IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 149

Suit No 67 of 2017

Between

Swee Wan Enterprises Pte Ltd

… Plaintiff

And

Yak Thye Peng

… Defendant

And

Yak Thye Peng

… Plaintiff in counterclaim

And

(1) Yak Tiong Liew
(2) Yak Chau Wei
(3) Swee Wan Enterprises Pte Ltd
(4) Swee Wan Trading Pte Ltd

… Defendants in counterclaim

JUDGMENT

[Companies] — [Directors] — [Loans]
[Companies] — [Oppression]
[Limitation of Actions] — [Particular causes of action] — [Contract]

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v
Yak Thye Peng

[2019] SGHC 149

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12 June 2019 Judgment reserved.

Hoo Sheau Peng J:

Introduction

1 In this action, the main protagonists are two brothers, Yak Thye Peng ("YTP") and Yak Tiong Liew ("YTL"), who have fallen out over the control and management of two family owned companies, Swee Wan Enterprises Pte Ltd ("SWE") and Swee Wan Trading Pte Ltd ("SWT"). Yak Chau Wei ("YCW"), the daughter of YTL, is also a party to the proceedings. Prior to this, the parties were embroiled in legal proceedings against other members of the Yak family.

2 Essentially, SWE claims for the sum of $1,805,156.62 as a debt, being part of the total amount paid out by SWE to YTP by way of five Bank of China Cheques ("the BOC Cheques"). YTP denies liability for the debt claimed. He

counterclaims against YTL, YCW, SWE and SWT for conspiracy and minority oppression.

3 Having considered the evidence and the parties' submissions, I allow the claim *in part* and dismiss the counterclaim. These are my reasons.

Background facts

History of the family business

4 Since its incorporation in 1979, SWE has been owned and managed by members of the Yak family. SWE was engaged in the wholesale and manufacturing of textile and clothing. It also acquired various properties.

5 YTP and YTL had been running SWE together from 1988, after the death of their father, Yap Kim Leng ("YKL"). YTP is the older brother. Being more proficient in English, he oversaw the management of SWE's finance and accounts, while YTL focused more on sales.[1]

6 Subsequently, SWT was incorporated in 1993. The wholesale and manufacturing business of SWE was transferred to SWT. Under this arrangement, SWT functioned as the trading vehicle, and SWE became a property holding company.[2]

7 In 2009, another entity, SW Apparel Pte Ltd ("SWA"), was incorporated. The purpose was to grow and diversify the family business, and to allow the nephews of YTP and YTL, namely Yak Eng Hwee ("Hwee") and

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1 YCW's AEIC, Volume 1 of the Bundle of Affidavits ("1BA") p 9 at para 14. YTP's AEIC, Volume 2 of the Bundle of Affidavits ("2BA") p 870 at para 19.

2 YCW's AEIC, 1BA p 10 at para 17.

Yak Eng Siong ("Siong"), to play a greater role in the family business. Hwee and Siong are brothers. Eventually, the wholesale and manufacturing business was meant to be transferred from SWT to SWA, which would then become the trading vehicle of the group of companies.[3]

8 I should add that apart from SWE, SWT and SWA, the Swee Wan group companies also included three other entities in Malaysia.

Ownership and management of SWE, SWT and SWA

9 Turning to the ownership of SWE, before 10 April 2015, YTP and YTL held 370,000 shares (44.58% shareholding) and 362,000 shares (43.61% shareholding) respectively, being almost equal stakes in SWE. Hwee and Siong owned 41,500 shares (5.00% shareholding) each, which were transferred to them by YKL, their grandfather, before his death. The remaining three minority shareholders with 5,000 shares (0.60% shareholding) each were Wong Ah Yoke (YTP's wife), Tang Siew Cheng (YTL's then wife), and the estate of Ng Geok Chuan (the mother of YTP and YTL).[4] Sometime after 10 April 2015, Hwee and Siong transferred their shares to YTL ("the 2015 Transfer"). Following a rights issue in June 2017 ("the Rights Issue"), YTL further increased his stake in SWE. More shall be said of the 2015 Transfer and the Rights Issue in due course.

10 From the time of its incorporation, YTP and YTL were directors of SWE. YCW was subsequently appointed a director on 2 October 2012. On 4 September 2015, YTP was removed from the appointment.

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3 YCW's AEIC, 1BA p 13 at para 31.

4 Notes of Evidence ("NE")/11.10.18/18/18 – 20/6; Defence and Counterclaim (Amendment No 3) at para 29.

11 Turning to SWT, prior to 10 April 2015, YTP and YTL, the main shareholders of SWT, held 400,000 shares (40% shareholding) and 500,000 shares (50% shareholding) respectively. Siong owned a 10% stake, being 100,000 shares which he later transferred to YTL sometime after 10 April 2015. YTP and YTL were appointed as directors from the outset. YCW was appointed as a director on 28 September 2012.

