLC 650 underscored the importance of satisfying the court that harm has been caused by the breach. The following pronouncement at 673 is especially apposite:

> [T]he petitioners must establish not merely that the [company] directors have been guilty of breaches of duty in the respects alleged, but also that those breaches caused the petitioners to suffer unfair prejudice in their capacity as preference shareholders. As Neill LJ said in *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 31:

> The [relevant] conduct must be both prejudicial (in the sense of causing prejudice or harm to the relevant interest) and also unfairly so: conduct may be unfair without being prejudicial or prejudicial without being unfair, and it is not sufficient if the conduct satisfies only one of these tests ...

On the facts of this case, the court decided that the petitioners did not show that they had suffered any unfair prejudice by reason of the breaches of duty by the directors. In the same vein, the presence or absence of loss is a significant factor to be taken into account in relation to the alleged breaches of the Agreement.

97 In short, there can be no precise guidelines stipulated as to whether there were unfair dealings by the strategic shareholders. The question is far more complicated than merely ascertaining whether the Agreement was violated. The expectations of the plaintiffs must also be considered against the backdrop of commercial realities. It is my opinion that the strategic shareholders' conduct, seen in light of all the relevant circumstances, did not lack probity. I shall now consider each of the plaintiffs' allegation to explain how I have arrived at this decision.

The strategic shareholders' conduct with respect to SAVI

98 The plaintiffs allege that the strategic shareholders wrongly excluded them from discussions with SAVI, and wrongly kept from them information about these negotiations. Additionally, they view the two SAVI resolutions to be invalid for breach of the Agreement. They also take issue with the strategic shareholders' conduct in relation to TC 104, arguing that the strategic shareholders sought to compromise eLogicity's own technology in order to advance SAVI's interests. Finally, the plaintiffs submit that the involvement of PSA in relation to SAVI's proposal to the EDB, as well as PSA and P&O's involvement in the SST initiative, were contrary to the Agreement or the understanding between shareholders.

99 In response, both the strategic shareholders deny excluding the plaintiffs from negotiations with SAVI or withholding information from them. PSAI claims that steps were taken to ensure that Ng and Lim were kept informed, but they were the ones who were obstructive and unreasonable. Likewise, POAP states that there was no sinister motive to collaborate with SAVI to the exclusion of the plaintiffs, and that there was therefore no wrongful exclusion. Any exclusion was self-inflicted. Both the strategic shareholders submit that the plaintiffs' allegations of breach of the Agreement were not properly pleaded. In any event, they claim that the SAVI resolutions passed were regular, valid and reasonable. Concerning TC 104, they argue that their nominee directors were seeking to advance eLogicity's interest. As regards the EDB trials and the SST initiative, POAP claims that only PSAI was involved in the former, and both parties assert that PSA and P&O's involvement in SST cannot be prejudicial to the plaintiffs as they are not shareholders of eLogicity.

Whether the plaintiffs were wrongfully excluded from negotiations with SAVI and whether information concerning SAVI was concealed from them

100 The plaintiffs have framed exclusion from discussions with SAVI and concealment of information as two separate issues for this court's consideration. I find it more logical to consider them concurrently, as the plaintiffs are essentially asserting in both issues that the strategic shareholders deliberately kept them out of the loop with respect to developments concerning SAVI. PSAI takes issue with the court's consideration of the second question, claiming that the plaintiffs have not pleaded this fact in their Statement of Claim. To my mind, there is absolutely no merit to this objection. The plaintiffs had averred in their Statement of Claim that the strategic shareholders had secretly negotiated with SAVI without informing them. The obvious implication from such a

statement is that the strategic shareholders had hidden information from the plaintiffs. Such concealment of information would have misled the plaintiffs and hindered them from fully understanding the ramifications of an alliance with SAVI. The plaintiffs' submissions are therefore a natural extension of what was pleaded.

101 I note that the plaintiffs characterise the strategic shareholders' acts in excluding them and concealing information as "wrongful". In my opinion, their conduct can only be justifiably labelled "wrongful" if two factors are present. First, the plaintiffs must have a legitimate expectation of being included in all negotiations with SAVI. Otherwise, it is untenable for them to allege that their exclusion was manifestly unfair and oppressive. Second, the motive underpinning the strategic shareholders' conduct should be wrongful. Excluding the plaintiffs, if motivated by nothing more than a desire to further eLogicity's interest, does not seem to me to be oppressive behaviour. In my view, both these factors are hardly satisfied on the available facts.

102 Turning to the first factor, I find it difficult to accept that the plaintiffs had legitimate expectations of being informed of every development concerning eLogicity, or of being included in every meeting with SAVI. Moreover, if this expectation indeed existed, it should have only been within the minds of Ng and Lim, who were part of eLogicity's management and board of directors. The other four individual plaintiffs – Hong Jen Cien, Wong Ban Kwang, Ng Siew King and Lo Lain – were only shareholders without executive positions (though Hong was a director). They have not demonstrated how their interests and expectations coincide with Ng and Lim's. The last plaintiff, P-Serv Pte Ltd, is a corporate shareholder and it is even more untenable to assume that it has interests synonymous with Ng and Lim's. The strategic shareholders have argued that these plaintiffs failed to personally give evidence and therefore their claim should be dismissed. POAP goes further to suggest that an adverse inference should be drawn against them pursuant to s 116 illus (g) of the Evidence Act (Cap 97, 1997 Rev Ed). I do not consider the failure to testify *per se* to be fatal to their case, if the evidence adduced by the plaintiffs is sufficient to establish their case. I also agree with the plaintiffs' submissions that s 136 of the Evidence Act does not require any particular number of witnesses to prove any fact. Nevertheless, I find that the plaintiffs have failed to adduce any evidence to prove that these five plaintiffs, who were not in eLogicity's management, had an interest in being included in negotiations pertaining to SAVI. The fact that the plaintiffs jointly owned shares together does not imply that their interests as members of the company are similar and indistinguishable.

103 Further, Ng and Lim themselves did not have any legitimate expectation of being included in the negotiations with SAVI. Counsel for the plaintiffs canvasses the argument that the Agreement provides for all three shareholder groups to be represented on the Board and that cl 5.04 provides that certain matters require the votes of all three shareholder groups. Exclusion of one of the shareholder groups from alliance negotiations therefore runs counter to the spirit and intent of the agreement. I find that submission to be an unjustified extrapolation of the Agreement. While I accept that the plaintiffs rightly expect from cl 5.04 to be consulted on issues like entering a joint venture or amending the memorandum and articles of eLogicity, I do not agree that their expectations can include matters not stipulated in cl 5.04 such as negotiations with other parties. As I alluded to earlier at [95], where parties have set out in great detail the terms governing their relationship, the court will be circumspect in construing legitimate expectations apart from those contained in the agreements between them. It would be wrong, in such circumstances, to place reliance on the "spirit and intent" of the Agreement. Such an expansive reading of the agreement would lead to uninhibited claims of one's expectations being disregarded, even when there has been no commercial unfairness. The first factor required for the strategic shareholders' conduct to be deemed wrongful is thus not fulfilled.

104 Turning now to the second factor, I find that there is also no proof that the strategic

shareholders, if they had indeed excluded the plaintiffs, were motivated by an improper collateral motive. The plaintiffs have relied on *Re East West Promotions Pty Ltd* (1986) 4 ACLC 84, approved of in *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd* [1994] 2 MLJ 789, for the principle that lack of candour or frankness may constitute oppression. The lack of frankness in both these cases was equated with oppressive behaviour because of the improper motive underlying the secretive behaviour. In *Kumagai,* the court discerned that the petitioner's course of conduct in dealing with a company which the first respondent had invested in reflected an intention to place the first respondent's investment in jeopardy. Naturally, the petitioner's lack of candour when challenged by the respondents was deemed to be consistent with the court's finding that his conduct was oppressive. The same circumstances prevailed in *Re East West Promotions Pty Ltd*. The respondent director in this case was found to have secretly appropriated the company's stock for her own use. It is evident from these cases that lack of candour alone cannot amount to unfair behaviour in the absence of an underlying sinister motive.

105 In this connection, I cannot see any reason to conclude that the strategic shareholders had an improper motive in their dealings with SAVI. It would be absurd for the strategic shareholders, having each invested a hefty sum of about $20m, to deliberately act to eLogicity's detriment. As can be seen later in my judgment, the strategic shareholders sought to include eLogicity in an alliance with SAVI and it is reasonable to assume that they were seeking to further the interest of eLogicity. The plaintiffs have not been able to persuade me that the strategic shareholders had any other collateral purpose. They have suggested that the strategic shareholders were influenced by PSA and P&O's desire to work together with SAVI. There is, in my opinion, nothing remiss in the strategic shareholders seeking a "win-win solution" that would benefit their parent companies as well as eradicate eLogicity's financial woes. I would readily find that there was an improper motive if it could be shown that the alliance with SAVI was undeniably detrimental to eLogicity. However, as I will elaborate later, there were both potential advantages and disadvantages to be reaped from the alliance, and consequently there was an irreconcilable clash of views on the merits of an alliance with SAVI. The strategic shareholders were not pursuing a course of action that would invariably cause eLogicity's downfall. In such circumstances, the strategic shareholders' conduct cannot be condemned as improper. I will now examine the parties' dealings with SAVI in chronological order to amplify my views.

Pre-investment discussions about SAVI

106 The minutes of a pre-investment meeting[1] held on 6 September 2000 between Burgess, Corcoran, Latta and Ng show that a possible alliance with SAVI was envisaged and Ng did not express any disapproval. The sixth point of the minutes states:

> A company, Savi Inc, was mentioned during the meeting for future business colloboration. PSA is of the opinion that while elogicity can be the "VISA" in the Sea, Savi will be the "King" in the Air for track and trace. P&O Ports and *PST* [the former name of eLogicity with the plaintiffs as shareholders] *welcome such collaboration,* provided Savi could share their business direction with the Company in due course. [emphasis added]

It is clear from this document that PSAI did not act surreptitiously. Nor did it conceal its plan concerning SAVI from Ng. It was made known to Ng that an alliance with SAVI was contemplated. Ng did not protest on the ground that the alliance was detrimental to eLogicity.

107 PSAI claims that the parties had reached an understanding that the company would "do a deal with SAVI" once the strategic shareholders invested in eLogicity, but Ng subsequently reneged from this agreement. I do not find this allegation to be supported by the evidence. It is evident from

the above document that the viability of an alliance with SAVI ultimately depended on future negotiations with SAVI when SAVI could then "share their business direction". A subsequent e-mail sent by Latta to Ng confirms my belief that no understanding existed between the parties. In this message sent on 10 October 2000, Latta told Ng, "The reason I want Savi in is because I think it is the right way to play this game out. You do not have to make a decision now but please hear them out and then we discuss later."[2] These words do not allude to any prior understanding Latta had with Ng, but only show that it was Latta's own plan that a deal should be struck with SAVI. What is evident, however, is that Latta, even prior to PSAI's investment in eLogicity, thought that co-operating with SAVI would be beneficial to eLogicity. Accordingly, I do not detect any improper purpose lurking behind PSAI's keenness to work with SAVI.

