IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 14

Civil Appeal No 85 of 2019

Between

(1) Ascend Field Pte Ltd
(2) Ng Meng Lay
(3) Yi Fang Xiang Services
(4) Kor Chee Kuan

… *Appellants*

And

Tee Wee Sien

… *Respondent*

Civil Appeal No 86 of 2019

Between

Tee Wee Sien

… *Appellant*

And

(1) Ng Meng Lay
(2) Yi Fang Xiang Services
(3) Kor Chee Kuan

… *Respondents*

In the matter of Suit No 740 of 2016

Between

Tee Wee Sien

… *Plaintiff*

And

(1) Ascend Field Pte Ltd
(2) Ng Meng Lay
(3) Yi Fang Xiang Services
(4) Kor Chee Kuan

… *Defendants*

JUDGMENT

[Companies] — [Oppression]

Ascend Field Pte Ltd and others
v
Tee Wee Sien and another appeal

[2020] SGCA 14

Court of Appeal — Civil Appeal Nos 85 and 86 of 2019
Judith Prakash JA, Belinda Ang Saw Ean J and Woo Bih Li J
19, 21 November 2019

9 March 2020 Judgment reserved.

Judith Prakash JA (delivering the judgment of the court):

Introduction

1 These appeals are mainly factual in nature, dealing with whether certain actions by one shareholder of a company were oppressive to the interests of the other shareholder. They arise from Suit No 740 of 2016 ("the Action") which was commenced by Mr Tee Wee Sien ("Mr Tee") against Ascend Field Pte Ltd ("AFPL"), Mr Ng Meng Lay ("Mr Ng"), Yi Fang Xiang Services ("YFX") and Ms Kor Chee Kuan ("Ms Kor") (collectively referred to as "the Defendants").

2 Mr Tee and Mr Ng were equal shareholders in AFPL, a Singapore company. Mr Ng was the sole director of AFPL at the material time. In the Action, Mr Tee sought relief under s 216 of the Companies Act (Cap 50, 2006 Rev Ed), alleging that Mr Ng had conducted AFPL's affairs in a manner oppressive to him as a shareholder of AFPL. Mr Tee also claimed that Mr Ng,

YFX and Ms Kor had engaged in an unlawful means conspiracy to injure him and AFPL.

3 The High Court judge ("the Judge") allowed Mr Tee's claims in part, finding that Mr Ng's diversion of five contracts, employees and resources from AFPL to YFX was oppressive to Mr Tee. He ordered an account of the profits of the diverted contracts, an account of the benefit that AFPL and YFX derived from their uncompensated use of each other's employees, and an inquiry into the extent to which YFX made use of AFPL's resources. The Judge also found that Mr Ng, YFX and Ms Kor had engaged in an unlawful means conspiracy to divert specific contracts from AFPL to YFX.

4 Civil Appeal No 85 of 2019 ("CA 85") is an appeal by AFPL, Mr Ng, YFX and Ms Kor against the Judge's decision to allow Mr Tee's claims in part, as stated above. In Civil Appeal No 86 of 2019 ("CA 86"), Mr Tee appeals against the Judge's dismissal of the other heads of oppression and his unlawful means conspiracy claim in its totality.

5 Having considered the facts and submissions, we allow Mr Tee's appeal in CA 86 in respect of part of the oppression claim and allow CA 85 in respect of the conspiracy claim. We explain our reasons and the consequential orders to be made in this judgment.

Facts

The parties and the background

6 Mr Ng is married to Ms Kor. In late 2010, Ms Kor set up YFX as a sole-proprietorship firm providing cleaning services for office premises and

buildings. Mr Ng helped her run the firm and her brother, Randy Kor, who was in the same business referred certain cleaning contracts to YFX. By May 2011, YFX was providing cleaning services to nine developments. We recognise that legally YFX and Ms Kor are not separate entities since YFX is a sole-proprietorship firm and not an incorporated company but, for clarity, we will when dealing with Ms Kor's personal business refer to it by the acronym YFX. Of the nine contracts YFX had just before AFPL was formed, four were in respect of developments belonging to companies owned by Mr Tee and his friend and business partner, Mr Ching Chiat Kwong ("Mr Ching").

7 Mr Tee is a businessman involved in property development. He and Mr Ng are first cousins and, according to Mr Tee, were close while they were growing up and remained in regular contact as adults. Mr Ching is the Chief Executive Officer of Oxley Holdings Ltd ("OHL"). He is also the sole owner of Oxley Construction Pte Ltd ("OCPL"). Both OCPL and OHL are involved in real estate development. These companies will be collectively referred to as the "Oxley businesses".

8 Mr Ng and Mr Tee set up AFPL in June 2011 after some discussions. No shareholders' agreement was entered into and although both men agreed they had had an informal understanding prior to the incorporation of AFPL, subsequently the content of that informal understanding was in dispute. We expand upon their disagreement later in this judgment at [41] *et seq*. Mr Ng and Mr Tee were directors of AFPL at its incorporation. Although Mr Tee claimed that he resigned as a director in 2012 at Mr Ng's request, records from the Accounting and Corporate Regulatory Authority ("ACRA") showed that his resignation as director took effect on the date of AFPL's incorporation.

9 AFPL had an initial share capital of $100,000 and since incorporation Mr Ng and Mr Tee have each held 50,000 shares in the company, making them equal shareholders at all times. Mr Ng did not contribute any capital to AFPL, however. Instead, Mr Ching and Mr Tee each contributed $50,000 to AFPL's initial paid-up capital. According to Mr Tee, half of his shares (*viz*, 25% of the shares in AFPL) were held on trust for Mr Ching.

Events leading to the commencement of the action

10 It was not disputed that Mr Ng effectively ran AFPL from its inception or that it was awarded several cleaning contracts by the Oxley businesses. Ms Kor assisted Mr Ng by performing administrative and accounting work for AFPL (for which she was paid a salary) while continuing to run YFX. She was also appointed the company secretary of APFL.

11 An OCPL employee, Mr Jason Wang ("Mr Wang"), was in charge of AFPL's accounts. After AFPL's incorporation, YFX transferred funds to AFPL pursuant to monthly "management fee" invoices bearing dates between 15 June 2011 and 15 December 2012. Some sales revenue was also transferred from YFX to AFPL from January 2013 to May 2013. During this period, YFX referred and transferred employees and business opportunities to AFPL.

12 By Mr Tee's account, the fund transfers from YFX were part of the informal understanding between him and Mr Ng that YFX would cease operations after AFPL was incorporated. However, Mr Ng had control of both AFPL and YFX at the material time. Mr Ng and Ms Kor claimed that these fund transfers were made despite Ms Kor's objections, in order to ameliorate AFPL's weak financial position at a time when Mr Tee was unwilling to provide additional capital to AFPL.

13 Mr Tee was initially a signatory of AFPL's bank account. He withdrew as signatory in 2012 and was reinstated in March 2015. He claimed to have discovered various lapses in AFPL's management after his reinstatement, including AFPL's payment of "service fees" to YFX and the deployment of AFPL's employees to YFX's projects. According to Mr Ng, the "service fee" payments covered the salaries of YFX employees who were subcontracted to AFPL to address AFPL's shortage in manpower.

14 Around 2016, Mr Tee and Mr Ching grew concerned about Mr Ng's management of AFPL and decided that AFPL's operations had to be restructured. Mr Tee, Mr Ching and Mr Ng agreed in March 2016 that: (a) the use of AFPL's banking facilities had to receive Mr Tee's prior approval; (b) the salaries of AFPL's employees were to be paid via cheque instead of cash; and (c) AFPL was to hire Mr Ho Bok Cheok, who had previously worked with Mr Ching, as an operations manager.

15 The relationship between Mr Ng and Mr Tee broke down in spite of the restructuring efforts. In May 2016, Mr Ching began mediating share buyout discussions with Mr Ng on Mr Tee's behalf, but no deal was finalised. Mr Tee also engaged a private investigator and obtained evidence that Mr Ng had deployed AFPL's employees, equipment and resources for YFX's benefit. Mr Ng claimed that Mr Ching and Mr Tee arranged for AFPL's cleaning contracts with third parties to be terminated from May to June 2016. On 9 June 2016, Mr Ng removed Mr Tee as a signatory of AFPL's bank account.