12 As for SWA, at the time of its incorporation, the shareholders were YTP (with 30% shareholding), YTL (with 30% shareholding), Hwee and Siong (with 20% shareholding each). All were directors of SWA.[5] By early 2012, Hwee was the only shareholder and director of SWA.[6]

Investigations into wrongdoings at SWE, SWT and SWA

13 Sometime in 2009, the then long-time auditor of SWE, SWT and SWA, Chua Soo Chiew ("Chua"), informed YTP of irregularities in the accounts of the family business. At that time, Yak Puay Khim ("Khim"), the sister of Hwee and Siong, was the bookkeeper for SWE, SWT and SWA.[7] YTP did not inform YTL about Chua's concerns.[8] Chua's services as auditor were terminated on 7 October 2011.[9] On 28 October 2011, Chua wrote a letter addressed to Siong, detailing the transactions of concern.[10]

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5 YCW's AEIC, 1BA p 13 at para 32.

6 YCW's AEIC, 1BA p 13 at para 33.

7 YTL's AEIC, 1BA p 625 at para 15; YCW's AEIC, 1BA p 13–15 at paras 33–42; YTP's AEIC, 2BA p 871 at para 22.

8 NE/11.10.18/33/16–23.

9 Volume 2 of the Agreed Bundle of Documents ("2AB") pp 951–955.

10 YCW's AEIC, 1BA pp 67–68.

14 Subsequently, in or around February 2012, YTL and YTP discovered that they were no longer shareholders or directors of SWA. Upon investigation by YCW, it appeared that Hwee had previously procured their agreement to the transfers of shares and their resignations by asking them to sign certain documents on the pretext of those documents being a release of their obligations as guarantors of loans that SWA had previously taken out.[11]

15 With YCW's background in finance, YTP and YTL wanted her to continue to assist them to investigate into the financial affairs of the companies. YCW had worked at several international financial institutions before founding an investment management firm, GAO Capital Pte Ltd ("GAO Capital") in 2008, as well as a corporate advisory and consulting firm, S2 Investments Pte Ltd ("S2") in 2012.[12]

16 YTP and YTL agreed that SWE would engage S2 to conduct a comprehensive review of the accounts of SWE, SWT and SWA. Pursuant to this arrangement, S2 therefore commenced work sometime in April 2012. It was not until some two years later that the arrangement was formalised in a letter of engagement dated 9 November 2014 ("the Letter of Engagement"), with the parties being SWE, SWT and S2.[13] YCW's business partner at GAO Capital and S2, one Ted Low Yushuo ("Low"), was also deeply involved in the investigations.[14]

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11 YTL's AEIC, 1BA p 625–626 at paras 13–17.

12 YCW's AEIC, 1BA p 11 at para 24.

13 YCW's AEIC, 1BA p 17 at paras 50–51.

14 YCW's AEIC, 1BA p 7 at para 8; pp 10–11 at paras 21–25.

17 In the course of the investigations, it appeared that substantial sums of money had been misappropriated from SWE's accounts by Khim, Hwee and Siong. The matter was reported to the Commercial Affairs Department ("CAD").

18 In anticipation that further investigation into the suspicious transactions would be required, and that legal advice would have to be taken in relation to seeking recourse against Khim, Hwee and Siong, YTP and YTL agreed that YCW should be appointed as a director of SWE so that she could act as the point of contact between the companies and the lawyers.[15] As such, YCW was appointed SWE's director: see [10] above. In fact, YCW was also appointed a director of SWT: see [11] above.

19 Subsequently, two accountancy firms, AccAssurance LLP ("AccAssurance") and STRIX Strategies Pte Ltd ("STRIX"), were engaged to assist in the preparation of a report on the investigation findings, and another firm, AccVisory Pte Ltd ("AccVisory"), was engaged to assist with the preparation of financial statements and filing of the annual returns of SWE and SWT.[16] AccVisory was also appointed to provide corporate secretarial services.[17]

Legal proceedings against Hwee, Siong and Khim

20 Ultimately, the investigations culminated in the commencement of two sets of legal proceedings. On 28 February 2014, Suit Nos 235 and 236 of 2014

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15 YTL's AEIC, 1BA p 626 at para 21.