Post-investment discussions about SAVI

108 After the strategic shareholders' investment in eLogicity on 29 September 2000, Ng as CEO was not excluded in discussions with SAVI. In his affidavit of evidence-in-chief, Ng stated that he had gone to PSA's office in October 2000 to have a chat with representatives from SAVI. At this meeting, they discussed the possibility of collaboration. Ng then continued to keep in touch with SAVI's David Shannon to arrange for another meeting.[3]

109 The plaintiffs drew my attention to an e-mail by PSAI's Tan to PSA personnel on 18 October 2000, which indicated that PSA's logistics department had been working with SAVI on a draft framework for potential co-operation between eLogicity and SAVI.[4] They submit that such negotiations should have been left to the management of eLogicity. In addition, they highlighted that a five-page discussion draft between SAVI and PSA was edited down to two pages by Latta before it was e-mailed to Ng.[5] While I accept that PSAI had taken matters into its own hands in this instance, I do not think that such show of initiative can be deemed to be unfair dealing. I observe that there is nothing incriminating in the paragraphs omitted from the discussion draft sent to Ng, except a paragraph which stated that SAVI had been presenting to PSA talking points for collaboration and that PSA's logistics department had reviewed and modified these points. Yet, even in this omitted paragraph, PSAI mentioned that "if a broad outline for collaboration can be found, *PSA would then be willing to present and support the collaboration proposal to the shareholders of eLogicity for their consideration*" [emphasis added]. PSAI had intended to include the plaintiffs in its pursuit of a collaboration between eLogicity and SAVI. Its initial exploratory discussions with SAVI, viewed in light of this intention, cannot possibly be oppressive.

110 However, I should qualify that, contrary to what the strategic shareholders claim, it was not readily apparent that an alliance with SAVI would be immensely beneficial to eLogicity. In this regard, I find the strategic shareholders' portrayal of Ng as an obstinate individual who deliberately obstructed any alliance negotiations to be excessive. One of PSAI's own nominee directors, Yap, expressed his concerns during the 2 February 2001 board meeting that SAVI was a threat to eLogicity and asked Ng for an analysis of SAVI. It was thus not surprising that Ng viewed SAVI, eLogicity's competitor, with some measure of caution. He expressed, in an e-mail to Yap on 5 February 2001, that eLogicity could be six to nine months ahead of SAVI. Nonetheless, he was receptive to the possibility of an alliance, posing the question in this email, "Is there any possibility for SAVI to work through eLogicity?"[6] In my opinion, the shareholders were ambivalent concerning the benefits of working with SAVI and the terms of the alliance. At this juncture, only PSAI's Latta opined that a partnership with SAVI would benefit eLogicity. The strategic shareholders' allegation that Ng was irrational and obstructive is unjustified.

111 Subsequently Latta continued to be in contact with SAVI. He met SAVI representatives for lunch on or around 26 March 2001. I would not place much emphasis on this meeting, as Latta had

explained to Ng in the board meeting in April 2001 that he maintained contact with SAVI because of PSA's pre-existing relationship with Ace Fusion, a company that had merged with SAVI. Latta, when cross-examined, said that he had called Ng earlier to keep him informed about this meeting. I am not inclined to accept this portion of his testimony, as there is no supporting evidence to confirm its veracity. I also find it strange that Ng would have questioned Latta in the April 2001 board meeting if Latta had informed him of the meeting with SAVI earlier. In any event, I should reiterate that I find no sinister motive on Latta's part, if indeed he had deliberately kept Ng in the dark. Further, Ng was given ample opportunity to hold discussions with SAVI after this incident. The minutes of the April 2001 board meeting show that the Board agreed that Ng would be eLogicity's sole spokesperson with SAVI. Ng, in his own evidence, said that he met SAVI's CEO, Verma, on 13 September 2001. It would appear to me that Latta's meeting with SAVI was an isolated incident.

112 Despite his opportunities to meet SAVI, Ng was upset over a meeting the strategic shareholders had with SAVI on 25 October 2001. In defence of his conduct, Latta testified that he wanted POAP to find out more about SAVI as he felt that Ng had been giving misinformation regarding SAVI to the Board. He also claimed that POAP's Burgess had not met SAVI yet and hence he sought to create an opportunity for a meeting. This latter piece of evidence is not accurate, as Burgess himself testified that Latta had earlier arranged for him to meet SAVI. Be that as it may, I find that there was nothing wrong in the strategic shareholders seeking to meet SAVI personally without Ng's presence. After all, they were negotiating with SAVI on behalf of and not apart from eLogicity, and Ng himself had been negotiating with SAVI all this while.

113 However, the seeds of discord were sown through this lack of transparency on the strategic shareholders' part. At the 26 October 2001 board meeting, Ng questioned the strategic shareholders' directors as to whether they had met SAVI recently. While Ng testified that all the directors flatly denied such a meeting and only Burgess told him after the meeting that they had met SAVI, the strategic shareholders' witnesses differed in their testimony. Ladd gave evidence that he said no, because Ng specifically asked whether he had met Verma and Verma was not present at the particular meeting. Latta, on the other hand, said that he did not volunteer the truth, while Burgess testified that he immediately told Ng that they had met SAVI. Irrespective of what was actually communicated to Ng, I find that the strategic shareholders' directors were not completely candid with Ng in this instance. This lack of frankness accentuated the suspicions Ng had and exacerbated an already tense relationship amongst the shareholders. At this point in time, the relationship between the shareholders had deteriorated considerably. All of the strategic shareholders' witnesses concurred that the 26 October meeting was conducted by Ng in a heated manner. The parties had several disagreements in previous meetings over the poor performance of the company. In addition, relationship problems between Ng and Owen had escalated to the point that Owen's directorship was eliminated. Moreover, the Executive Committee had been dissolved and reconstituted because of Ng's difficulties in working with Latta.

114 Despite the above instance of exclusion, Ng was still consulted and included in dealings with SAVI. In November 2001, he was agreeable to explore approaching SAVI through its shareholder, Temasek Holdings. In fact, Ng testfied that he himself had suggested such an approach. However, all such attempts were short-circuited when Ng heard a rumour that SAVI was working with eLogicity on track and trace solutions. I find then that during the period between September 2000 and December 2001, Ng, on the whole, was not excluded from negotiating with SAVI. The occasional instances when he was kept in the dark were not motivated by an intention to harm eLogicity. It is most likely that such exclusion was spurred by deepening distrust amongst the parties and the suspicion by the strategic shareholders that Ng was not keen on an alliance with SAVI.

December 2001: The plaintiffs announced their intention to exit eLogicity

115 The fractures in the parties' relationship worsened when the plaintiffs in December 2001 indicated that they wanted to sell their shares in eLogicity. PSAI posits that Ng had an undisclosed agenda, since he created an initial impression that he was interested in an alliance with SAVI and subsequently made an about-turn in December 2001 by saying that there was no value in working with SAVI. Again, I find this accusation to be somewhat extreme. I do not perceive Ng to be deliberately blowing hot and cold in order to mislead the strategic shareholders. Ng had earlier expressed in board meetings his reservations about partnering with SAVI. Some of the strategic shareholders' directors also shared his concerns. Besides Yap, Burgess had expressed in an e-mail on 7 November 2001 that "it is difficult to recognise SAVI as having anything more than T&T [track and trace] with the US [Department of Defence] and beyond that passive tags/bar coding for its other claimed commercial links."[7] Corcoran of POAP also told Burgess on 1 November that SAVI had no benefit which he could see for eLogicity.[8] Hence, my view is that the parties had genuine disagreement over the exact benefits of allying with SAVI, and no one party was deliberately seeking to mislead the other.

116 The steady deterioration of the shareholders' relationship was manifested in the plaintiffs' desire to exit the company. Thereafter, the instances of exclusion of the plaintiffs increased. I do not consider these exclusions to be unfair to the plaintiffs, as the strategic shareholders were justified in thinking that the plaintiffs would play a reduced role in the light of their intention to leave the company. Their understanding was shared with the plaintiffs in an informal meeting held on 14 December 2001, but the plaintiffs did not concur.[9] Furthermore, Latta shared with the rest of the Board in an e-mail dated 4 January 2002 that SAVI did not trust the current management headed by Ng.[10] It was understandable that the strategic shareholders, in the interest of eLogicity, then decided to minimise contact between Ng and SAVI. Consequently, they communicated privately with SAVI on several occasions. An e-mail by SAVI's Bruce Jacquemard on 13 December 2001 summarising his thoughts on the terms of a partnership was not shared with Ng.[11] A few days later, on 15 December 2001, Verma e-mailed Tan, sharing that SAVI had some very constructive meetings with Latta and they had developed a framework for SAVI and eLogicity's relationship.[12] Another e-mail by Verma to Ladd on 27 December 2001 informing him that SAVI's concept had been approved by the US Department of Transport was also not forwarded to Ng and the other plaintiffs.[13]

117 In short, December 2001 marked the steady decline in the trust between the shareholders. It is therefore not surprising to me that the strategic shareholders increasingly excluded the plaintiffs from their discussions with SAVI. After all, the strategic shareholders' suspicions of Ng's intentions grew when Verma informed them that Ng had asked SAVI to buy the plaintiffs' shares.[14] POAP was also wary of Ng after Ng discovered Ladd's actions in relation to the new eModal. In a note written to Ng, POAP stated that Ng told Childs on 11 February 2002 that the plaintiffs would proceed with legal action against them if POAP did not agree to purchase their entire shareholding.[15] While Ng did not confirm whether he said this, he admitted during cross-examination to reserving his legal rights against POAP. Since the relationship between the plaintiffs and the strategic shareholders was becoming increasingly strained, and the latter suspected that Ng was acting in bad faith, it was not unreasonable for them to exclude the plaintiffs in all dealings with SAVI.

The first SAVI resolution

118 When Ng received Verma's proposal for a partnership on 8 February 2002, the issue was slated as part of the agenda for the board meeting on 21 February 2002. However, as both the plaintiffs and strategic shareholders indicated, that meeting was a particularly fiery one, where the directors debated less pressing matters such as the presence of Lee & Lee. It was only on the next day, at the re-adjourned meeting, that the first SAVI resolution was passed, which I have reproduced earlier at [30]. The resolution, phrased in a somewhat nebulous manner, sought to exclude the

plaintiffs from negotiating with SAVI. The first portion of the resolution stated that both the management and the strategic shareholders were to "simultaneously engage in discussion with SAVI to achieve mutually beneficial outcomes", creating the impression that the management, including Ng and Lim, was not excluded. However, the second portion of the resolution promptly restricted the management's involvement to negotiations on "specific projects and technology/operational issues". Negotiations for a "possible long term strategic alliance" were now strictly kept within the province of the strategic shareholders. As such, this resolution effectively excluded the plaintiffs from discussions with SAVI on collaboration.

119 Be that as it may, I am not disposed to find that this resolution was unfair to the plaintiffs. One reason for my view is that the strategic shareholders were suspicious of Ng's intentions and concerned that Ng was unduly hampering their efforts to seal an agreement with SAVI. Moreover, as I explained above, the strategic shareholders were seeking to revive eLogicity through this alliance and were thus motivated by a genuine desire to further eLogicity's interests. Another more significant reason for my view is that the strategic shareholders were justified in thinking that the alliance was most ideal at this juncture. SAVI's Verma in his proposal stated that the US Department of Defence had implemented container security projects and SAVI was well-positioned to participate in these projects. By allying itself with SAVI, eLogicity would be able to benefit from SAVI's strengths. I therefore find that the first resolution did not amount to any unfair dealing on the strategic shareholders' part.