16 It was not disputed that five contracts to clean the following premises were diverted from AFPL to YFX from April 2016 to July 2016:

(a) No 10 Tebing Lane @ Punggol Pte Ltd ("No 10 Tebing Lane

contract");

(b) Sports Hub @ Punggol Pte Ltd ("Sports Hub contract");

(c) 60 Punggol East @ Par Golf Resources Pte Ltd ("Par Golf contract");

(d) 223 @ Mountbatten Edge Pte Ltd ("Mountbatten contract"); and

(e) Edward Boustead Centre @ Boustead Services Pte Ltd ("Boustead contract").

We refer to the contracts at [16(a)]–[16(c)] as the "Punggol contracts". The Punggol contracts were transferred to YFX in April 2016, the Mountbatten contract was transferred to YFX in June 2016 and the Boustead contract was transferred to YFX in July 2016.

The Action and the decision below

17 Mr Tee commenced the Action on 12 July 2016. He alleged that the following instances of Mr Ng's conduct constituted oppression under s 216 of the Companies Act:

(a) diverting AFPL's contracts, employees and resources to YFX (respectively, the "Diversion of Contracts", "Diversion of Employees" and "Diversion of Resources" claims);

(b) causing AFPL to make wrongful "service fee" payments to YFX for services allegedly rendered and causing AFPL to pay for YFX's employees' wages ("Wrongful Payments claim");

(c) exposing AFPL to criminal liability by obtaining false supporting quotations from AFPL and YFX to secure contracts in contravention of s 6(*c*) of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) ("PCA") and submitting false salary declarations to the Ministry of Manpower in contravention of ss 20 and 22 of the Employment of Foreign Manpower Act (Cap 91A, 2009 Rev Ed) ("Exposure to Criminal Liability claim");

(d) removing Mr Tee as AFPL's bank signatory ("Bank Signatory claim");

(e) causing AFPL to retain moneys by refusing to declare dividends that were due to Mr Tee ("Non-Declaration of Dividends claim"); and

(f) causing AFPL to make a loan of approximately $200,000 to Mr Ng ("$200,000 Loan claim").

We elaborate on these claims when we analyse them individually below.

18 Mr Tee also pleaded a claim of conspiracy by unlawful means by Mr Ng, YFX and Ms Kor against Mr Tee and/or AFPL in respect of the Diversion of Contracts, Diversion of Employees, Diversion of Resources and Wrongful Payments claims.

19 The Judge's oral grounds of decision are recorded in the notes of evidence for the hearing on 18 March 2019. He did not issue written grounds.

20 The Judge preferred the account of the Defendants as regards the informal understanding that AFPL was founded on. The effect of the informal understanding between Mr Ng and Mr Tee was that Mr Ng was to run AFPL's

day-to-day operations but was to seek Mr Tee and Mr Ching's approval for major decisions. OCPL was to award its cleaning contracts to AFPL, and AFPL was to prioritise serving OCPL and sites related to it. Mr Ng and Mr Tee had not agreed that YFX would be shut down and its business transferred to AFPL.

21 Turning to the claims under s 216 of the Companies Act, the Judge made the following findings:

(a) In respect of the Diversion of Contracts claim, Mr Ng wrongfully diverted five of AFPL's contracts to YFX, as listed at [16] above. The Defendants were to account for the profits derived from the five diverted contracts.

(b) In respect of the Diversion of Employees claim, there was a reciprocal arrangement for AFPL and YFX to assist each other. The Judge ordered an account of the benefit derived by YFX from its uncompensated use of AFPL's employees, and a separate accounting of the benefit derived by AFPL for any uncompensated use of YFX's employees.

(c) In respect of the Diversion of Resources claim, surveillance reports disclosed YFX's *ad hoc* use of AFPL's company vehicle and YFX's contracts appeared to refer to the use of AFPL's scrubber. The Judge ordered an inquiry into the extent of YFX's use of AFPL's vehicle and equipment.

The Judge accepted the Defendants' explanations for the other impugned conduct and dismissed Mr Tee's other claims under s 216 of the Companies Act. The Judge ordered AFPL to be wound up.

22 The Judge found that Mr Tee's conspiracy by unlawful means claim succeeded only in respect of the five contracts that were found to have been wrongfully diverted to YFX. The claim did not succeed in relation to the diversion of employees and resources to YFX. The latter diversions were not carried out with the intention of causing damage to AFPL or Mr Tee but were part of a reciprocal agreement between AFPL and YFX to make mutual use of their employees and resources.

23 In July 2019, two persons were appointed to act as the joint and several liquidators of AFPL pursuant to the Judge's winding-up order.

Issues in these appeals

24 The following issues arise for our determination:

(a) In respect of the oppression claim:

(i) what the terms of the informal understanding between Mr Ng and Mr Tee were; and

(ii) whether, in the light of the informal understanding between them, Mr Ng's conduct constituted commercial unfairness to Mr Tee.

(b) In respect of the unlawful means conspiracy claim:

(i) whether Mr Tee was the proper plaintiff to bring the claim; and

(ii) if so, whether the elements of conspiracy were made out.

Preliminary matter: Conflict of interest in the conduct of CA 85

25 Mr Vinit Chhabra ("Mr Chhabra") and Ms Tan Yew Cheng ("Ms Tan") represented AFPL, Mr Ng, YFX and Ms Kor in CA 85. At the hearing, we highlighted that counsel had placed themselves in a position of actual conflict of interest by representing both AFPL and Mr Ng in their appeal against the Judge's decision. The Judge's finding that Mr Ng had wrongfully diverted AFPL's contracts, employees and resources to YFX amounted to a finding that he had failed to act in AFPL's interests. In these circumstances, there was a diversity of interest between AFPL and Mr Ng. It was not *prima facie* in AFPL's interest for Mr Ng to have control over the conduct of CA 85 on its behalf. Liquidators have also been appointed to administer the winding up of AFPL and there was no reason why Mr Ng should continue to give instructions on AFPL's behalf in CA 85.

26 For the purposes of these appeals, we consider the appellants in CA 85 to be limited only to Mr Ng, YFX and Ms Kor, and not to include AFPL, which ought to have been separately represented by the liquidators or solicitors appointed by the liquidators. We deal with the repercussions of Mr Chhabra and Ms Tan's representation of AFPL below when determining the issue of costs.

The claim in oppression

The applicable law

27 Section 216 of the Companies Act allows a shareholder to bring an action for relief where:

(a) the company's affairs or the directors' powers are being exercised in a manner oppressive to one or more shareholders, or in disregard of one or more shareholders' interests; or

(b) some act of the company has been done or threatened or a members' resolution is passed or proposed which unfairly discriminates against or is otherwise prejudicial to one or more shareholders.

28 The legal principles which apply to a s 216 action are well established and we therefore only set them out briefly. As this Court held in *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 ("*Sakae Holdings*") at [81], s 216 encapsulates four limbs: (a) oppression; (b) disregard of a shareholder's interests; (c) unfair discrimination; and (d) prejudice. The common element supporting these four limbs is commercial unfairness, which is found where there has been "a visible departure from the standards of fair dealing … which a shareholder is entitled to expect": *Over & Over Ltd v Bonvests Holdings Ltd and another* [2010] 2 SLR 776 ("*Over & Over*") at [77].

29 In assessing commercial unfairness, the court should bear in mind that the essence of a claim for relief under s 216 lies in upholding the commercial agreement between the shareholders of the company, irrespective of whether the agreement is found in the formal constitutional documents of the company, in less formal shareholders' agreements or, in the case of quasi-partnerships, in the legitimate expectations of the shareholders: *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 at [88]. This point was also emphasised in *Sakae Holdings* at [172], where this Court emphasised that it is the understanding between the shareholders of a company,

whether contained in a formal agreement or in an informal understanding, that generally will form the backdrop against which the court determines whether there has been commercial unfairness.

Mr Tee's standing to bring the s 216 claim

30 While this point was not disputed by the parties, we think it appropriate to make an observation as to Mr Tee's standing *qua* shareholder to bring an oppression claim under s 216 of the Companies Act.

31 We first consider the size of Mr Tee's shareholding in AFPL. The Judge accepted that Mr Tee held 25% of AFPL's shares on trust for Mr Ching. Section 216(1) of the Companies Act confers standing on "[a]ny member … of a company"; a member is defined under s 19(6A) of the Companies Act as one "who agrees to become a member of a company and whose name is entered" in its register of members. Even if Mr Tee and Mr Ching conducted themselves with the understanding that the former was to represent the latter's interests in relation to AFPL, Mr Tee must be regarded as a 50% shareholder in AFPL for the purposes of the s 216 claim.