16 YCW's AEIC, 1BA p 18 at para 56; 1BA pp 279- 280

17 YCW's AEIC, 1BA p 16 at para 48.

("Suits 235/236") were commenced by SWE and SWT against, *inter alia,* Hwee, Siong and Khim for alleged misappropriation of funds from the companies.[18]

21 As against Khim, summary judgment was obtained in the sum of about $4,100,000.[19] As against Hwee and Siong, the claims in Suits 235/236 were eventually settled pursuant to a settlement agreement dated 10 April 2015 ("the Suits 235/236 Settlement Agreement").[20] By the agreement, Hwee and Siong were to pay SWE and SWT a sum of $600,000 by the earlier of the two dates being (i) 30 days from the completion date for the sale of Hwee's property; or (ii) 31 December 2017.[21]

22 Separately, Suit No 664 of 2014 ("Suit 664") was commenced on 20 June 2014 by YTL in his personal capacity against both Hwee and SWA for the recovery of YTL's shares in SWA which had been transferred to Hwee.[22] This suit was also settled pursuant to a separate settlement agreement dated 10 April 2015 ("the Suit 664 Settlement Agreement").[23] By the agreement, Hwee and SWA agreed to pay YTL a sum of $2,150,000 in instalments, and for Hwee and Siong to transfer all of their shares in SWE to YTL *ie,* the 2015 Transfer referred to at [9] above. Further, Siong was to transfer all 100,000 of his shares in SWT to YTL: see [11] above. I note that while the Suit 664 Settlement Agreement refers to transfers of 40,000 shares each in SWE by Hwee and Siong,

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18 YTL's AEIC, 1BA p 627 at para 23.

19 NE/09.10.2018/39/9–11.

20 YCW's AEIC, 1BA p 20 at para 62.

21 YCW's AEIC, 1BA p 144 at cl 3.1.

22 YTL's AEIC, 1BA p 627 at para 24.

23 YCW's AEIC, 1BA p 20 at para 64.

it is common ground between the parties that both Hwee and Siong each held 41,500 shares before the 2015 Transfer. Nothing, however, turns on this discrepancy.

23 I should add that in separate criminal proceedings, Khim was sentenced to eight years' imprisonment.[24]

Withdrawals by YTP and YTL

24 In the course of the investigations into Khim, Siong and Hwee's activities, it was also revealed that *both* YTP and YTL had withdrawn substantial sums of money from SWE and SWT. Indeed, in Suits 235/236, Hwee counterclaimed against, *inter alia,* YTP and YTL for oppression, alleging that they had withdrawn sums from SWE for their personal use, without Hwee's knowledge and consent.

25 These withdrawals were detailed in a spreadsheet prepared by AccVisory, which was sent to YCW via an email dated 9 October 2013 ("the AccVisory email"):[25]

S/N	Withdrawn by	Date	BOC Cheque No	Amount
1	YTP	5 July 2006	394985	$525,000
2	YTP	7 July 2006	394988	$500,000
3	YTP	11 May 2007 (The cheque was in fact	606009	$500,000

[24] YCW's AEIC, 1BA pp 19–20 at para 61.

[25] YCW's AEIC, 1BA p 18 at para 57; pp 119–120.

		dated 23 April 2007)		
4	YTP	11 August 2008	793826	$447,700
5	YTP	24 October 2008	793845	$300,000
6	YTP	24 October 2008	793846	$200,000
7	YTP	17 June 2009	61687	$300,156.62
	YTP	Total		$2,772,856.62
8	YTL	24 April 2007	606010	$500,000
9	YTL	1 August 2008	793827	$441,650
	YTL	Total		$941,650.00

26 I pause to observe that out of the seven cheques issued to YTP listed in the AccVisory email, SWE acknowledged the sum of $447,700 by way of cheque number 793826 to be a payment of dividend to YTP. This was documented by way of the minutes of an annual general meeting on 25 June 2008, along with the sum of $441,650 by way of cheque number 793827 paid to YTL.[26] As such, subsequently, SWE did not treat these two amounts as owing from YTP and YTL respectively.

27 On 14 November 2013, a directors' resolution was passed, regularising the withdrawals of the remaining sums by both YTP and YTL as interest-free

[26] YCW's AEIC, 1BA p 217.

loans repayable on demand ("the 2013 Resolution"). The 2013 Resolution was signed by the directors of SWE at the time, *ie*, YTP, YTL and YCW, and stated as follows:[27]

> **Authorising unsecured balances to directors**
>
> APPROVED the sum of S$500,000 withdrawn in 2007 by YAK TIONG LIEW using [BOC cheque] 606010, S$2,325,156.62 withdrawn between 2006 and 2008 by YAK THYE PENG using [BOC cheques] 606009, 793485, 793486, 061687, 394985, 394988 less US$300,000 returned on 10 September 2008. The amount withdrawn shall be interest free and repayable on demand to the company.