120 The strategic shareholders' witnesses also maintained that they knew at all times that the plaintiffs could veto any possible alliance with SAVI, and therefore this resolution could not have authorised the strategic shareholders to enter an alliance without the plaintiffs' approval. I agree that the strategic shareholders were aware of cl 5.04(k) of the Agreement, which requires unanimous approval of all three shareholder groups for a joint venture. As early as 19 October 2000, prior to the strategic shareholders' investment in eLogicity, Latta, in his draft discussion paper on SAVI, mentioned that "the decision will not be PSA's alone" as "no one part of eLogicity maintains a controlling interest in the company". Nevertheless, I suspect that the strategic shareholders were exploring ways to slowly erode this procedural requirement, the first resolution being a prelude to their attempts. My views are fortified by a note from Ladd on 14 December 2001, which explored eLogicity's future in the light of the plaintiffs' impending departure. He commented that the strategic shareholders could "force through necessary decisions by majority". In this regard, he suggested that they could avoid the need for unanimous approval of all three shareholder groups in cl 5.04 by classifying the collaboration with SAVI as a change of business plan which only required a 60% majority according to cl 5.03(h).[16] I also notice that the strategic shareholders attempted to carry through a resolution to enter into an alliance with SAVI without the plaintiffs' approval at the 12 April 2002 meeting, but this attempt was thwarted for want of procedural propriety. Nonetheless, since the strategic shareholders ultimately did not exclude the plaintiffs from voting on the alliance, and they continued to keep Ng informed of developments with SAVI, I do not see how the intention to reduce Ng's involvement in the negotiations was prejudicial in any way.

The proposal by Verma on 6 March 2002

121 The plaintiffs and the strategic shareholders have accused each other of conducting themselves unreasonably in their responses to Verma's second proposal on 6 March 2002. In my analysis, there was no gross lack of probity on the strategic shareholders' part. The strategic shareholders were certainly concerned when Ng on 1 March 2002 replied to Verma's proposal, stating that he did not know what form of strategic partnership Verma had in mind, and expressing his reservations on the desirability of eLogicity using SAVI's technology.[17] This response, from Ng's perspective, was not unreasonable since he was not kept in the loop regarding the framework of the

partnership with SAVI. However, from the strategic shareholders' perspective, a more favourable reply should have been sent. Consequently, PSAI's Henry Tan asked Lim to send a favourable reply to Verma's second proposal for a joint application to participate in the CSI. Notably, in this instance, the strategic shareholders still sought to include Ng in the negotiations. When Ng asked for more information, Tan forwarded Verma's e-mail to him, but excised one paragraph:[18]

> We believe we are well positioned to get a significant portion of these funds as we feel the spec [specification] is written around our solution. We are teamed with Accenture but need to make a final call on a potential partnership with port operators like PSA and P&O.

122 The plaintiffs have taken issue with this omission, alleging that Tan deliberately concealed the facts that SAVI was interested in partnering with PSA and P&O, and that SAVI viewed its technology as more favourable than eLogicity's. I note that Tan, who is the most appropriate person to shed light on this omission, did not testify for PSAI at the eleventh hour. This certainly does not reflect well on PSAI. Notwithstanding the absence of Tan's clarification, I am of the view that, even if Tan deliberately excised that paragraph, it was understandable as Ng would be likely to vehemently object if he found out that SAVI viewed its technology as superior to eLogicity's. As regards SAVI's interest in PSA and P&O, I should reiterate that there is nothing sinister in the strategic shareholders seeking a win-win solution for their parent companies as well as for eLogicity. There is then no oppression in withholding these facts which the strategic shareholders felt compelled to do, for fear of encountering more opposition by Ng.

123 PSAI has blamed Ng for sending a non-committal reply to Verma. There is no merit to such an accusation. Ng adopted the draft sent by Henry Tan, except that he did not include a paragraph stating:

> Under the mandate given by the Board of eLogicity International Pte Ltd the PSA and P&O Directors would like to explore a long-term strategic alliance with SAVI.

Ng had legitimate reasons to object to this sentence as he did not approve of the first SAVI resolution. He had informed Tan of this omission. Unfortunately, the exclusion of that paragraph caused Verma to be dissatisfied with the reply. Several typographical errors which were made by Tan were also not corrected by Ng, but these were ultimately Tan's own mistakes and not due to Ng's obstructive streak. In sum, nothing significant turns on these e-mail exchanges. Any withholding of information was not motivated by improper motives.

The meeting between SAVI and the strategic shareholders on 11 to 12 March 2002

124 The strategic shareholders may have deliberately prevented Ng from attending the meeting with SAVI on 11 to 12 March 2002. I do not accept POAP's submission that any exclusion was self-inflicted because Ng chose not to attend the meeting. Ng had asked for details of the meeting after reading about it in Verma's e-mail, which Tan had forwarded to him on 6 March 2002. During the trial, Ng asserted that Childs refused to give him particulars when he asked Childs for them. He was inaccurate in this respect, as the e-mail exchanges show that it was Tan, not Childs, who withheld such information. Tan replied to Ng on 7 March 2002, saying that he did not have details of the meeting.[19] Yet, Verma had earlier e-mailed Tan together with Latta and Ladd, notifying them that rooms had been booked for them in California.[20] Tan must have known about this e-mail, since he replied to Verma on 6 March 2002 to state that he would not be available to attend the meeting.[21] Again, without Tan's clarification at the trial, I can only infer from these e-mails that Tan had deliberately kept this information from Ng. It was only after Ng told Childs that Tan refrained from giving him details, that Childs e-mailed on 8 March 2002 to give the dates of the meeting.[22] I will

not go so far as to agree with the plaintiffs that Childs' belated response was deliberately timed to thwart Ng's attempt to be present. Childs had replied on the same day when Ng called him on 8 March 2002.

125 The parties also dispute whether the Non-Binding Summary of Discussions signed by SAVI and the strategic shareholders at the 11 to 12 March 2002 meeting was deliberately concealed from the plaintiffs. POAP, in my view, avoids addressing the issue by stating that Ng would have known about this document if he had not avoided the meeting. However, I have already found that Ng did not intentionally absent himself from the meeting. PSAI, on the other hand, submits that Ng was kept informed about the meeting and the Non-Binding Summary of Discussions was given to Ng. That is also inaccurate. What actually transpired was that Ng asked Childs to present an update on the meeting with SAVI at the next board meeting on 15 March 2002. This did not occur, as the 15 March 2002 meeting was spent discussing Ladd's actions in relation to the new eModal. When Ng again asked for an update via e-mail, Latta said that he had no opportunity to do so but would do so at the reconvened meeting on 22 March 2002. Childs responded briefly by informing Ng that the discussions were purely exploratory and no commitments were entered into.[23] This was not a misleading reply, as the Summary of Discussions was a "non-binding" one.

126 Although I do not accept the strategic shareholders' submissions, I am of the view that the available evidence does not show that Childs and Latta plotted to hide this document. I accept Childs' and Latta's explanation that there were no opportunities to discuss it on 15 March 2002. The minutes of the 22 March 2002 meeting recorded that Latta gave an update on SAVI and that the Summary of Discussions was prepared, copies of which were presented to the Board.[24] Unfortunately, Ng never had sight of this document, as he could not attend the 22 March 2002 meeting, and Latta forgot to hand this document to Ng's secretary, though he initially said he thought he had. I do not discern any plan to conceal this document. While I observe that this Summary of Discussions stated that the terms of collaboration entailed "selecting SAVI as a preferred software and hardware technology vendor" and leveraging on the "container handling and sea cargo messaging expertise of P&O Ports and PSA Corporation", I do not find that the strategic shareholders intended to keep such information from Ng. If they had such intentions, there would be no reason to record in the 22 March 2002 board meeting minutes that this document was available. Also, Ng was well aware that SAVI wanted to collaborate with eLogicity on the condition that SAVI's technology was to be used. According to Ng's own evidence, Verma informed him of this condition in December 2001. Ng himself had alluded to this condition when he replied to Verma's first proposal. Since both the plaintiffs and the strategic shareholders were aware of SAVI's views concerning its technology, there was no need for the strategic shareholders to conceal this fact from Ng. They did not volunteer information, which they knew would upset Ng and fuel greater opposition. Yet, neither did they hide the Summary of Discussions from him. Hence, I find that the plaintiffs' interpretation of all these events is flawed.

The 22 March 2002 board meeting and the second SAVI resolution

127 Lim and Ng's failure to attend the re-convened meeting on 22 March 2002 was the result of a series of unhappy coincidences, rather than of the strategic shareholders' elaborate schemes. SAVI had requested a response from eLogicity concerning the joint proposal for a CSI application by 22 March 2002. Consequently, on 19 March 2002, the strategic shareholders through Ladd issued a notice for the 15 March 2002 meeting to be re-convened. Ng informed the strategic shareholders that he had to be away in the US for a business trip. According to Ng, Lim and Hong were also not available as Lim's mother living in Malaysia fell critically ill and Hong had another business commitment. Although Ng was not aware of the deadline imposed by SAVI, it is apparent to me from his earlier message sent to Tan and Burgess on 16 March 2002 that he knew that time was of the essence. In this e-mail, Ng wrote, "You are aware the deadline for [US Department of Transport's] $93m grant

submission is 28 March 2002."[25]

128 The plaintiffs claim that the strategic shareholders were unreasonable in carrying on with the meeting despite their absence. I do not find the strategic shareholders' conduct reprehensible. They could not possibly accept Ng's suggestion to wait till after 28 March 2002 to hold a meeting, as it would then be too late to submit a joint application with SAVI. They also did not seem to be aware that Ng had scheduled to travel to the US to submit joint proposals together with Transcore. Their surprise was registered in POAP's letter to Ng on 28 March where they told Ng that he had failed to provide any details on Transcore.[26] Ng then cannot blame them for failing to take his important business trip into consideration. Admittedly, Latta's e-mail enclosing the proposed second SAVI resolutions and informing the directors of the use of the teleconferencing facility was sent only one day before the meeting. However, in view of the urgency and lack of time, I am disinclined to make a finding that the strategic shareholders were seeking to prevent the plaintiffs from attending the meeting. I also accept Latta's evidence that he spent considerable time attempting to call the plaintiffs before the strategic shareholders commenced the meeting without them.

129 The second SAVI resolution, reproduced at [33] above, went further than the first resolution. Comprising two clauses, the first clause purported to grant the strategic shareholders the authority to negotiate with SAVI concerning the CSI and other related matters. This statement effectively superceded the first resolution, which had provided that the management's sphere of influence still included negotiating with SAVI on specific projects. The second clause is slightly ambiguous. It states that the directors were authorised to "do all acts and things as they may consider necessary or expedient to give effect to the above resolution, *including entering into an agreement with SAVI on behalf of eLogicity on such terms as the Directors may in their sole discretion deem to be appropriate*" [emphasis added]. The italicised portion of the resolution suggests that the strategic shareholders sought to exclude the plaintiffs from deciding to enter into an agreement with SAVI for an application for CSI. As I adverted to earlier, there is compelling indication that the strategic shareholders intended to unilaterally conclude an agreement for a joint venture with SAVI without the plaintiffs' approval. This resolution does not reflect well on the strategic shareholders, for it appears to be a thinly veiled attempt to circumvent the Agreement's requirement for unanimous approval. Nevertheless, the plaintiffs' claim of oppression is still not satisfied as the strategic shareholders eventually sought the plaintiffs' approval on 12 April 2002 and the plaintiffs were able to effectively veto their plan. As I earlier held at [96] above, there must be some harm done to the shareholders' interests before liability under s 216 can be established: *Re Blackwood Hodge plc* ([96] *supra*).

The meeting with SAVI on 25 March 2002 in Sydney

130 Ng and the other plaintiffs were certainly not apprised of the meeting with SAVI on 25 March 2002 in Sydney. POAP submits that this meeting was mentioned at the 22 March 2002 Board meeting. I notice that the minutes of the meeting did raise this matter.[27]

131 However, I also note from an e-mail from Ng's secretary that by 25 March 2002, the minutes were still not ready. There was thus no way the plaintiffs could have found out about the meeting. The strategic shareholders had failed to disclose the necessary details to the plaintiffs. At this stage, the shareholders' deteriorating relationship was beyond remedy.