32 This brings us to our main point. While claims under s 216 of the Companies Act are generally referred to as "minority oppression" claims, the touchstone is not whether the claimant is a minority shareholder of the company in question, but whether he lacks the power to stop the allegedly oppressive acts: *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 ("*Ng Kek Wee*") at [48]. Conversely, where a member is able to remedy any prejudice or discrimination he has suffered through the ordinary powers he possesses by virtue of his position as member, the conduct of the defendant cannot be said to be unfair to him.

33 In *Ng Kek Wee*, this Court held that the respondent was disentitled from claiming relief under s 216, as it held 53.625% of the company's shares, had majority voting power and could have used that voting power to take control of the company: at [55]. Table A of the Fourth Schedule to the Companies Act had been adopted wholesale in the company's constitutional documents, and nothing in the memorandum or articles of association conferred special powers of control on the appellant as managing director or precluded the participation of the respondent on the board: at [56]. The respondent could have participated in the board and could have removed the appellant as a director of the company at any time, notwithstanding that there was an agreement between the parties that the appellant was to run and manage the company although he was to report to the Exco: at [56], [57].

34 Table A of the Fourth Schedule to the Companies Act was also adopted wholesale in AFPL's constitutional documents. Under those provisions, Mr Tee as a 50% shareholder did not have majority voting power to unilaterally remove Mr Ng as a director, to appoint himself as director, or to otherwise participate in the management of AFPL. In these circumstances, he lacked the shareholder power to stop the allegedly oppressive acts and was not disbarred from claiming relief under s 216. Nor did he have directors' powers to stop the allegedly oppressive conduct. Although he disputed the ACRA records stating that his directorship commenced and ceased on the date of AFPL's incorporation on 6 June 2011, nothing turns on this. All that is relevant is that Mr Tee was no longer a director of AFPL when the allegedly oppressive acts took place.

Whether the s 216 claim was properly founded on personal wrongs

35 In *Sakae Holdings* at [88], the court distinguished between personal wrongs against the shareholder, for which relief under s 216 is available, and corporate wrongs against the company, which should be redressed through the commencement of a statutory derivative action under s 216A of the Companies Act. A director's breach of his fiduciary duties is a corporate wrong done to the company. The proper plaintiff in an action brought to seek redress for such wrongs is *prima facie* the company itself. That being said, acts that constitute a corporate wrong may concurrently be oppressive to an individual shareholder.

36 Mr Tee did not draw a clear distinction between personal and corporate wrongs in his framing of the oppression claim. He pleaded that Mr Ng's oppressive conduct involved: (a) breaches of the informal understanding between him and Mr Tee; and (b) breaches of fiduciary duties owed to AFPL. We reproduce portions of paras 28 and 28A of the amended statement of claim for illustration:

> 28. In breach of his agreement with [Mr Tee] and of his fiduciary duties to [AFPL], [Mr Ng] has refused, neglected and/or failed to cause the operations and employees of [YFX] to cease and to cause any and all contracts of [YFX] to be transferred to [AFPL].
>
> …
>
> 28A. Further, in breach of his fiduciary duties to [AFPL], [Mr Ng] diverted and/or caused contracts to be awarded and/or sub-contracted to [YFX] … instead of [AFPL].

37 The breaches alleged in para 28, to the extent that they were in breach of the understanding between Mr Ng and Mr Tee, could constitute personal wrongs against Mr Tee. But the extent to which Mr Ng's breaches of fiduciary duties to AFPL, as alleged for example in para 28A, separately amounted to

distinct personal wrongs against Mr Tee was not apparent from the parties' submissions or addressed by the Judge.

38 In *Sakae Holdings*, this Court set out a framework to ascertain if a claim pursued under s 216 properly involved a personal wrong, or if the claim concerned a corporate wrong and was an abuse of process that should have been pursued under s 216A instead (at [116] *et seq*):

> (a) Injury
>
> (i) What is the real injury that the plaintiff seeks to vindicate?
>
> (ii) Is that injury distinct from the injury to the company and does it amount to commercial unfairness against the plaintiff?
>
> (b) Remedy
>
> (i) What is the essential remedy that is being sought and is it a remedy that meaningfully vindicates the real injury that the plaintiff has suffered?
>
> (ii) Is it a remedy that can only be obtained under s 216 (*eg*, a winding-up order or a share buyout order) and not under s 216A?

39 Applying this framework to the facts in *Sakae Holding*, the Court was satisfied that it was not an abuse of process for the minority shareholder ("Sakae") to bring a s 216 claim (at [125]–[129]):

> (a) The real injury which Sakae sought to vindicate was the injury to its investment in the joint venture and the breach of its legitimate expectations as to how the company's affairs and its financial investment was to be managed. Sakae had funded the joint venture with the legitimate expectation that its funds would not be siphoned away or mismanaged in the way that they were. All but one of the impugned transactions had been carried out in breach of Sakae's rights that had

been carefully negotiated for in the joint venture agreement and/or documents executed at the inception of the parties' joint venture, and sham documents had been created to conceal the transactions. The facts of the case, as a whole, presented a picture of systemic abuse in relation to the company's management.

(b) Dealing specifically with breaches of the appellant directors' fiduciary duties, while the wrongs that Sakae complained of constituted wrongs against the company, they separately amounted to a distinct personal wrong against Sakae. Sakae had allowed one Ong Siew Kee ("Andy Ong") to manage the company's affairs because of the longstanding friendship between Andy Ong and Sakae's chairman. Andy Ong knew that Sakae trusted him and deliberately took advantage of that trust to use the company as a vehicle through which he cheated Sakae. The systemic abuses benefitted one group of shareholders (*ie*, those entities controlled by Andy Ong) at the expense of the other (*ie*, Sakae).

(c) The essential remedy sought was an exit of the joint venture agreement, either through a winding up of the company or a buyout of Sakae's shares in the company. These were the only remedies that enabled Sakae to meaningfully vindicate the real injury it suffered, namely, the misuse of its investment in the company and the breach of its expectations as to how the company would be managed. While restitutionary orders were also sought, these were incidental to the essential remedy sought and were necessary in so far as they ensured a fair value exit for Sakae.

(d) The remedies that Sakae sought were only available under s 216.

40 Applying the *Sakae Holdings* framework to the present facts will require us to determine what Mr Tee's legitimate expectations were *qua* shareholder of AFPL. We turn now to this issue.

The informal understanding between Mr Ng and Mr Tee

41 The parties agreed that AFPL was established as a quasi-partnership based on the relationship of mutual trust and confidence between Mr Ng and Mr Tee and that the terms of the informal understanding between them were crucial to determining if any unfairness was occasioned by Mr Ng's management of AFPL. We consider this agreement on the nature of AFPL to be correct. It is clear to us in the circumstances in which AFPL was incorporated, with the parties orally agreeing on terms which would not be reflected in the company's Memorandum and Articles of Association, and the close relationship between Mr Ng and Mr Tee at the time, that AFPL was a quasi-partnership. Each party was to bring his different capabilities to the business venture: Mr Ng was to take charge of AFPL's everyday management, drawing upon his experience in helping his wife with her own cleaning services business; Mr Tee was to provide the capital and business connections necessary for AFPL's success.

42 According to Mr Tee, the terms of the informal understanding at the time of AFPL's incorporation were that:

(a) He would source AFPL's capital, but 50% of AFPL's issued shares would be allotted to Mr Ng.

(b) He and Mr Ng would have an equal right to participate in AFPL's day-to-day operations and would have an equal say in AFPL's management.

(c) Mr Ng would cause YFX to cease operations within three months of AFPL's incorporation and would transfer YFX's contracts and employees to AFPL. It would have been "inconceivable" for him and Mr Ching to invest in AFPL while allowing YFX to continue operating and to compete with AFPL.

43 Mr Ng claimed that the informal understanding was, instead, that:

(a) Mr Tee and Mr Ching would provide financial support for AFPL, and Mr Ching would arrange for cleaning contracts from the Oxley businesses to be awarded to AFPL.

(b) Mr Ng would run AFPL's operations but would seek Mr Ching and Mr Tee's approval for major decisions.

YFX's operations were not discussed as part of the informal understanding between them.

44 The Judge preferred the Defendants' account of the informal understanding. Mr Tee in CA 86 challenged only the finding that there had been no agreement for YFX to be shut down after AFPL's incorporation. We therefore adopt the Judge's findings in respect of the unchallenged terms of the informal understanding, as set out at [43(a)] and [43(b)].

45 The Judge's reasons for finding that there was no agreement to close down YFX were as follows:

(a) First, shutting down YFX would have been an important decision involving Ms Kor. It was incredible that Mr Ng would have readily agreed to this without first consulting her.

(b) Second, if YFX were to be shut down and its business transferred to AFPL, this would have been treated as a capital contribution by Mr Ng. On the contrary, the parties referred to Mr Ng throughout as not having contributed capital to AFPL.

(c) Third, AFPL's accounts were kept and prepared by OCPL and AFPL's payments of "service fees" to YFX were easily available to Mr Tee and Mr Ching. Mr Ng would have done more to conceal YFX's continued operations if he had agreed to transfer YFX to AFPL.

(d) Fourth, Mr Tee's argument that he and Mr Ching would not have allowed YFX to continue running was not compelling, as it did not follow that both companies were necessarily competitors.

(e) Finally, although the transfer of YFX's profits to AFPL was strong evidence that there was an understanding to shut YFX down, Mr Ng and Ms Kor's explanation that the transfers were made to address AFPL's financial difficulties was not implausible, having regard to their knowledge and sophistication, or lack thereof.

46 With respect, we have various difficulties with the Judge's views on this issue. On Mr Ng and Ms Kor's own account, Mr Ng controlled many aspects of YFX's finances and business decisions in 2011 and 2012, notwithstanding that YFX was Ms Kor's sole proprietorship. For instance, the decision to transfer YFX's moneys, business and employees to AFPL appeared to have been driven

by Mr Ng over Ms Kor's objections. Further, from the time that AFPL was formed, Ms Kor took on a great deal of work for it which was really not compatible with her later avowed intention to continue her own business. She prepared quotations and invoices for AFPL in addition to performing her legal role as company secretary. It bears mention that this was remunerated employment. Ms Kor was not simply lending a hand to help her husband from time to time.

47 Secondly, the Judge had little basis to find that AFPL and YFX were not competitors or to summarily dismiss Mr Tee's argument that his decision to invest in AFPL would have been inconsistent with an agreement for YFX to continue operating. On the face of it, both AFPL and YFX provided cleaning services. That the type of services provided was the same was more important than the difference in degree alleged by the Defendants (*ie*, AFPL had big contracts for commercial and residential properties while YFX serviced mostly small condominiums). This was consistent with, and shown by, Mr Ng's later business decision to make use of each business's employees and resources for the other's benefit.

48 We also do not agree with the Judge's assumption that Mr Ng and Ms Kor were unsophisticated business people; by all accounts, they ran both businesses fairly successfully. Ms Kor also had access to Randy Kor's contacts and experience. When these matters are taken together with the transfer of profits from YFX to AFPL from 2011 to 2013 as well as the transfer of contracts and manpower to AFPL, our view is that it is more likely than not that there was an understanding between Mr Ng and Mr Tee that YFX would be shut down after AFPL was incorporated. Indeed, it is very difficult to accept as truthful Ms Kor's account of her transferring the profits of YFX to APFL simply to help

her husband in his new business. The Judge himself recognised that the transfer of the profits was strong evidence for the existence of the understanding. When it is recalled (from the facts at [6] above) that YFX was only set up in late 2010 and that in May 2011 at least four of that business's nine cleaning contracts had come from Mr Tee and Mr Ching who would have expected these to be taken over by AFPL in due course, it is even less plausible that the transfer of profits was made voluntarily as a gift from Ms Kor to her husband.

49 That being said, while the evidence supports Mr Tee's account that there was an *initial* understanding for YFX to be closed after AFPL was incorporated, various text messages show that Mr Tee was aware of and tolerated YFX's continued existence after 2012.

50 Mr Tee deposed that Mr Ng had explained to him that YFX required until June 2012 to fully cease its operations and to transfer its contracts and workers to AFPL. Mr Tee accepted Mr Ng's explanation on account of their familial relationship. Mr Ng had assured him that YFX would continue transferring profits to AFPL until it ceased to operate. When he confronted Mr Ng in September 2012 about YFX's continued operations, Mr Ng explained that YFX had been transferred to his brother-in-law, Randy Kor. Mr Tee's position was that he had no objections if YFX continued to operate after it was divested or sold to Randy Kor. In that situation, Mr Ng would no longer be in a position of conflict of interest.

51 To this end, Mr Tee testified at trial that he only found out in May 2016 that Ms Kor continued to own YFX. This claim is, however, inconsistent with the following WhatsApp messages he exchanged with Mr Ng on 2 May 2015:

Mr Tee:	*Why so many worker still employ by [YFX]? Can make it clean cut? Transfer for to [AFPL].*
Mr Ng:	Not enough quota bro.
Mr Tee:	Why [YFX] got quota?
Mr Ng:	We got quota all dispersed out. 2 quota take from [YFX]. 1 at sun plaza, 1 at Ubi. N irving. …
	Not own people nobody want to let u use.
Mr Tee:	Ok try not to complicate things. I told you before in the beginning.
	[YFX] doesn't belong to [AFPL].
	Unless it is own by [AFPL] than no issue. If not it is not very healthy to have *related party transaction.*
Mr Ng:	Ok. Really lucky *they* let us use. To think back they use themselves can make more bro.
Mr Tee :	U decide. My opinion only.
Mr Ng:	Ok I know bro. i think right than I do.
Mr Tee:	Ok.

[emphasis added]

52 Although Mr Tee performed an ACRA search on 3 May 2015 that revealed that Ms Kor owned YFX, he claimed to have taken Mr Ng at his word that Ms Kor was only the nominal owner of YFX and that the true owner and manager of YFX was her brother. But even if this were true, he also alluded to Ms Kor's continued ownership of YFX in a WhatsApp conversation with Mr Ching on 16 March 2016:

Mr Ching:	[Mr Ng] has let success goes into his head.
…	
Mr Tee:	Yes. You will know more after u investigate.
Mr Ching:	I will not give up [AFPL] without letting him know he is cheating the wrong people.
Mr Tee:	*I told him at least 4 times to close his ipt company.*

…

Mr Tee: I said *you are inviting trouble keeping your wife co around.*

[emphasis added]

Mr Tee explained at trial that the "ipt" company referred to YFX, which was an "interested-party transaction company".

53 Mr Tee referred to YFX as a "related party" on 2 May 2015 and told Mr Ching on 16 March 2016 that he had told Mr Ng to close "[his] wife['s] co[mpany]" on multiple occasions. We infer from these statements that he knew that Ms Kor owned YFX at least from 3 May 2015, when he performed the ACRA search on YFX confirming her continued ownership of the business. This, however, did not mean that Mr Tee was satisfied with these arrangements; it was clear that he disapproved of YFX's continued operations and its close business relationship with AFPL. It appeared that it was in this context that Mr Ng sought to portray himself as not involved in YFX's operations in his conversation with Mr Tee on 2 May 2015 (at [51] above), referring to YFX in the third person (*viz*, "they").

54 In the light of these interactions, we take the view that Mr Tee's modified legitimate expectation from May 2015 onwards as understood and accepted by Mr Ng was that YFX would continue running but Mr Ng would not be in a position of conflict of interest in relation to it. In other words, AFPL's dealings with YFX should only benefit AFPL; YFX was not to compete with AFPL or to gain a commercial advantage at AFPL's expense. That this departed from the initial informal understanding between Mr Ng and Mr Tee is not surprising. Some degree of informality and flexibility in arrangements is to be expected in quasi-partnerships. As observed in *Over & Over* at [83], business

relationships in quasi-partnerships are "thin in words but thick in trust", "underpinned by the implicit belief that each will do right by the other without the need to spell out in embarrassing detail what is expected or needed".

55 Mr Tee's legitimate expectations in this regard overlapped with the fiduciary duties that Mr Ng owed to AFPL. As expressed in *Sakae Holdings* at [135]:

> … Fiduciary duties in the classic sense encompass the two distinct rules proscribing a fiduciary from making a profit out of his fiduciary position (namely, the no-profit rule) and putting himself in a position where his own interests and his duty to his principal are in conflict (namely, the no-conflict rule) …

56 To summarise the discussion therefore, breach of fiduciary duties by a director does not by itself constitute oppression of a shareholder. It is only when an injury is caused to the shareholder which is distinct from the injury caused to the company and such injury amounts to commercial unfairness that oppression is made out. The commercial unfairness in turn must have its basis in a breach or violation of the shareholder's legitimate expectations of the manner in which the company is to be run. It is against this background that we turn our attention to the conduct that was said to constitute oppression.