132 The draft letter of intent, produced at this meeting, was only seen by the plaintiffs during the discovery process for this trial.[28] This document elaborated on the terms contained in the Non-Binding Summary of Discussions, namely, that SAVI would be the preferred technology provider and eLogicity would cede its technology. PSA and P&O were also listed as parties to the letter of intent, together with eLogicity and SAVI. I need not comment further on whether these terms were

deliberately concealed from Ng, as I have earlier stated that there was no reason to withhold the information regarding the ceding of eLogicity's technology, and that there was nothing untoward in including PSA and P&O as parties to this alliance. In any case, this was merely a *draft* letter of intent which was not concluded between the parties.

The 12 April 2002 meeting

133 The strategic shareholders eventually presented the terms of the alliance to the plaintiffs during the 12 April 2002 meeting, including Verma's desire that the Board should only comprise representatives of the strategic shareholders, and the need for eLogicity's technology to be ceded to SAVI. As I alluded to above, the strategic shareholders seemed intent on overriding the plaintiffs' opposition to these terms, as they proposed a resolution that "subject only to detailed documentation the Company will enter into an agreement with SAVI incorporating the terms and conditions set out above". This resolution was purportedly passed by a vote of six to three, and this was done after the strategic shareholders removed Ng as CEO pursuant to the 60% majority required in cl 5.03(k) of the Agreement. I am therefore inclined to infer, from these acts, that the strategic shareholders did not truly intend to adhere strictly to the requirement in cl 5.04. Nonetheless, it is not necessary for me to decide on this point, as the Board recognised that the above resolution was procedurally improper and then passed an alternate resolution for a non-disclosure agreement to be signed with SAVI. The strategic shareholders, if they indeed sought to disregard the plaintiffs' interest on this occasion, did not actually harm the plaintiffs.

134 In fact, the strategic shareholders showed that they continued to give regard to the plaintiffs' views. Latta e-mailed Ng, Lim and Hong on 17 April 2002, asking them to re-consider their decision.[29] He also informed them that there would be a meeting with SAVI the next day, when the strategic shareholders would tell SAVI about the Board's decision. He concluded his message on a bleak note:

> If we are fortunate, Savi will re-consider and continue the alliance discussions. Otherwise we will consider the alliance discussions ended.

The plaintiffs did not flinch in adhering to their views and also did not attend the meeting on 18 April 2002. There is ample evidence that the strategic shareholders respected the plaintiffs' views. I am satisfied that their behaviour towards the plaintiffs, in light of the trying circumstances and the numerous misunderstandings, was proper. Any exclusion of the plaintiffs from negotiating with SAVI was precipitated by the distrust amongst the shareholders, SAVI's dislike of Ng and the plaintiffs' declaration of their intention to leave the company. I could not detect any intention on their part to deliberately withhold information from Ng.

Whether the two SAVI resolutions were in breach of the Agreement

135 Both the strategic shareholders are of the view that the plaintiffs did not properly plead that the Agreement was breached. While I agree that the plaintiffs did not plead every clause which they now allege were breached, I find that they had given the strategic shareholders ample notice in para 17 of their Statement of Claim, where they averred that the Agreement would be referred to at the trial for its full terms and effect. The objective of O 18 r 7 of the Rules of Court, which requires a party to plead all material facts supporting his claim, is to ensure that the opponent is not taken by surprise. No surprise was sprung on the strategic shareholders. Apart from pleading para 17, the plaintiffs averred at para 30(a) of their Statement of Claim that the first SAVI resolution breached cl 5.04. The plaintiffs' counsel then referred to the Agreement in their opening statement. POAP's counsel, in turn, cited various clauses within the Agreement to refute the plaintiffs' claim. All the

parties were aware of the significance of the Agreement.

136 Moreover, the breach of the Agreement is not a material fact that was required to be pleaded. The plaintiffs' main claim is that various acts by the strategic shareholders were oppressive under s 216 of the Companies Act. The Agreement is only relevant in so far as it reflects the plaintiffs' expectations. Unlike the cases cited by POAP, *China Construction (South Pacific) Development Co Pte Ltd v Shao Hai* [2004] 2 SLR 479 and *Overseas Union Insurance Ltd v Home and Overseas Insurance Co Ltd* [2002] 4 SLR 104, there was no failure by the plaintiffs to plead an essential cause of action or facts that were pivotal in establishing their claim. As the strategic shareholders' objections are unwarranted, I proceed now to examine the plaintiffs' arguments.

137 According to the plaintiffs, the first SAVI resolution on 22 February 2002 breached cll 5.04 and 18.09. Clause 5.04 stipulates that:

> The Shareholders shall, save as otherwise contemplated by this Agreement, procure that the Group shall not carry into effect any of the following matters unless such actions be approved by each of PSA, P&O and a majority of the Existing Shareholders…such approval to be given in writing or at a Shareholders' general meeting
>
> …
>
> (k) participate in any joint venture or partnership;
>
> …

138 Clause 18.09 contains an undertaking to adhere to the spirit and intent of the Agreement. The first SAVI resolution only excluded the plaintiffs from negotiating with SAVI for a long-term alliance. It did not purport to enter into an alliance without including the plaintiffs' concurrence. I cannot see how cl 5.04 was breached, especially since the strategic shareholders eventually sought the plaintiffs' approval of SAVI's proposal for a partnership. As for the question whether the spirit of the Agreement was breached, I have also held above that an overly-expansive construction of the Agreement is not appropriate when the parties dealt at arms' length and had specifically set out the terms of their dealings with one another. Further, the parties at cl 18.05 agreed that the Agreement set forth "the entire understanding and agreement between the parties". There is therefore no room to allege that legitimate expectations independent of the Agreement existed and were disregarded.

139 Next, the plaintiffs assert that the second SAVI resolution disregarded cll 5.04, 4.05 and 4.09 of the Agreement. As in the first resolution, this resolution merely excluded the plaintiffs from discussing with SAVI on a joint CSI proposal. Clause 5.04 was not actually breached. The plaintiffs reason that cl 4.05 requires a *quorum* of at least three directors from each of the shareholder groups. The exact words of this clause are as follows:

> The quorum for all meetings of the Board shall be three (3) Directors, comprising one (1) Director appointed by each of (i) the Existing Shareholders a group [the plaintiffs] (ii) P&O [POAP] and (iii) PSA [PSAI], present personally or by his alternate. If within half an hour of the time appointed for the meeting, a quorum is not present, the meeting shall be adjourned to three (3) Business Days later at the same time and place or to such other day and time or to a different place as the Director or Directors present may by not less than two (2) Business Days' notice in writing to all the Directors appoint. If at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting, any two (2) Directors present at such meeting shall constitute a quorum, provided that no decision shall be taken on any matter not

specified in the agenda in respect of the meeting, when it was first called.

140 I observe that the notice of the adjourned seventh board meeting was issued pursuant to this clause. That could have been a procedural error. This clause provides that if a quorum is not present, the meeting can be held on any subsequent day with a notice of at least two days being given. It then stipulates that in the event there is still no quorum, any two directors may constitute a quorum. The 15 March 2002 meeting was not adjourned because of a lack of quorum; the directors could not complete their discussions because of their disputes. Clause 4.05 is thus inapplicable and the re-convened meeting should have been treated like any other meeting requiring the normal quorum. There is no clause providing for the required number of days for notice of such a reconvened meeting. As such, the general provision in cl 4.09 should have applied, which stipulates that 14 days' notice should have been given unless such notice is waived. It is therefore my conclusion that the adjourned seventh board meeting was fraught with procedural irregularities. Notwithstanding that these breaches resulted in the absence of the plaintiffs and the passing of the second SAVI resolution despite an insufficient quorum, I am still not persuaded that these irregularities constituted oppression. There was ultimately no detriment occasioned to the plaintiffs' interest as members of the company. The resolution, passed in their absence, only excluded them from discussions with SAVI and I have held above that this did not result in an unfair breach of legitimate expectations.

Whether the Strategic Shareholders in relation to TC 104 sought to compromise eLogicity's technology

141 The plaintiffs have sought to show that the POAP directors acted in a way that was detrimental to eLogicity and its prospects of working with Transcore. POAP objects to their submissions concerning Transcore, arguing that this fact was not pleaded. In examining the plaintiffs' Statement of Claim, I observed that they pleaded at para 30 that the strategic shareholders, in seeking to achieve an alliance with SAVI, exercised their directors' powers and usurped the role of eLogicity's management to the detriment of the plaintiffs. In the supporting particulars, they briefly adverted to how the strategic shareholders sought to influence Ng's input in TC 104. They then added this sentence, "This was notwithstanding that the 1st plaintiff's input supports the use of the 5th defendants' [eLogicity's] product." I infer that the main fact pleaded here is that the strategic shareholders' acts jeopardised eLogicity's interests. Although it was not explicitly stated that this would in turn harm eLogicity's prospects of collaborating with Transcore, I find that this fact is merely an elaboration of the detriment that would have been caused to eLogicity. The court can legitimately consider it in connection with the pleaded fact that the strategic shareholders have caused detriment to eLogicity. It was therefore not essential for the plaintiffs to plead it.

142 I turn then to ascertain whether the plaintiffs' claims are justifiable. They argue that the strategic shareholders, in asking Ng to cease making representations on TC 104, were willing to compromise eLogicity's technology in favour of SAVI. This would put SAVI in a stronger bargaining position *vis-à-vis* Transcore, which Ng was working with for the joint submission of a CSI proposal. I accept the plaintiffs' submission that Ng's failure to make representations on TC 104 could possibly have negative repercussions on eLogicity's technology. SAVI's letter to Ladd and Childs betrayed its fear that Ng's input, if accepted, might lead to the imposition of a standard for an electronic seal that might "open a chink in [SAVI's] standard certification plan".[30] SAVI's concern implied that if Ng pursued his view in TC 104, eLogicity's own eSeal might then surpass SAVI's technology. It is thus understandable why Ng, when asked by POAP to cease making representations in TC 104, replied that he could not favour SAVI's technology.

143 Nonetheless, the plaintiffs' emphasis on the potential detriment caused to eLogicity misses the point. From the plaintiffs' perspective, the POAP directors were harming eLogicity. Yet, from the

strategic shareholders' point of view, they were advancing eLogicity's interests by preventing its prospects of collaborating with SAVI from being jeopardised. Since the concept of "harm caused to eLogicity" is inherently nebulous and varies according to each party's view, the strategic shareholders cannot be said to have acted to the detriment of eLogicity. The fact of the matter was that POAP chastised Ng out of their own apprehension regarding eLogicity's future. In their opinion, Ng's immediate concern that eLogicity's technology should not be compromised was outweighed by the more weighty concern that SAVI, a potential partner, should not be offended. As POAP put it in its letter dated 28 March 2002, Ng's representations were "clearly having the effect of unsettling the relationship which eLogicity [was] trying very hard to develop with SAVI and quite possibly damaging irreparably the future of an alliance between eLogicity and SAVI".[31]

144 The strategic shareholders also did not seem to be aware of Ng's dealings with Transcore and could not possibly be aware of how they might harm eLogicity's dealings with Transcore. In their response to Ng's reply, POAP stated that Ng had not provided details of his discussions with Transcore.[32] While Ng denies keeping such information from the strategic shareholders, I am inclined to think that he had not been updating the Board frequently on the developments with Transcore. The strategic shareholders did not seem to be aware of Ng's plan to meet Transcore in the US for the purpose of the CSI application. Further, when POAP asked for the contact details of Transcore, Ng refused to provide them, and retorted that this was another instance that the strategic shareholders sought to usurp the management's powers.[33] POAP's counsel also brought to my attention several e-mails by POAP's Corcoran. In one message, he told Burgess that they should help Ng with his preferred path of collaborating with Transcore. In a similar vein, he told Ng in another e-mail that he should quietly work on developing strategic alliances with other parties besides SAVI, and that they would watch the SAVI initiative fall.[34] It seems to me then that Ng was pursuing his own agenda in relation to Transcore, and that most of the strategic shareholders' directors were unaware of these developments. In view of Ng's own conduct, it is untenable for the plaintiffs to now claim that the strategic shareholders were harming eLogicity's prospects of co-operating with Transcore.