The conduct on Mr Ng's part said to constitute oppression

(1) Diversion of Contracts claim

57 Mr Tee's case at trial and in CA 86 was that Mr Ng's diversion of the following contracts from AFPL to YFX was oppressive to him:

(a) all the contracts that YFX entered into after AFPL's incorporation, which should have been transferred to AFPL pursuant to the terms of the initial understanding;

(b) the specific contracts to provide cleaning services to (i) Gillenia @ 35 Rosyth Road, commencing 1 April 2014 ("the Gillenia contract"); and (ii) Stellar RV @ 308 River Valley Road, commencing 16 December 2015 ("the Stellar RV contract"); and

(c) the five contracts that were transferred to YFX from April to July 2016, as listed at [16].

We deal with each category of contracts in turn.

(A) THE CONTRACTS THAT YFX ENTERED INTO AFTER AFPL'S INCORPORATION

58 In the light of our finding that the parties reached the understanding in May 2015 that YFX need not be closed, no oppression was occasioned by YFX's entry into contracts thereafter or by Mr Ng's failure to cause YFX to transfer post-May 2015 contracts to AFPL. However, up till the time Mr Tee found out about Ms Kor's continued ownership of YFX and agreed to it, Mr Ng was under a continuing obligation to ensure that all contracts in YFX's name were transferred to AFPL. In allowing YFX to continue to run existing contracts and take on new ones after AFPL was incorporated up to end April 2015, Mr Ng was preferring the interest of YFX over that of AFPL as well as acting contrary to Mr Tee's legitimate expectations. We allow Mr Tee's appeal in respect of the contracts which YFX had after AFPL's incorporation but only up to end April 2015.

(B) THE GILLENIA AND STELLAR RV CONTRACTS

59 Mr Tee identified the Gillenia and Stellar RV contracts as contracts that Mr Ng diverted from AFPL to YFX in breach of his fiduciary duties to AFPL.

60 Mr Ng explained that the managing agent for the Gillenia and Stellar RV management corporation strata titles had asked him *qua* director of AFPL to submit quotations for those cleaning projects. He made a business decision not to submit quotations on AFPL's behalf as AFPL suffered a manpower shortage at the time. He informed Ms Kor of these projects and that AFPL would not be bidding for them. Ms Kor decided to submit quotations for the two contracts on YFX's behalf. The contracts were eventually awarded to YFX. The Judge did not find that Mr Tee's oppression claim succeeded on this issue but did not provide any reasons.

61 In our view, Mr Ng's conduct as regards the Gillenia and Stellar RV contracts should be considered as two interrelated decisions:

(a) first, his decision to cause AFPL to forgo the contracts; and

(b) second, his decision to tell Ms Kor about the contracts, thereby enabling YFX to bid for and eventually acquire them.

62 The court is normally reluctant to accept that managerial decisions can amount to unfairly prejudicial conduct, save for cases of serious mismanagement of a company's business: see *Sakae Holdings* at [147], citing *Re Elgindata Ltd* [1991] BCLC 959 at 993. It was common ground between the parties that AFPL was facing a shortage of manpower at the time. Mr Tee's accounting expert, Mr Owen Hawkes ("Mr Hawkes"), corroborated that AFPL suffered a deficit of employees for 38 of the 39 months during which its monthly

manpower requirements were estimated (*ie*, from October 2013 to December 2016). We accept, in these circumstances, that it could have been a *bona fide* decision on Mr Ng's part to cause AFPL not to take on further contracts because the company was already shorthanded. We hesitate to make this finding, however, given that AFPL had an established practice of subcontracting manpower from YFX to meet its manpower shortfalls and YFX did have sufficient manpower at the time to enable AFPL to service the contracts, seeing that it was able to acquire the two contracts that AFPL did not bid for.

63 The propriety of Mr Ng's decision that AFPL should not bid for the Gillenia and Stellar RV contracts must also be considered in the light of his subsequent decision to inform Ms Kor about these contracts. Mr Ng's knowledge of the two contracts was business information that he acquired in the course of his management of AFPL. Passing along such information to his wife, who was running a firm in the same line of business, was a breach of his fiduciary duty and, specifically, of the no-conflict rule.

64 Furthermore, although Mr Ng stated in evidence that he only informed Ms Kor about the contracts and that she submitted quotations on YFX's behalf, we are doubtful that he was as removed from YFX's business as he wanted the court to believe. Mr Tee argued that Mr Ng's involvement in YFX was significant: three of the managing agents of the property developments that contracted with YFX variously identified Mr Ng as the "boss" and "point of contact" for YFX. Indeed, the letter confirming the award of the Gillenia contract to YFX was addressed to Mr Ng.

65 All things considered, Mr Ng had a significant conflict of interest in relation to AFPL and YFX. Any likelihood that he was acting *bona fide* when

he caused AFPL to forgo the two contracts is diminished by his subsequent act of allowing YFX to profit from its acquisition of the forgone contracts. We find that Mr Ng effectively diverted the contracts from AFPL to YFX. This was both a breach of his fiduciary duty to AFPL and a distinct personal wrong against Mr Tee, who had invested in AFPL with the legitimate expectation that Mr Ng could be trusted to manage AFPL without placing himself in a conflict of interest. We accordingly allow Mr Tee's appeal in respect of the diversion of these contracts.

(C) THE FIVE CONTRACTS TRANSFERRED TO YFX FROM APRIL TO JULY 2016

66 Mr Ng and Ms Kor argued in CA 85 that the Judge erred in finding that the Punggol contracts, Mountbatten contract and Boustead contract were wrongfully diverted from AFPL to YFX, given the circumstances in which the five contracts were transferred. Their arguments were as follows:

(a) The Punggol contracts were rightfully YFX's to begin with. Ms Kor had transferred the Sports Hub and No 10 Tebing Lane contracts from YFX to AFPL in September 2011 and May 2012 respectively to support AFPL. Mr Ng subsequently secured the Par Golf contract on AFPL's behalf on the basis that the worksites under the three Punggol contracts were closely located and were cleaned by the same YFX employee who was subcontracted to AFPL. YFX "took back" the three Punggol contracts after Mr Ching expressed his unhappiness about the arrangement to second manpower from YFX.

(b) The Mountbatten and Boustead contracts were transferred to YFX in June and July 2016 after the May 2016 share buyout negotiations had occurred (see [15] above). Mr Ching had threatened to

> close down AFPL and to inform its customers to contract with a new cleaning company. Mr Ng took Mr Ching's threat seriously and alerted the parties to the Mountbatten and Boustead contracts that AFPL might close down. The fairness of his transfer of these contracts to YFX had to be considered in the context of Mr Ching and Mr Tee's actions in causing AFPL's Oxley-related projects to be terminated during the same period.

67 The Judge found that the five contracts in question were diverted to YFX when the relationship between the parties broke down and after Mr Ching caused the Oxley businesses to divert their contracts from AFPL to a third party cleaning company, Global Commercial Cleaning Pte Ltd ("GCC"). The Judge held that, regardless of such action, Mr Ng had no excuse to divert the contracts to YFX.

68 We agree with the Judge's findings on this issue. YFX was not entitled to the Sports Hub and No 10 Tebing Lane contracts, having previously transferred them to AFPL in line with the original understanding that YFX was to close down. Mr Ng therefore acted wrongfully in diverting them back to YFX. It followed that he had no commercial justification for diverting the Par Golf contract to YFX simply because the worksite for the Par Golf contract was closely located to the cleaning sites under the Sports Hub and No 10 Tebing Lane contracts.

69 As for the Mountbatten and Boustead contracts, the High Court in *Leong Chee Kin (on behalf of himself and as a minority shareholder of Ideal Design Studio Pte Ltd) v Ideal Design Studio Pte Ltd and others* [2018] 4 SLR 331 observed at [76] that the law does not condone a tit-for-tat approach to

shareholder relations. Regardless of the breakdown of the relationship between Mr Ng, Mr Tee and Mr Ching at the material time or any alleged threats that the latter two men had made, Mr Ching and Mr Tee had no management control over AFPL and could not have caused it to shut down. Even if AFPL's Oxley-related contracts were terminated, Mr Ng was not precluded from ensuring that AFPL performed its other existing contracts. Any grievances that he had could have been managed through proper means, such as his continued participation in the share buyout negotiations or by taking legal action against Mr Ching and Mr Tee for their alleged interference with AFPL's contractual relations. In the circumstances, it was wrong for him to breach Mr Tee's legitimate expectations by diverting AFPL's contracts to YFX. We accordingly uphold the Judge's finding of oppression in respect of the five diverted contracts.

(2) Diversion of Employees claim

70 The Judge found that there were two limbs to Mr Tee's Diversion of Employees claim:

(a) First, in relation to an alleged transfer of workers from AFPL to YFX, the Judge found that workers were transferred both ways and that the net figure of workers transferred was essentially zero. There was no commercial unfairness in this regard. In so far as workers were transferred as a function of the contracts diverted from AFPL to YFX, any losses or gains from such transfer would be accounted for in respect of that claim.

(b) Second, in respect of the alleged diversion of AFPL's workers to work on YFX's sites, he found that there was a "reciprocal arrangement between AFPL and YFX to assist each other". He accepted that both

> AFPL and YFX had a shortage of workers and that Mr Ng deployed workers with spare time or capacity between the companies to meet manpower demands. The Judge held, however, that any uncompensated deployment of workers would be oppressive. He accordingly ordered an account of the benefit that both companies derived from the uncompensated use of the other's workers.

71 Mr Tee argued in CA 86 that any transfer of workers exacerbated AFPL's manpower shortage. He also never agreed to a reciprocal arrangement between AFPL and YFX. Such an arrangement was commercially unfair because YFX did not compensate AFPL for its use of the latter's workers.

72 In CA 85, Mr Ng and Ms Kor defended the Judge's finding that the cross deployment of workers was mutually beneficial, but qualified that any deployment was *ad hoc* and that it was implicit that both businesses could use the other's labour without compensation. The consideration under this arrangement was the ready supply of manpower from the other company.

73 We do not see any reason to depart from the Judge's findings on this claim. As regards the transfer of workers, Mr Hawkes' analysis established that 11 workers were transferred from AFPL to YFX and 12 workers were transferred from YFX to AFPL. We do not find that a mutual transfer of a practically equal number of workers was commercially unfair or even a wrong in respect of AFPL. In this respect, we assume that the transfers were carried out in accordance with all applicable labour laws. The diversion of workers from AFPL to work for YFX on its sites while these workers were still being paid by AFPL was, however, a different matter. Such diversion was capable of constituting a breach of Mr Ng's fiduciary duties to AFPL.

74 Whether arranging for the mutual deployment of AFPL and YFX's workers was a correct or wrongful policy for Mr Ng to undertake depends on whether a fair value was paid to APFL for the use of such labour. It is plausible that there was some commercial justification for Mr Ng's decision to run AFPL in such a way that it had a close working relationship with YFX. To this extent, we accept that Mr Ng might have engaged in a *quid pro quo* arrangement of sorts with YFX. That he used his connections with YFX to benefit AFPL is evident from his conversation with Mr Tee on 2 May 2015 (excerpted at [51] above), when he explained how he subcontracted workers from YFX to meet AFPL's manpower needs. It would not be wrong in this context for him to deploy AFPL's workers to assist YFX when needed if this was done on a commercial arms-length basis.

75 It is disingenuous for the appellants in CA 85 to claim that the arrangement between AFPL and YFX was to use each other's workers "without charge". This was untrue: YFX charged "service fees" to AFPL for its use of YFX's workers. (These payments form the basis of Mr Tee's Wrongful Payments claim, which we address below.) It would be wrong for Mr Ng to make AFPL pay YFX for the use of YFX's workers while YFX made uncompensated use of AFPL's labour. Any conduct on Mr Ng's part that caused AFPL to deploy workers to YFX without receiving a fair value in return would be a breach of his duty to AFPL.

76 In our view, this breach of duty was, beyond being a corporate wrong, also oppressive to Mr Tee's interests as a shareholder. This was because it demonstrated that Mr Ng was running AFPL for the benefit of YFX, a firm that Mr Tee legitimately expected him to distance himself from if it was not going

to be closed down entirely. The next claim, considered below, is another example of the same type of oppression.

(3) Diversion of Resources claim

77 The Judge found that there was surveillance evidence of YFX's *ad hoc* use of AFPL's company vehicle. YFX's contracts also referred to equipment that belonged to AFPL. The Judge ordered an inquiry into the exact extent to which YFX benefitted from the use of AFPL's vehicle and equipment.

78 Mr Ng's and Ms Kor's written case in CA 85 was that there was no "systematic" use of AFPL's company vehicle. The "sparse" sightings of YFX's use of AFPL's company vehicle to transport its employees and supplies were only in the nature of "convenient help" rendered to YFX. There was "a complete absence of evidence" of any use of AFPL's equipment. Accordingly, an inquiry into YFX's use of AFPL's vehicle and equipment should not have been ordered. In the alternative, even if YFX had made use of AFPL's equipment, it was not commercially unreasonable that it had done so given that YFX had lent its financial and manpower resources to support AFPL's operations.

79 We disagree with the appellants in CA 85. Although Mr Ng managed AFPL in such a way that it had a close business relationship with YFX, the commercial understanding he had with Mr Tee was that the two companies were to be run separately. To that end, it would have been commercially unfair if AFPL's resources were utilised by YFX for no consideration. Although there was limited evidence of YFX's use of AFPL's vehicle and only circumstantial evidence in relation to its use of AFPL's equipment, the Judge was well aware of these limitations. We therefore uphold his order for an inquiry into the exact extent of YFX's use of AFPL's resources, being an inquiry which would be

undertaken under the auspices of AFPL's liquidators and which would be necessary to ascertain what amounts if any were due from YFX to AFPL in respect of the same.

(4) Wrongful Payments claim

80 The parties did not dispute that AFPL made "service fee" payments to YFX for its use of the latter's employees. The Judge found that although YFX charged a premium for the use of its employees, the premiums amounted to less than $9,000 and Mr Ng's explanation that the premiums covered workmen insurance and medical and other expenses was reasonable. No commercial unfairness was occasioned by the payment of these "service fees".

81 Mr Tee submitted that Mr Ng acted in "clear conflict of interest" in causing premiums to be paid to YFX, thereby preferring YFX's interests over AFPL's. Mr Ng and Ms Kor responded that Mr Tee was aware of any payments made by AFPL. Mr Wang, the OCPL employee in charge of AFPL's accounts, would have flagged any improper payments. Furthermore, there was no commercial unfairness caused by the "service fee" payments. Mr Hawkes accounted for the payments made in a breakdown comprising salaries, foreign worker levy payments, the purchase of cleaning materials, administrative payments, insurance payments and medical expenses.

82 We make the following observations about the payment of premiums under the "service fee" arrangement. First, while Mr Wang was employed by OCPL and was placed in charge of AFPL's accounts, there was no reason why Mr Tee would have been apprised of AFPL's accounts, especially when it did not appear that he was formally involved in OCPL's management or business. Second, we agree with the Judge's reasoning to the extent that Mr Ng provided

a reasonable explanation that the premiums were used to pay for the occasions when YFX's workers were used. We do not, however, take Mr Ng's explanation at face value and hold that AFPL's payment of fees would have been oppressive if the fees paid exceeded the market rate for such services. This is a matter for AFPL's liquidators to look into.

(5) Exposure to Criminal Liability claim

83 Mr Tee claimed that Mr Ng exposed AFPL to criminal liability by obtaining false supporting quotations from AFPL and YFX to secure contracts and by submitting false declarations to the Ministry of Manpower. The Judge dismissed both aspects of this claim. Mr Tee appealed only against the Judge's finding that Mr Ng's procurement of supporting quotations was not oppressive.

84 It was not disputed that OCPL's managing agent, Ocean IFM Pte Ltd ("Ocean IFM"), had the practice of obtaining quotations from three companies when procuring cleaning services, and that it would contract with the company that provided the lowest quotation. Mr Ng acknowledged at trial that when AFPL provided quotations upon Ocean IFM's request, he would cause YFX to provide supporting quotations so that AFPL's quotations would be the lowest amongst those solicited. He claimed not to remember instances where AFPL submitted quotations to support YFX's bids. Mr Tee argued that this practice contravened s 6(*c*) of the PCA, which criminalises corrupt transactions.

85 The Judge dismissed this claim on the basis that Ms Lindsay Tan ("Ms Tan"), an OHL employee, testified that "the practice of giving supporting quotation[s]" was required by Ocean IFM and was a practice that the Oxley businesses were engaged in.

86 While Ms Tan did not expressly acknowledge Mr Ng's practice of obtaining supporting quotations from YFX to support AFPL's bids, the evidence from her and Mr Ching indicates that the process by which the Oxley businesses procured their cleaning contracts was loose and informal. The Oxley businesses prioritised business relationships over strict compliance with a formal tendering process.