The EDB trials and SST

145 In their submissions, the plaintiffs state that PSA's involvement in the EDB trials was in breach of the spirit and intent of the Agreement, as well as the understanding between the shareholders that eLogicity would have the support of PSA terminals over rival track-and-trace ventures. I accept the plaintiffs' evidence that PSA participated in the EDB trials together with SAVI. In his cross-examination, Latta admitted that he took part in the EDB trials as a representative of PSA, and that he had resigned from the Board during the period of his involvement. The plaintiffs also adduced evidence of SAVI's proposal to EDB on 22 April 2002.[35] It appears to me that this proposal, if fully implemented, might well have been in direct competition with eLogicity's business. The proposal had the heading "container shipment security and pilot tracking system", and entailed the setting up of a pilot system that would demonstrate container visibility for tracking and tracing, as well as the use of SAVI's electronic seal. SAVI in this proposal also expressed its intention that this pilot project be extended into a global multi-modal visibility and security network. These statements mirror eLogicity's vision and business plan.

146 In this regard, I should again highlight that Tan and Yap's failure to testify for PSAI is perturbing. Tan was Latta's superior and would have known more about PSA's dealings with SAVI. Yap would probably have known even more details since he was still working in PSA at the time of the trial, unlike Latta and Tan who had resigned. Due to PSAI's late withdrawal of Yap and Tan as witnesses, the court cannot make any conclusive finding as to whether the ambit of PSA's co-operation with SAVI extended beyond the EDB pilot trials. A *Business Times* article had reported that

PSA was in talks with SAVI to introduce security software in Singapore's ports. In May 2002, the Board questioned PSAI on this article, and Tan denied that there was any project between PSA and SAVI. Despite this denial, there was no effort by PSAI to correct the "inaccurate reporting". Furthermore, a press release from PSAI's own website on 19 December 2002 reported that PSA Logistics, a wholly-owned subsidiary of PSA, had launched a product termed "N2N solutions" to complement the SST, an initiative which PSA had entered into.[36] While I recognise that these press articles are hearsay evidence, I find that the failure of Yap and Tan to clarify these assertions strongly suggests that PSA had not only participated in the EDB trials with SAVI, but had subsequently worked with SAVI in the SST initiative. My view is fortified by an e-mail by Corcoran, that explicitly referred to the SST project as being concluded between SAVI, HPH/LINE, POAP *and PSA*.[37]

147 Nonetheless, even if I had found that PSA had collaborated with SAVI after the EDB trials, this act would still not have constituted oppression of the plaintiffs. According to cl 15.02 of the Agreement, the plaintiffs can only legitimately expect that PSAI's "affiliated corporations" would not compete with eLogicity. Clause 15.04 defines "affiliated corporations" as corporations which PSAI directly controls and which carry on the business of container terminal operations or general stevedoring operations. PSA, a parent company of PSAI, is not such a corporation. The plaintiffs seek to circumvent this clause by alleging that there is a violation of the spirit and intent of the Agreement. However, I cannot see how it is consistent with the general provisions of the Agreement to expect PSAI to exert control over its parent company and prevent it from participating in any business similar to eLogicity. That would be too restrictive an interpretation of the Agreement. The plaintiffs also rely on PSA's informal assurance to Ng that it would support the company fully, claiming that this understanding was now breached. This understanding was only made by PSA, not PSAI. The plaintiffs cannot argue that PSA's breach of an agreement can be imputed to PSAI. Accordingly, I find that PSA's involvement in the EDB trials does not result in PSAI's liability under s 216. Incidentally, POAP does not incur any liability as well, as there is no evidence of POAP's participation in these trials.

148 I will also dismiss the plaintiffs' allegations concerning the SST initiative, based on the reasons in the preceding paragraph. Ladd had conceded that P&O had entered this initiative, but the plaintiffs have no basis to hold P&O liable as it has been removed from this originating summons. POAP, on the other hand, cannot be responsible for the acts of P&O, its parent corporation. There was insufficient evidence adduced at the trial to establish that POAP itself had participated in the SST. Both Childs and Ladd could not give definitive answers as to whether POAP owned the container terminal at Port Newark, which had been invited to participate in SST. With regard to PSA's involvement in SST, Latta could not clarify whether PSA's participation in the EDB trials was part of the SST initiative, but I have decided above that PSA was probably involved in the SST. Nonetheless, PSA's acts cannot be imputed to PSAI. There was also no affirmative testimony from Latta that PSAI's terminals had been involved in SST. In short, there is insufficient evidence for me to determine whether the strategic shareholders had worked together with SAVI in a business that was similar to eLogicity's. It is highly plausible that their parent companies, PSA and P&O, knowingly collaborated with eLogicity's competitor. It is also likely that the strategic shareholders were actively seeking to establish an alliance among eLogicity, SAVI and their parent companies. However, their plan did not materialise due to the plaintiffs' vehement objection to an alliance with SAVI. I do not think it was unreasonable for PSA and P&O to then work with SAVI after all attempts to convince eLogicity to join the alliance failed.

The alleged exclusion of the plaintiffs from the management and "mothballing" of eLogicity

Removal of Ng and Lim from management

149 With regard to this issue, the plaintiffs claim that the removal of Ng as CEO on 12 April 2002 was motivated by the strategic shareholders' desire to do a deal with SAVI, and that their purported reasons for dismissing Ng were not genuine. In my opinion, there may have been various reasons underlying the strategic shareholders' decision, some of which could have been unspoken. Regardless of their actual motives, the strategic shareholders' decision to remove Ng as CEO cannot be unfair in any way if Ng had no legitimate expectation of having an entrenched position in eLogicity's management, and if the decision to remove him was made without any *mala fides*.

150 From my reading of the Agreement, I do not discern an express understanding that Ng would remain as CEO indefinitely. I acknowledge that cl 6.03 provided that the CEO "shall initially be Mr Ng Sing King". However, cl 6.04 promptly qualifies that the right of appointment in the preceding clause shall include the right to remove such appointee. Clause 5.03(k) further provides a mechanism for the removal of the CEO; a 60% majority vote from the shareholders suffices. I also note that unlike the provisions on the appointment of directors, there is no clause stipulating that each of the three shareholder groups should be represented in eLogicity's management. Hence, the unambiguous terms in the Agreement preclude any understanding that Ng's position would be entrenched or that the plaintiffs would be represented in the management team. Ng also cannot claim any implied understanding that he would be given the right of participation in management apart from the Agreement, since such expectations are unlikely to arise apart from a quasi-partnership situation such as in *Ebrahmi v Westbourne Galleries Ltd* ([95] *supra*). These considerations also apply to the plaintiffs' complaint in relation to the removal of Lim as Senior Vice-President – Corporate. I do not regard the act of removing Ng and Lim to be oppressive since the strategic shareholders were *entitled* to remove the plaintiffs from the management.

151 However, counsel for PSAI carried this point too far by suggesting to Ng in cross-examination that he could be removed even if the strategic shareholders "didn't like [his] face". That position is grossly misguided, as it neglects the question of whether the decision was made in bad faith or whether the strategic shareholders' directors exercised their powers capriciously. In this regard, I accept the plaintiffs' submission that the strategic shareholders were motivated by their desire to collaborate with SAVI. I base this conclusion on the e-mails sent by SAVI's CEO Verma in which he communicated his intense aversion to Ng. In one such correspondence, he said that the relationship between SAVI and eLogicity would be jeopardised if Ng continued to play a significant role in the company.[38] These messages culminated in his "ultimatum" sent on 12 April 2002, when Verma laid down his conditions for an alliance. One of the demands was that the Board would comprise only representatives from the strategic shareholders. There was a similar underlying theme in his other conditions – that the strategic shareholders would have absolute control to determine eLogicity's direction, and that the plaintiffs be removed completely as shareholders or corporatise their shareholding. This was confirmed when Ladd, a POAP director, conceded during cross-examination that the removal of Ng was in part motivated by their desire to enter into an alliance with SAVI. In the light of the strategic shareholders' enthusiasm to ally with SAVI, I am surprised that they strenuously maintain that their interest in SAVI was never a reason for their decision to terminate Ng's employment. Since the strategic shareholders had promptly heeded SAVI's earlier request to prevent Ng from continuing to make representations in TC 104, I see no reason why they would not have similarly acceded to Verma's present request that the management should not include the plaintiffs. POAP counters the plaintiffs' allegation by stating that removing Ng would have prevented them from getting the plaintiffs' approval to enter the alliance. I do not find this a compelling argument, having already found above that there are indications that the strategic shareholders could have been thinking of circumventing the requirement of unanimous approval.

152 Despite this finding, I do not think that the strategic shareholders were exercising their powers in bad faith. They were ultimately driven by a desire to alleviate the dismal state of affairs in

eLogicity by entering into an alliance with SAVI. There is nothing illegitimate in seeking to remove a CEO whom they perceived to be hindering their prospects of pursuing this plan which they thought was in eLogicity's interest. The strategic shareholders' directors must have also thought that such a move was justified in view of the plaintiffs' intention to exit the company. They had already asked Ng to consider resigning on 15 March 2002. In these circumstances, I cannot see how there was any bad faith.

153 I am also conscious that the alliance with SAVI was merely one of several factors the strategic shareholders took into consideration before deciding to remove Ng. Three reasons were proffered at the board meeting on 12 April and they are, in my view, not totally invalid. Ng had failed to prepare a balanced budget for the financial year 2002, and he had failed to produce tangible results in eLogicity's performance. Most crucially, Ng also could not work with the Board. Board meetings were fraught with fiery disputes. While the disputes may not have stemmed solely from Ng's personality, the strategic shareholders' witnesses have testified that Ng was frequently emotional and belligerent. I recognise that the strategic shareholders may have given Ng grounds to be distressed. Nevertheless, the majority shareholders, in the interest of the company, were entitled to remove a member of the management with whom they could not work together: *Re Tri-Circle Investment Pte Ltd* [1993] 2 SLR 523. With regard to Ng's management of the company and its finances, both the strategic shareholders spent considerable time at the trial attempting to show that Ng was hopelessly incompetent as a CEO. I do not deem it necessary to adjudicate on the competence of Ng or on whether eLogicity's poor performance should be attributed to him. The court does not sit as arbiter of such issues. I also recognise that it is easy on hindsight to find fault with Ng as CEO and to attribute all the company's problems solely to his mismanagement of the company. However, it is undeniable that the strategic shareholders were constantly dissatisfied with eLogicity's financial health, and Ng as CEO ultimately had to bear responsibility for the poor performance of eLogicity. I shall now elaborate on the numerous financial woes that plagued eLogicity.