87 Mr Ching qualified that while the Oxley businesses recommended their "preferred partners" to their managing agents, the managing agents had to ensure that the party eventually offered the contract provided the lowest tender bid. This qualification, however, conflicted with his later evidence, which suggested that Oxley-related projects were granted to "preferred partners" as a matter of course:

> Q. … [I]n fact, you have admitted this morning that all Oxley projects and Oxley-related projects after June 2011, right up to end 2015, were referred to AFPL, yes?
>
> A. Yes, he's our preferred contractor during that period.
>
> …
>
> A. Your Honour, I think there is a proper tendering process by the [managing agent]. He's not the only contractor but he's the contractor that has been appointed *because he's the preferred contractor.*
>
> [emphasis added]

He repeated, shortly after:

> Q. Of course, as things stood then, all Oxley projects were continuing to be referred to AFPL?
>
> A. Yes, *because he was our preferred partner.*
>
> [emphasis added]

88 Ms Tan's evidence also alluded to the tendering process as being a mere formality. She acknowledged that when GCC became the Oxley businesses' preferred partner in 2016, she coordinated with it to ensure that its bids were the lowest amongst those submitted:

> Q. So you received the two quotes, what did you do?
>
> A. Called this Jack to ask him to revise his price.
>
> Q. Who is Jack?
>
> A. From this Global Commercial Cleaning.
>
> Q. You asked him to revise the price to what price?
>
> A. To match the lowest.
>
> Q. … [W]ould it be correct to say that you wanted Global Commercial Cleaning to get the cleaning contract?
>
> A. Global Commercial Cleaning is our preferred working partners for cleaning services at that time.

89 The test for commercial unfairness does not depend strictly on what is lawful. As observed by Vinodh Coomaraswamy J in *Lim Kok Wah and others v Lim Boh Yong and others and other matters* [2015] 5 SLR 307 at [100], unlawful conduct of a technical nature, *eg*, a trivial breach of director's duties, is not necessarily commercially unfair. Although it was improper for Mr Ng to procure supporting quotations from YFX to support AFPL's bids for Oxley-related contracts, this would not impact negatively on AFPL's business. Further, it does not lie in Mr Tee's mouth to allege it was not commercially fair since the Oxley tendering process as described by Mr Ching and Ms Tan appeared to be a mere formality. The practice of procuring quotations was geared towards ensuring that AFPL, which was the Oxley businesses' preferred partner at the time, would be awarded the Oxley-related contracts regardless. We therefore agree with the Judge that Mr Ng's conduct in this regard was not oppressive.

(6) Bank Signatory claim

90 The Judge found that Mr Ng's removal of Mr Tee as a bank signatory in June 2016 was not oppressive, as Mr Tee had unreasonably declined to approve mid-month salary payments on the basis that supporting documents had not been provided. This was contrary to AFPL's usual practice, which was to reconcile supporting documents only when salary payments were made at the end of each month.

91 We respectfully disagree with the Judge's analysis. The Judge's description of AFPL's accepted practice did not take account of the internal restructuring efforts that Mr Ng, Mr Tee and Mr Ching had put in place after their discussions in March 2016 (see above at [14]). The e-mail from Mr Ng sent on 31 March 2016 recording their discussions stated that Mr Tee would have "priority approval" over all banking facilities. Mr Tee's e-mail response acknowledged that these efforts would involve "inconvenient and cumbersome procedures", but expressed a hope that a new norm would be created to "restructure the company to make it stronger".

92 As Mr Tee highlighted in CA 86, Mr Ng was able to approve salary payments in May 2016 notwithstanding Mr Tee's refusal to approve the salary payments in that month. This indicated that Mr Tee's refusal to approve salary payments did not pose a true obstacle to AFPL's operations. Considering the circumstances, we find that it was oppressive for Mr Ng to remove Mr Tee as a signatory in contravention of the system of internal controls that he had agreed to implement. We therefore allow Mr Tee's appeal in CA 86 on this issue.

(7) Non-Declaration of Dividends claim

93 Mr Tee claimed that Mr Ng acted oppressively to him by not making dividend payments in respect of AFPL. The Judge dismissed this claim, finding instead that Mr Ng treated Mr Ching as AFPL's financial decision-maker and that it was Mr Ching who determined when dividends should be declared.

94 In CA 86, Mr Tee argued that AFPL's articles of association provided that the declaration of dividends was within Mr Ng's purview *qua* director, and that Mr Ching was not the ultimate decision-maker in this regard.

95 We turn again to the parties' interactions to determine whether Mr Ng acted in a commercially unfair manner to Mr Tee in failing to declare dividends.

96 It was not disputed that dividends were first declared in February 2015. This first declaration was precipitated by an e-mail that Mr Wang sent to Mr Ng and Mr Tee on 2 February 2015:

> Mr Ching propose [*sic*] to have a board meeting … to discuss the following matters:
>
> 1) P&L accounts up to Dec 2014.
> 2) Company projects …
> 3) Dividend.
> 4) Any other matter.

This meeting was held on 3 February 2015. The meeting minutes dated 3 February 2015 support Mr Ng's account that it was Mr Ching who made financial decisions in AFPL. During the meeting, it was Mr Ching who proposed to increase Mr Ng's salary from $5,000 to $7,000 and to grant him a six-month performance bonus. The meeting minutes did not record the discussion on dividends, but Mr Ng explained that Mr Ching later instructed

him to pay Mr Tee his share of the dividends so that their initial $100,000 capital investment in AFPL could be recouped.

97 Mr Ng's account that he was not allowed to retain his share of the dividends was corroborated by the WhatsApp messages between him and Mr Tee on 10 February 2015:

Mr Tee:	Bro. Ching message me that he want to take out 30k each for returning of the working capital. U check with Jason [Wang].
Mr Ng:	Ok I check later.
	Tee Wee Sien right.
Mr Tee:	Correct.
Mr Ng:	Ok I issue 1 50k your name.1 my name will transfer another 50k to u. Total capital 100k pay out.
Mr Tee:	Ok can.
	Ask Jason [Wang] to inform Ching I will issue 50k to him.

98 The inference to be drawn from the above evidence is that Mr Ng did not have much say over the distribution of AFPL's profits. We agree with the Judge's finding that the decision to declare dividends was effectively within Mr Ching's control. Any failure to declare dividends could not be attributed to Mr Ng and did not amount to oppressive conduct on his part.

(8) $200,000 Loan claim

99 Mr Tee claimed that Mr Ng had wrongfully taken a loan of $200,000 from AFPL without proper approval. He relied on the following facts as pleaded at para 36 of his amended statement of claim:

> (a) In or around May or June 2016, [Mr Tee] and [Mr Ng] had engaged one Ms. Patricia Quah of Patricia Quah & Co, a law firm, to represent them in, *inter alia*, the proposed sale of all [Mr Tee's] shares in [AFPL] to [Mr Ng].
>
> (b) In respect of the aforesaid proposal … Ms. Patricia Quah stated in an email to, *inter alia*, [Mr Tee] and [Mr Ng] that [Mr Ng] had spoken about a loan of $200,000 from [AFPL].
>
> (c) … the aforesaid loan has not been authorised by [AFPL] and was unilaterally effected by [Mr Ng], without the approval of [AFPL].
>
> (d) To date, this loan has not been repaid to [AFPL].

100 The Judge accepted Mr Ng's explanation that the reference to the loan of $200,000 was a reference to a separate sum of RM788,000 that AFPL had advanced in connection with a renovation project in Kuala Lumpur, Malaysia ("the RM Loan"). A steel trading company, Ascend Field Global Supplies Pte Ltd ("AFGPSL"), was allegedly liable to repay the RM Loan.

101 Mr Tee had the burden of proving in the trial below that a $200,000 loan had been taken by Mr Ng. Neither party pointed to specific entries in AFPL's financial records that substantiated that a loan in that sum had been made. It was not sufficient for Mr Tee to rely on the mere reference to a loan by a solicitor to discharge his burden of proof. We uphold the Judge's finding that no loan was made and dismiss Mr Tee's appeal in CA 86 on this issue.

Conclusion on the oppression claim

102 We were generally dissatisfied with the manner in which Mr Tee ran his case. His amended statement of claim included many allegations of breach of fiduciary duties by Mr Ng, which were not for him to pursue regardless of how well-established the breaches were. Those claims should have been pursued in a derivative action under s 216A instead. In so far as they amounted to separate

personal wrongs against Mr Tee, it was incumbent on him to clearly frame his case as such.

103 Be that as it may, Mr Tee's claim in oppression was sufficiently made out in the instances that we have found above and that we mention at [110] below in connection with the reliefs awarded. The commercial agreement as constituted by the informal understanding between Mr Tee and Mr Ng at AFPL's inception and throughout its operation was that Mr Tee would provide capital and business connections for AFPL. In return, Mr Tee legitimately expected Mr Ng to manage AFPL's day-to-day operations without enriching himself or YFX at AFPL's expense.

104 Instead of running AFPL only for the benefit of its shareholders, Mr Ng diverted AFPL's contracts to YFX. This was both a breach of Mr Ng's fiduciary duties and a separate personal wrong against Mr Tee, whose trust in Mr Ng was exploited to benefit YFX at AFPL's expense. In so far as AFPL's workers and resources were diverted to YFX without fair compensation and AFPL's "service fee" payments exceeded fair value, these actions also amounted to oppressive conduct. Mr Ng also reneged upon his agreement with Mr Tee and Mr Ching to implement internal restructuring controls when he removed Mr Tee as a bank signatory in June 2016; this was another personal wrong committed against Mr Tee.

105 Given that the real injury which Mr Tee sought to vindicate was the injury to his investment and the breach of his legitimate expectations, the essential remedy sought in his amended statement of claim was a buyout of his shares or a winding up of the company. The winding-up order and other consequential orders made ensure a fair value exit for Mr Tee. We are,

accordingly, satisfied that there was no abuse of process in Mr Tee's bringing a claim under s 216 of the Companies Act.

Remedies

106 The Judge found that Mr Tee's oppression claim succeeded (although not all the claims were made out) and ordered AFPL to be wound up. He ordered as follows:

> a. [The Defendants] are to account for the profits derived from the Diversion of 5 contracts between April 2016 and July 2016;
>
> b. An account of the benefit derived by YFX from uncompensated use of AFPL workers, with the measure of damages being the actual salary amount which YFX would have been required to reimburse AFPL ('Damages for Diversion of AFPL Workers'), including instances where AFPL paid for workers who worked substantially for YFX;
>
> c. An account of the benefit derived by AFPL from any uncompensated use of YFX's workers, with this amount set off against the Damages for Diversion of AFPL Workers; and
>
> d. The exact extent which YFX had benefited from use of AFPL's vehicle and equipment based on actual incidents and usage.

He also ordered the appointed liquidators to look into the possibility of recovering the RM Loan from AFGPSL.

107 Counsel for Mr Ng conceded that the winding-up order should be upheld if oppression was found. Having confirmed the holding that Mr Ng's conduct in managing AFPL was oppressive to Mr Tee, we uphold the winding-up order. We consider the other restitutionary orders made below.

108 The Court of Appeal in *Sakae Holdings* recognised that restitutionary orders in favour of the company may be granted in an oppression action under

s 216 in so far as these orders are necessary to ensure a fair exit value for the oppressed member: at [119] and [128]. The payment orders made by the High Court against three directors for their wrongful diversion of the company's assets were upheld on appeal. The High Court in the judgment on appeal in *Sakae Holdings* also held that the authorities did not permit the shareholders to ask for orders directly against the third parties who might have received moneys from the company pursuant to the directors' breaches: see *Sakae Holdings Ltd v Gryphon Real Estate Investment Corp Pte Ltd and others (Foo Peow Yong Douglas, third party) and another suit* [2017] SGHC 73 at [302]. This holding was not appealed against.

109 In the present case, Mr Tee prayed for the following specific reliefs in relation to the oppression claim: the return to AFPL of the $200,000 loan; an order for Mr Ng to buy out his shares in AFPL; or, in the alternative, for AFPL to be wound up. He prayed for an account of profits only in relation to the unlawful means conspiracy claim. As we explain below, the latter claim was wrongly brought as he was not the proper plaintiff. Mr Tee did not suggest that Ms Kor was a party to the oppression claim or that relief should be ordered against her under s 216(2) of the Companies Act. Furthermore, no submissions were made by the parties either below or on appeal as to whether this court should allow restitutionary orders to be made against third parties to an oppression claim. The extent of Mr Ng's involvement in the business of YFX and Ms Kor's involvement in the diversion of contracts, employees and resources were also not squarely dealt with at the trial.

110 In the circumstances, we do not think that it is appropriate to uphold the Judge's orders in relation to Ms Kor whether in her own name or as YFX. We therefore vary the remedies granted as follows: We order an inquiry into

damages payable to AFPL by Mr Ng for acting in breach of his fiduciary duty to AFPL in diverting its contracts to YFX and, in respect of the period from AFPL's incorporation up to end April 2015, for allowing YFX to remain in existence and compete with AFPL, and for providing the use of AFPL's resources and manpower to YFX without fee. The inquiry shall be conducted in the Action by Mr Tee but any damages found to be payable shall be paid by Mr Ng to AFPL and shall constitute a debt to AFPL. Further, the liquidators can look into: (a) the benefits that YFX/Ms Kor derived from the diversions of AFPL's contracts, workers and resources; (b) whether the "service fee" payments, including the premiums paid, exceeded the market value for subcontracting YFX's labour; and (c) the alleged RM Loan. We leave it to the liquidators to decide whether to pursue any action against YFX/Ms Kor or Mr Ng on AFPL's behalf.

The claim in conspiracy

111 Mr Tee's claim in conspiracy was against Mr Ng, YFX and Ms Kor for conspiring to injure him and AFPL by unlawful means. The Judge allowed this claim in respect of Mr Ng's diversion of five contracts from AFPL to YFX from April to July 2016. Mr Ng and Ms Kor challenged this finding on the basis that they did not have an intention to cause harm to Mr Tee. Mr Tee's appeal in CA 86 rested on the argument that the Judge ought to have found more broadly that Mr Ng, YFX and Ms Kor were liable for conspiracy by unlawful means through their diversion of AFPL's contracts, employees and resources to YFX.

112 With respect, the Judge should not have allowed Mr Tee's claim in unlawful means conspiracy at all. The conspiracy, if any, was directed at AFPL, not Mr Tee. The personal wrong that Mr Tee suffered in his capacity as a

shareholder that he sought to redress under s 216 was not equivalent to the loss to AFPL that formed the basis of the claim in unlawful means conspiracy. Any such loss that Mr Tee sustained would have been wholly reflective of the wrong done to the company. AFPL would have been the proper plaintiff to bring such an action. We would also point out that in this respect only Mr Ng and Ms Kor could have been parties to a conspiracy since YFX is not a legal person but simply Ms Kor's business name. To contend that Ms Kor and Mr Ng could have conspired in any way with YFX is a nonsense.

113 We therefore allow the appeal against the Judge's finding of unlawful means conspiracy, albeit on different grounds from those put forward by the appellants in CA 85. In these circumstances, we make no finding in relation to whether such a claim could have succeeded if it had been brought by AFPL. We leave it to the liquidators to investigate any allegations of unlawful means conspiracy and to determine whether to pursue any legal action on this issue.

Costs

114 Given that both appeals succeeded in part, the parties are to make submissions on costs in writing (limited to ten pages) within ten days of this judgment. We reiterate that it was improper for counsel for Mr Ng and YFX/Ms Kor to act for AFPL in CA 85. A company in an oppression action should be separately represented from the alleged oppressor, even where the latter continues to manage the company. This serves to safeguard the interests of the company. Mr Chhabra informed us at the hearing of the appeal that the legal fees in CA 85 were paid by Mr Ng and Ms Kor, and not by AFPL. For the avoidance of doubt, we order that Mr Chhabra and Ms Tan are not to recover

any costs for acting for AFPL from AFPL itself. AFPL may recover any costs paid by it from Mr Ng and Ms Kor.

Conclusion

115 For the reasons set out above, we make the following orders:

(a) CA 85 is allowed in part in respect of the claim in unlawful means conspiracy.

(b) CA 86 is allowed in respect of the Diversion of Contracts claim and the Bank Signatory claim.

(c) The order to wind up AFPL is upheld.

(d) The other orders made by the Judge are varied to the effect that there is to be no order to account against Ms Kor or YFX or Mr Ng in the Action but there will be an inquiry into damages payable to AFPL by Mr Ng for acting in breach of his fiduciary duty to AFPL as stated in [110] above.

(e) Any costs paid by AFPL to counsel for the appellants in CA 85 are to be recovered from Mr Ng and Ms Kor.

Judith Prakash Judge of Appeal	Belinda Ang Saw Ean Judge	Woo Bih Li Judge

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