154 There were many disputes during board meetings over Ng's budgets and forecasts. His initial business plan in July 2000 seemed promising as it envisaged sales of US$30m, and was accompanied with a list of 29 beta and initial customers. It turned out that this plan was utterly unattainable, and that most of the beta and initial customers were actually not prospective or actual clients of eLogicity.[39] I need not decide whether the business plan contained misrepresentations, as PSAI's counterclaim has been withdrawn. The strategic shareholders must have conducted their own due diligence before deciding to invest considerable sums of about $20m each. However, I believe that the overly-optimistic portrayal of eLogicity's potential caused the strategic shareholders much dismay when the actual performance turned out to be a far cry from Ng's projections. The first plan was later tempered with more realism in the September 2000 projections, which were based on projections supplied by the strategic shareholders. While the strategic shareholders were willing to invest in eLogicity based on these projections, they did not expect the company to fare so poorly. The company's performance was consistently dismal, as Ng himself acknowledged when cross-examined by PSAI's counsel. It would not be inaccurate to state that the figures in eLogicity's accounts were staggeringly abysmal. In 2001, Ng reported that the company incurred losses amounting to $9.976m. It only generated sales revenue of $371,000 but incurred expenses of about $10m.[40] There was a monthly burn rate of about $850,000.[41] The Board's target of an annualised contract revenue of $5m by 1 January 2002 also could not be achieved. The strategic shareholders' initial investment of about US$40m was depleted to a cash balance of merely S$1.8m by April 2002.[42] The strategic shareholders were understandably distressed over this state of affairs and there was therefore a legitimate basis for them to dismiss Ng as CEO.

155 As eLogicity's financial woes persisted, the strategic shareholders took issue with the financial forecasts produced by the management. The first forecast in early 2001 was approved, but there

were problems concerning the second one released on 12 April 2001. Ng was upset that PSAI did not provide updates on the potential sales it could introduce so that he could incorporate these figures into his forecast. In response, the strategic shareholders clarified that they could not be responsible for sales revenue but could only assist in bringing in sales.[43] Ng may have been given the impression by the strategic shareholders that he could use their figures on potential sales as a basis for formulating a forecast. There was, in this regard, an informal understanding amongst the shareholders that the strategic shareholders would support eLogicity in terms of introducing customers. Burgess and Corcoran in certain e-mails had reminded PSAI that it was expected to bring projects to eLogicity.[44] Nonetheless, the Board was right in stating at this meeting that the company, and not the shareholders, was ultimately responsible for bringing in sales and revenue. The management under Ng consistently failed to do so, and the financial projections had to be modified accordingly. There were still concerns expressed over the third re-forecast on 21 February 2002. The figures were noticeably lower than before, but Ladd acknowledged that these projections were now based on the company's actual performance.[45] It is my evaluation from the foregoing that the strategic shareholders were led to believe that the company could perform much better than it actually was capable of. This impression was in part due to the strategic shareholders' own representation to Ng that they would support eLogicity and introduce customers. Although the strategic shareholders' expectations were lowered over time, the fact remains that eLogicity did not maintain a decent financial performance. Within merely two years after their investment, it seemed to the strategic shareholders that their hopes were completely dashed and their faith in eLogicity's vision was misplaced. It was thus not unreasonable for them to hold Ng, the CEO, responsible and to remove him from his position.

156 POAP submitted a litany of other complaints about Ng's incompetence, namely, the failure to obtain radio licences to operate the eSeal in other countries, the absence of a working system to trace vehicles, an uncertain pricing system for the eSeal, the lack of a contract with EJB for the supply of the eSeal, the lack of a patent for the eSeal and the failure to obtain grants from EDB. I will not address all these complaints as these matters only came to light after Ng was already dismissed. I do not deny that some of these matters, such as the failure to conclude a contract with EDB, were valid points of dissatisfaction. The issue here, however, is whether the strategic shareholders had exercised their directors' powers capriciously on 12 April 2002. To my mind, additional facts surfacing after Ng's removal cannot be used as retrospective justification of the strategic shareholders' decision. What is germane to the present issue is the strategic shareholders' state of mind as at 12 April 2002, and whether the facts then known to them were valid reasons for dismissing Ng.

157 Following the removal of Lim and Ng from the management, the strategic shareholders appeared to have run the company to the exclusion of the plaintiffs. The plaintiffs take issue with this usurpation of their management rights. I agree that under the leadership of the acting CEO, Corcoran, the strategic shareholders deliberately excluded the plaintiffs, who by now only had representation on the Board. A new business plan was formulated without consultation with the plaintiffs.[46] A temporary CEO Advisory Committee was formed to assist Corcoran in replacing Ng as CEO.[47] It is most telling that Burgess admitted during the trial that the strategic shareholders had effectively taken over the management of the company after 12 April 2002 without involving the plaintiffs. Despite this exclusion, I do not find that any legitimate expectations were breached. I found no merit in the plaintiffs' suggestion that under the Agreement, each group of shareholders was assured of some representation in management over and above their three seats each in the board. Clause 6.03 merely provides that Ng would be the first CEO, and cl 6.06 provides for an establishment of an Executive Committee which would include representatives from each shareholder group. Beyond these clauses, there is no entrenchment of management positions for the plaintiffs. I do not see why the strategic shareholders should include the plaintiffs in the discussion of management issues after they had legitimately removed Lim and Ng from the management team. Ng, Lim and Hong were not removed

as directors and still had the opportunity to offer their views during one final board meeting on 17 May 2002. The strategic shareholders' conduct in ignoring the plaintiffs, though regrettable, does not offend one's sense of commercial fairness.

Downsizing of eLogicity

158 I can also detect no sinister motive in the strategic shareholders' decision to "mothball" eLogicity on 17 May 2002. The plaintiffs allege that this decision was prompted by their desire to collaborate with SAVI and to "get eLogicity out of the way". The circumstantial evidence strongly indicates that there is some truth in this allegation. I found earlier that P&O and PSA might have collaborated together with SAVI in the SST initiative. Given the intention of the strategic shareholders' parent companies to work closely with SAVI, and the plaintiffs' staunch refusal to allow eLogicity to partner with SAVI, the strategic shareholders probably reasoned that it was pointless for eLogicity to compete against SAVI, which was PSA and P&O's chosen partner. I also notice that the strategic shareholders seemed unusually diffident to various negative developments in eLogicity. After some employees expressed, in an e-mail on 28 April 2002, how their morale had been adversely affected, the strategic shareholders failed to respond.[48] In addition, there were a few newspaper articles reporting that PSA and SAVI were to enter into a partnership. A potential customer of eLogicity, Mitsui and Co, wrote to Corcoran, stating that they were very worried about the situation within eLogicity.[49] Again the strategic shareholders remained indifferent. Although Yap had clarified at a board meeting that the articles were speculative and inaccurate, he did nothing to correct this wrong impression.[50] The strategic shareholders' apathy is highly suggestive of their declining interest in eLogicity.

159 There is however insufficient evidence for me to conclude that the above reason was the sole basis for the decision to mothball eLogicity. After all, it is difficult to understand why the strategic shareholders, who invested considerable sums of money in eLogicity, would now intentionally seek to diminish the value of company. On an objective analysis of eLogicity's performance, it was evident that the company was on the brink of atrophy and that corrective steps had to be taken. Since September 2000, its assets were being depleted at an alarming burn rate of approximately $850,000. The five-year plan produced by Ng reflected a negative closing cash balance for the year 2002.[51] The plaintiffs dispute this, pointing out that the revised five-year plans show that there would be positive cash flow in certain months of 2002.[52] I do not disagree that there were positive figures for certain months. Nevertheless, I find that the strategic shareholders' fears about the viability of eLogicity were amply justified in the light of eLogicity's consistently dismal performance. The decision to downsize eLogicity was a *bona fide* one made by the Board after Corcoran presented three alternative scenarios. Downsizing seemed the most realistic course of action to take in order to minimise eLogicity's losses. It was also a reasonable option as "mothballing" eLogicity, unlike the other two scenarios, would result in the highest amount of cash balance of $6.161m at the end of 2003.[53] I therefore conclude that in this instance, the strategic shareholders' directors did not exercise their powers in an oppressive manner. I now turn to consider the plaintiffs' final claim under s 216.

The PIE and the new eModal

160 The principal complaint in relation to both the PIE and the new eModal is that the strategic shareholders' directors had breached their duties by being involved in initiatives that were competitive with eLogicity. The plaintiffs argue that these acts amounted to breaches of the Agreement or an understanding between the shareholders. POAP opposes this last submission, alleging that it had not been pleaded. In my opinion, there is no merit to POAP's objection. The plaintiffs' primary allegation that the strategic shareholders became involved in matters in direct competition with eLogicity was

pleaded at para 32 of the Statement of Claim. By including these words "notwithstanding the Shareholders' Agreement", the plaintiffs had also alluded to the Agreement. One can readily infer, from reading this paragraph, that the plaintiffs claimed that the Agreement was not complied with. In any event, for the reasons stated earlier at [135] and [136] above, this matter is not a material fact that must be pleaded according to O 18 r 7 of the Rules of Court.

The PIE

161 It is not disputed that Ladd and Yap represented P&O and PSA respectively in discussing the possibility of establishing the PIE together with HPH/LINE. Based on Ladd's testimony in court, the PIE could have posed a competitive threat to eLogicity's business. Ladd confirmed that the discussions on the PIE included the provision of track and trace services by the PIE. Nevertheless, there is meagre evidence to support the plaintiffs' claim that the PIE in fact came into being. Ng's suspicions were essentially predicated on rumours which he heard from Corcoran in February 2001. Based on this second-hand information, he immediately concluded that PSA, P&O and HPH/LINE had set up the PIE. However, Ng was assured that the PIE was effectively dead in February 2001. The idea ultimately did not take off. Although Ladd still attended a meeting on the PIE in July 2001 initiated by HPH/LINE, P&O informed HPH/LINE that it was no longer interested in this concept. Since the alleged competitive business did not materialise, Ladd and Yap's involvement in exploratory discussions cannot be deemed oppressive as there was no discernible detriment to eLogicity.

The new eModal

162 The plaintiffs' actual grievance here concerns their suspicion that the abandoned PIE was resurrected in the form of the new eModal, and that Ladd on behalf of P&O engaged in discussions together with HPH/LINE and SSA. The plaintiffs think that Ladd's acts caused eLogicity's failure to conclude TAAs with SSA and HPH/LINE.

163 Ladd revealed at the trial that Jon Hemingway of SSA invited the P&O group to invest in the new eModal on 9 October 2001. Ladd, who was still a director in eLogicity, then represented POSN (the ultimate holding company of the P&O group) in these discussions. Ladd was concurrently assisting eLogicity in negotiating with SSA and HPH/LINE for the conclusion of TAAs. When David Gunn of HPH/LINE subsequently told eLogicity via e-mail on 30 January 2002 that the proposal for the TAA was "stuck at HPH level because it has become entangled with the possible acquisition of equity in eModal by P&O Ports and HPH", it appeared that Ladd had been involved in the new eModal at the expense of eLogicity's business. David Gunn in this e-mail added that Ladd was handling the issue of competition between eLogicity and eModal.[54] Another e-mail also appears to confirm the plaintiffs' allegation. In corresponding with HPH/LINE on 28 December 2001 concerning the new eModal, Ladd said:

> On the non-compete, I expect Jon [Hemingway of SSA] would want a clear statement from P&O of where eLogicity sits in relation to new eModal.[55]

SSA had informed eLogicity on 25 January 2002 that it would not conclude any TAA with it.[56] These developments are highly suggestive that SSA and HPH/LINE declined to work with eLogicity because of their involvement in the new eModal.

164 POAP maintains that there was no conflict between eModal and eLogicity's business, and that they are in fact complementary. Ladd gave evidence that the eModal was originally a community system operating in the West Coast of the US, and that the new eModal was intended to replicate this community system in other regions. He argued, with considerable aplomb and persuasion, that

community systems were important partners of eLogicity as they supplied EDI information that would complement the use of the eSeal. Ladd further stated that he believed that by working with the new eModal, eLogicity would be relieved of the need to conclude TAAs with SSA. Ladd's reasoning is, admittedly, compelling, for eLogicity was able to work with various other community systems like PSA's Portnet and P&O's ePorts without viewing them as competitors. It therefore seemed reasonable that the new eModal, another community system, should not be viewed differently. It is highly plausible that the new eModal did not conflict with the primary business of eLogicity.

165 While I recognise this, I could well see that there was at least a potential conflict between the two businesses. A potentially competitive business can also be simultaneously viewed as complementary. The label one ascribes to the new eModal will vary according to one's perspective. The fact that a business is viewed as complementary therefore need not preclude the possibility that it is also competitive. In my evaluation, there is evidence to show that Ladd's opinion on the new eModal was an isolated one that was not shared by SSA and HPH/LINE. Owen informed Ng on 10 September 2001 that Jon Hemingway of SSA, while considering a TAA with eLogicity, was concerned that there might be a "cut-in" on his eModal business.[57] Owen clarified during the trial that this meant that Jon Hemingway was unsure as to whether there would be an overlap between the two businesses. I also note how Ladd maintained during his cross-examination that HPH/LINE, POSN and SSA understood that the businesses of eLogicity and the new eModal would not compete with each other. He claimed that they were merely discussing how to phrase a "non-compete clause" to demarcate the activities of the new eModal *vis-à-vis* eLogicity. However, there would be no need to discuss this matter if, as Ladd claims, the new eModal was clearly complementary to eLogicity. There must have been potential overlap between the two businesses so that demarcation became necessary. Moreover, while Ladd claimed to be certain on the complementary nature of eModal, David Gunn of HPH/LINE seemed more ambivalent. Ladd tried to write to HPH/LINE to confirm that David Gunn was incorrect in linking the hold-up of the TAA with eLogicity with the possible eModal investment, but HPH/LINE replied that David Gunn thought that the eModal deal might involve exclusivity issues and that HPH/LINE needed to have a clear understanding of its position before agreeing to a TAA.[58] I am convinced by the evidence that there were genuine concerns shared by HPH/LINE and SSA that the new eModal's activities could overlap with eLogicity's, or that issues of exclusivity precluded their conclusion of TAAs with eLogicity. There is more than sufficient indication that there was potential conflict between the two businesses.

166 The next issue I have to consider is whether Ladd was in breach of his fiduciary duties and whether POAP should in turn be held responsible for his actions. It is trite law that a director will breach his duty if he places himself in a position where his duty to the company and some other interest conflict, and he fails to disclose the latter interest. The more complex question is whether this breach of fiduciary duty amounts to an oppressive act by his company. There are two subsidiary issues arising from this question; first, whether one POAP director's breach of duty can be attributed to POAP and second, whether a breach of fiduciary duty is equivalent to oppressive conduct under s 216 of the Companies Act. With regard to the first issue, I do not consider it possible for Ladd's actions to be imputed to POAP for the purpose of liability under s 216. POAP can only be said to be vicariously liable for Ladd's breach of fiduciary duty if Ladd as POAP's agent was acting within the scope of his employment. There has to be a sufficiently close connection between Ladd's acts and the scope of his employment: *Lister v Hesley Hall Ltd* [2001] 1 AC 215 and *Dubai Aluminium Company Ltd v Salaam* [2003] 2 AC 366. The evidence before me shows that Ladd, in being involved in the new eModal, had exceeded the scope of his responsibility as POAP's nominee director in eLogicity. Ladd testified that he was acting under the directions of POSN, and not POAP, in exploring the possibility of investing in the new eModal. None of the other POAP directors in eLogicity seemed to be aware of his involvement. When they were informed of his conduct, Burgess and Corcoran even expressed dismay that Ladd seemed to be working against the interest of eLogicity.[59] Hence it is clear to me that

Ladd had gone on a frolic of his own and was not acting on behalf of POAP in the negotiations on the new eModal. In such circumstances, POAP cannot be held responsible for Ladd's breach of duty.

167 Further, even if POAP can be held responsible for Ladd's conduct, there will still be no liability under s 216 of the Companies Act. This brings me to the second subsidiary issue – whether a breach of fiduciary duty is synonymous with oppression under s 216. The plaintiffs have cited *Kumagai Gumi Co Ltd v Zenecon Pte Ltd* [1995] 2 SLR 297, *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324 and the Australian case of *Jenkins v Enterprise Gold Mines NL* (1992) 6 ACSR 539 to bolster their argument that breaches of duties are relevant matters to consider in relation to s 216 liability. However, these cases only stand for the proposition that breaches are *relevant* considerations, and not that breaches are necessarily equivalent to oppression under s 216. The court will only find that such breaches are tantamount to oppressive behaviour if they resulted in loss to the aggrieved shareholder. In this regard, I refer again to *Re Blackwood Hodge plc*, alluded to earlier at [96] above. This is a case in point in which the plaintiffs alleged that certain directors acted in breach of fiduciary duty. Parker J distinguished the case of *Scottish Co-operative Wholesale Society Ltd v Meyer* in the following manner (at 676):

> In the *Scottish Co-operative* case the damage to the minority shareholders was clear: the conduct of the majority shareholder had caused the value of their shares to be reduced. The nominee directors were seeking to justify their failure to protest against such conduct on the footing that any protest would have been ineffective. As Lord Denning made clear in the passage quoted above, it did not lie in their mouths to make such an assertion. By contrast, in the instant case *the petitioners have to establish that they have suffered unfair prejudice.* The mere fact that the [company] directors did not apply their minds properly to the question of merger does not establish unfair prejudice, nor does it give rise to a presumption of unfair prejudice.[emphasis added]

The court expressly highlighted the fact that breach of duty is not necessarily synonymous with unfair prejudice. Loss to the plaintiffs is therefore a vital condition for establishing liability under s 216, and it is this issue that I now proceed to consider.

168 There is tenuous evidence to show that Ladd's involvement in the new eModal had caused SSA and HPH/LINE to decline to work with eLogicity. There is no compelling ground to believe that these corporations would have entered TAAs with eLogicity but for their interest in investing in the new eModal. In explaining his decision not to work with eLogicity on 20 December 2001, Mike Schwank of SSA commented that he could see no value in facilitating the use of eLogicity's RFID tags.[60] Similarly, HPH/LINE cited many other reasons for refusing to conclude a TAA with eLogicity, including its desire to first establish relationships with other global players in the electronics and soft goods industries,[61] and difficulty in obtaining consent from its individual terminals.[62] At the material time, HPH/LINE was not ready to decide whether it made sense to sell its data to eLogicity. Hence, there is no proof that the new eModal was the primary reason for HPH/LINE and SSA's refusal to work with eLogicity. Moreover, HPH/LINE and SSA might still have been keen to invest in the new eModal with or without Ladd's involvement in the discussions. In that event, they would still not have worked with eLogicity since they took the view that the new eModal required exclusivity. The plaintiffs' claim is plainly unsustainable as Ladd's actions, while deplorable, have not caused any loss to them.

169 All three claims by the plaintiffs under s 216 cannot be established based on the available evidence. In my opinion, the strategic shareholders' conduct, while not totally beyond reproach, has nonetheless not transgressed the acceptable commercial standards of probity. Contrary to the plaintiffs' claim, there was no oppressive behaviour which had caused the diminution in value of the company. The plaintiffs should have accepted PSAI's offer to purchase their shares at a fair value to

be determined by an independent expert. Their intransigence in not even entertaining PSAI's proposal was unreasonable. Accordingly, I dismiss the plaintiffs' prayer for their shares in eLogicity to be purchased by the strategic shareholders. I now proceed to consider POAP's petition for eLogicity to be wound up.

The winding up petition

170 The plaintiffs initially prayed for the winding up of eLogicity as an alternative remedy to the strategic shareholders' purchase of their shares, pursuant to s 216. They have now abandoned this prayer, contending that the company is still viable and should not be wound up. However, POAP filed a winding up petition pursuant to s 254(1)(i) of the Companies Act, which provides:

> The Court may order the winding up if the Court is of opinion that it is *just and equitable* that the company be wound up. [emphasis added]

171 There are two grounds for POAP's assertion that winding up is just and equitable: first, the irretrievable breakdown in the relationship among the shareholders; and second, the loss of the substratum of the company. I now consider these in turn.

Whether there is irretrievable breakdown in the relationship amongst the shareholders

172 It is patently obvious from the evidence considered above that there are irreconcilable differences and that the shareholders can no longer work together. The degree of acrimony amongst them is readily apparent from their conduct at the board meetings. These meetings were disorderly and acrimonious and the disputes amongst the shareholders hampered the calm discussion of urgent issues on the agenda. The fifth board meeting on 21 February 2002 is most illustrative of the tension. At this juncture, the plaintiffs had found out about Ladd's involvement in the new eModal. The strategic shareholders discovered that the plaintiffs' directors were tape-recording the proceedings and took issue with this. After a vote was taken against having a verbatim record of the meeting, there was a dispute over the presence of the plaintiffs' solicitors, Lee & Lee, at the meeting. A heated argument ensued over this matter, as well as other contentious issues like the accuracy of the minutes of earlier board meetings. Incidentally, the latter issue was a perennial point of contention amongst the shareholders. The last set of agreed board meetings was for the fourth meeting on 3 August 2001. Thereafter, there were incessant disputes about whether the minutes accurately reflected what each shareholder had said. The strategic shareholders have characterised the meetings as fiery and replete with even shouting and crying. I cannot see how future board meetings can be constructive in any way given the tension between the parties, which is likely to be further exacerbated by these legal proceedings.

173 It is noteworthy that Ng himself admitted that by 26 March 2002, his relationship with the other board members had deteriorated considerably. While he was being cross-examined on a correspondence exchange, I asked him whether the relationship between the shareholders had soured. He confirmed that at this stage, they had reached a point of no return. Indeed, there were many unpleasant clashes amongst them by this date. Ng did not have a good working relationship with Owen, a POAP secondee. Barely four months after Owen commenced work in eLogicity, Ng had confiscated his laptop computer and then made serious allegations against him. PAOP eventually agreed that Owen would leave eLogicity. Disputes were also rife in the Executive Committee. Due to problems in the relationship between Latta and Ng, it had to be dissolved in September 2001 and reconstituted in March 2002 without Latta. These incidents indubitably show that the relationship between the parties was seriously strained. The relationship was fraught with mutual suspicions; the plaintiffs thought that the strategic shareholders had a collateral motive for seeking an alliance with

SAVI, whilst the strategic shareholders suspected that Ng's conduct was meant to pressure them to purchase the plaintiffs' shares. The present circumstances are akin to the facts in *Re Goodwealth Trading Pte Ltd* [1990] SLR 1239. In that case, the directors had also lost confidence in working with each other. Yong Pung How CJ commented at 1245–1256, [13]:

> [A] principle which has become increasingly accepted is that courts will not hesitate to provide relief and wind up a company, as they would a partnership, if it is clear that the parties involved will no longer be able to work together. In the leading case of *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, the House of Lords applied partnership principles in making a winding-up order. Although this was a case in which a partner was in fact excluded, the judgments envisaged a wide extension of these principles to cover the cases where directors have lost confidence in working with each other. Lord Cross said at p 387:
>
> > All that happened was that without one being more to blame than the other the two could no longer work together in harmony.

It is my opinion that eLogicity's business has been crippled by endless disputes between the shareholders, and that they will not be able to work together in the future. I therefore have no doubt that on the ground of irretrievable breakdown of relationship alone, winding up of the company is just and equitable.

Loss of substratum of the company

174 This is an additional ground to fortify my conclusion that winding up is just and equitable. I believe that the company is no longer viable and it would thus be pointless for the shareholders to continue flogging a dead horse. After the downsizing of eLogicity, Corcoran, the acting CEO, still encountered problems in seeking to revive the company. There were various obstacles to eLogicity's progress, including the lack of a patent for the eSeal, the lack of a contract with EJB for the supply of the eSeal and the failure to have a working system for the tracing of vehicles. The last problem caused Ford, a major customer, to refuse to allow eLogicity to perform any more proofs of concept. Due to these problems, it was resolved by the Board on 5 March 2003 that the company should continue to employ skeletal staff and minimise its business activities. The company only has a part-time secretary at the moment. The plaintiffs have pointed out that eLogicity still has TAAs with various companies. Childs also gave evidence that Corcoran had managed to secure various contracts. However, it remains doubtful to me whether the company, after such a long hiatus, can operate profitably. I also consider it pertinent that PSA and P&O, the parent companies of the strategic shareholders, have proceeded to work with SAVI in the SST, which seems to have a relatively wide global influence. I do not see how the strategic shareholders would have any more motivation to seek to advance eLogicity's main business of providing global track and trace services, as it would be in direct contradiction with what their parent companies are now seeking to achieve. In the premises, I will allow POAP's winding up petition.

Conclusion

175 It is tragic that eLogicity, which had the potential to be a thriving business, was plagued by irreconcilable differences amongst the shareholders. These differences had surfaced very soon after the strategic shareholders invested in eLogicity in September 2000. The first sign of the breakdown in their relationship was seen in December 2001, when the plaintiffs indicated their intention to leave the company. Thereafter, the suspicions amongst the shareholders continued to fester, and fuelled even further misunderstandings which culminated in the removal of Ng and Lim from the management, followed by the downsizing of eLogicity.

176 The progress of the company was ultimately hampered by the shareholders themselves. As a result of their failure to reconcile, eLogicity, once brimming with optimism over its vision of establishing a global track and trace network, has been reduced to a dormant company with only one member in its management. The plaintiffs have attributed the current state of the company to the actions of the strategic shareholders. However, I have found that their claims of oppression under s 216 of the Companies Act are unmeritorious, as the acceptable standards of commercial fairness have not been breached in any way. The strategic shareholders' conduct in relation to SAVI was motivated by a genuine desire to advance eLogicity's interest. In any event, no alliance was entered into because of the plaintiffs' opposition and consequently no loss was suffered. Their decisions to remove Ng and Lim from management, and to downsize eLogicity were reasonably made in light of the surrounding circumstances. Ladd's involvement in discussing the new eModal cannot be imputed to both the strategic shareholders, and could not be shown to have caused eLogicity any harm. In sum, I find that the strategic shareholders' conduct did not depart from the standards of fair play. The plaintiffs merely disagreed with the strategic shareholders on many issues, but as Lord Wilberforce emphasised in *Re Kong Thai Sawmill Sdn Bhd* ([93] *supra*), that is not enough to amount to oppression.

177 In my analysis, no single party can be blamed for the failure of eLogicity's business. The demise of eLogicity was caused by the shareholders' inability to see eye to eye or to compromise. There has been a constant clash of opposite aspirations and egos. In these circumstances, winding up the company is the most appropriate course of action in order to put an end to a chapter of bitterness and acrimony.

178 While I have found the plaintiffs' case unsustainable, I also recognise that the strategic shareholders' conduct was not totally beyond reproach. Although their behaviour was not oppressive, they had given the plaintiffs cause to be aggrieved. One of the two cryptically-worded SAVI resolutions was procedurally irregular, and both resolutions appeared to be thinly veiled attempts to circumvent the requirement under the Agreement for unanimous approval of all three shareholder groups before eLogicity could enter into a joint venture with SAVI. As regards the new eModal, Ladd was in breach of his fiduciary duties in being engaged in negotiations concerning a business that was potentially in competition with eLogicity. Both Ladd and Yap had also placed themselves in positions of conflict by discussing the PIE on behalf of P&O and PSA.

179 Moreover, the strategic shareholders, in the course of the trial, had made various allegations against the plaintiffs, which were, in my view, unjustified. PSAI wrongly claimed that Ng had agreed even before investment by the strategic shareholders to enter into an alliance with SAVI. Both the strategic shareholders wrongly accused Ng of being obstructive of eLogicity's dealings with SAVI on various occasions. For reasons mentioned above, I find that many of these allegations were irrelevant to the issue at hand. While I acknowledge that Ng was not entirely blameless, I do not deem it proper for the strategic shareholders to flippantly raise unfounded allegations against the plaintiffs, which had the effect of unnecessarily prolonging the trial.

180 In view of these circumstances, I do not find it appropriate that costs should follow the event according to O 59 r 3 of the Rules of Court. The Court of Appeal in *Tullio v Maoro* [1994] 2 SLR 489 at 496, [24] had made the following pronouncement concerning the exercise of a court's discretion in awarding costs:

> We have found *Re Elgindata Ltd (No 2)* which is a recent judgment of the English Court of Appeal most helpful as it has collected together all the relevant principles which should govern the awarding of costs. Suffice to set out here the headnote which reads:

> The principles on which costs were to be awarded were (i) that costs were in the discretion of the court, (ii) *that costs should follow the event except when it appeared to the court that in the circumstances of the case some other order should be made*, (iii) that the general rule did not cease to apply simply because the successful party raised issues or made allegations that failed, but that *he could be deprived of his costs in whole or in part where he had caused a significant increase in the length of the proceedings*, and (iv) that *where the successful party raised issues or made allegations improperly or unreasonably the court could not only deprive him of his costs* but could also order him to pay the whole or part of the unsuccessful party's costs. The fourth principle implied, moreover, that a successful party who neither improperly nor unreasonably raised issues or made allegations which failed ought not to be ordered to pay any part of the unsuccessful party's costs …

[emphasis added]

181 Although the strategic shareholders have successfully defended themselves in the originating summons, they have "raised issues or made allegations improperly or unreasonably". Accordingly, I order that the plaintiffs and the strategic shareholders bear their own costs for the originating summons.

Plaintiffs' claim in originating summons dismissed. Winding up petition granted.

Abbreviated term	**Full term**
The Agreement	The Shareholders Agreement entered into by PSAI, POAP and the plaintiffs in September 2000 (at [5])
Bauer	Joseph Bauer: SAVI's Vice-President (at [28])
Burgess	Andrew Burgess: One of eLogicity's directors nominated by POAP (at [5])
CEO	Chief Executive Officer (at [5])
Childs	Colin John Childs: One of eLogicity's directors nominated by POAP (at [5])
Corcoran	Joseph Corcoran: One of eLogicity's directors nominated by POAP (at [5])
CSI	Container Security Initiative (at [30])
D&N	Drew & Napier LLC (at [12])
EDB	Economic Development Board (at [37])

EDI	Electronic Data Interchange (at [4])
EJB	E J Brooks: supplier of eSeals (at [49])
eLogicity	eLogicity International Pte Ltd (at [1])
eSeal	A wireless security device developed by eLogicity (at [3])
ESOS	eLogicity's Employee Share Option Scheme (at [45])
Hong	Hong Jen Cien: One of eLogicity's directors nominated by the plaintiffs (at [5])
HPH/LINE	Hutchinson Ports and Logistics Information Network Enterprise (at [11])
Ladd	Jonathan Ladd: One of eLogicity's directors nominated by POAP to replace Burgess on or about 12 April 2001
Latta	Kelvin Dee Latta: One of eLogicity's directors nominated by PSAI (at [5])
Lim	Lim Khoon Hock: One of eLogicity's directors nominated by the plaintiffs. Also eLogicity's Senior Vice-President – Corporate (at [5])
Ng	Ng Sing King: One of eLogicity's directors nominated by the plaintiffs. Also CEO and Chairman of Board till 12 April 2002 (at [3])
Owen	David Owen: He was seconded by POAP to be eLogicity's Chief Financial Officer in June 2001. He left eLogicity in September 2001 (at [70])
P&O	P&O Ports Ltd: Parent company of P&O Australia Ports Pty Ltd (at [2])
PIE	Port Information Exchange (at [11])
POAP	P&O Australia Ports Pty Ltd: subsidiary of P&O (at [2])

POSN	Peninsular and Oriental Steam Navigation Company: the ultimate holding company of POAP & P&O (at [19])
PSA	PSA Corporation Ltd: Parent company of PSA International Pte Ltd (at [2])
PSAI	PSA International Pte Ltd: subsidiary of PSA (at [2])
RFID	Radio Frequency Identification (at [4])
SAVI	SAVI Technology Inc (at [9])
SST	Smart and Secure Tradelanes: a programme allegedly set out by PSA, P&O and HPH to track and monitor containers (at [37])
The strategic shareholders	PSAI and POAP (at [2])
Tan	Henry Tan Kim Soon: One of eLogicity's directors nominated by PSAI (at [5])
TAA	Terminal Access Alliance (at [4])
TC 104	ISO/TC 104 Committee (at [34])
Verma	Vick Verma: CEO of SAVI (at [30])
White	Tracee White: She was seconded by POAP to be eLogicity's Assistant Vice-President – Projects. Her primary role was to market eLogicity's vehicle-tracking system (at [68])
Yap	Robert Yap Min Choy: One of eLogicity's directors nominated by PSAI (at [5])

[1]Agreed Bundle ("AB") Vol 2 at 487

[2]4 AB 1166

[3]Ng's second affidavit of evidence-in-chief paras 107-109

[4]5 AB 1171

[5]4 AB 1166

[6]6 AB 1525

[7]12 AB 3496

[8]12 AB 3407

[9]14 AB 3925

[10]14 AB 3958

[11]14 AB 3958

[12]14 AB 3856

[13]14 AB 3937

[14]16 AB 4501

[15]15 AB 4138

[16]14 AB 3842

[17]15 AB 4217

[18]15 AB 4209 and 15 AB 4296

[19]15 AB 4293

[20]15 AB 4238

[21]15 AB 4238

[22]15 AB 4345

[23]16 AB 4577

[24]17 AB 4686

[25]16 AB 4521

[26]17 AB 4775

[27]17 AB 4687

[28]17AB 4708

[29]19 AB 5374

[30]17 AB 4671

[31]17 AB 4774

[32]17 AB 4775

[33]17 AB 4764

[34]12 AB 3359, 3407

[35]19 AB 5418

[36]Plaintiffs' Bundle of Documents 1

[37]22 AB 6223

[38]16 AB 4501

[39]1 AB 8-10

[40]31 AB 8238

[41]32 AB 8657

[42]32 AB 8649

[43]33 AB 8839

[44]9 AB 2557 and 10 AB 2884

[45]33 AB 8849

[46]19 AB 5399

[47]20 AB 5463

[48]20 AB 5492

[49]22 AB 6131

[50]34 AB 8984

[51]10 AB 2835

[52]10 AB 2834, 30 AB 8032 and 31 AB 8248

[53]32 AB 8667

[54]14 AB 4095

[55]23 AB 6560

[56]23 AB 6556

[57]10 AB 2740

[58]16 AB 4467

[59]14 AB 4090, 4092

[60]14 AB 3909

[61]15 AB 4202

[62]16 AB 4467