As regards cheque numbers 793485 and 793486 as referred to in the 2013 Resolution, it is not disputed that the correct references should in fact be to cheque numbers 793845 and 793846 respectively.[28]

28 Upon further review, SWE accepted that the amount in cheque number 394988 of $500,000 is not due from YTP. This was set out in a summary produced by YCW sometime after 25 April 2014 ("YCW's summary").[29] As for the only remaining sum held against YTL of $500,000 paid out *vide* cheque number 606010, SWE accepted that YTL repaid this amount in October 2008. Thus, according to SWE, there was nothing further due from YTL.[30]

29 As against YTP, what remained due to SWE are the payments made under the BOC Cheques, with the total amount of $1,825,156.62. According to YTL and YCW, there were discussions for YTP to repay the outstanding

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27 YCW's AEIC, 1BA p 206.

28 NE/10.10.18/8/22 – 9/1.

29 YCW's AEIC, 1BA p 19 at para 59. See also YCW's AEIC, 1BA pp 139–140. NE/10.10.18/14/8 – 16/14.

30 YCW's AEIC, 1BA p 24 at para 80.

amount from the time the withdrawals were discovered, but to no avail.[31] Therefore, SWE commenced the present proceedings on 25 January 2017.

YTP's non-election as director of SWE

30 While discussions were ongoing for YTP to repay the outstanding amount, a notice was issued on 21 August 2015 convening an annual general meeting of SWE. One of the matters to be dealt with was the re-election of directors:[32]

> NOTICE IS HEREBY GIVEN that the Annual General Meeting of shareholders of [SWE] will be held… on 4 September 2015… to transact the following business:
>
> ORDINARY BUSINESS
>
> 1. …
>
> 2. …
>
> 3. To re-elect [YTP], [YTL] and [YCW] retiring under Article 74 of the Company's Articles of association; …

31 On 4 September 2015, the AGM was convened with only Tang Siew Cheng (YTL's ex-wife) and Low (as proxy for YTL) in attendance. YCW (a non-shareholder) presided as chairperson of the meeting. YTP did not attend, and called after the AGM was over to say that he could not attend as he had been ill. It was resolved at the AGM that only YTL and YCW be re-elected as directors; YTP was not re-elected.[33]

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31 YCW's AEIC, 1BA p 19 at para 76; YTL's AEIC at 1BA p 629 at paras 32–33; NE/12.10.18/42/23–28.

32 YCW's AEIC, 1BA p 27 at para 88; p 219.

33 YCW's AEIC, 1BA p 28 at paras 91–92; p 266.

Charging by S2

32 As was mentioned at [16] above, S2 had been engaged to conduct investigative work sometime in April 2012, but a formal Letter of Engagement was only signed on 9 November 2014. The Letter of Engagement provided for time-based fees: work done by the two lead partners (YCW and Low) was to be charged at $250 per hour, and work done by all other staff was to be charged at $100 per hour. According to Low, this rate was eventually bargained down by YTP to $100 per hour for all staff, including the lead partners.[34] However, according to YTP, he did not know about the Letter of Engagement. Low had suggested capping the professional fees at 8% of the recovered sum, and YTP had agreed to this.[35]

33 On 15 December 2014, a first progress bill for the sum of $301,881.70 was rendered to SWE and SWT. This sum was duly paid by SWT by way of a cheque dated 16 December 2014.[36] On 15 May 2017, a second progress bill for $520,000 was issued. A sum of $250,000 was paid on 1 August 2018 in respect of this bill, and the balance remains outstanding.[37]

34 In the cover letter to the second progress bill issued on 15 May 2017, Low stated that the professional costs incurred up to 31 December 2016 was in fact $1,500,000.[38] He explained that the actual sum incurred was $2,334,494.85,

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34 Low's AEIC, 1BA p 656 at para 19.

35 YTP's AEIC, 2BA p 882 at paras 94–95.

36 YTP's AEIC, 2BA p 1205.

37 Low's AEIC, 1BA p 658 para 27.

38 Low's AEIC, 1BA p 811.

but that due to SWE and SWT's tight financial situation, he had agreed to a cap of $1,500,000 on the fees owed.[39]

35 Based on his removal as a director of SWE, the charging by S2 and other matters which YTP views to be oppressive conduct, YTP brought his counterclaim against YTL, YCW, SWE and SWT on 2 March 2017.

The Rights Issue

36 Thereafter, on 24 May 2017, YTP received notice that an extraordinary general meeting ("EGM") would be convened for the purpose of approving the Rights Issue. This was a rights issue of 1,771,910 ordinary shares at the par value of $1 per share, to be offered to existing shareholders in proportion to their current shareholdings.[40] According to SWE, the capital was urgently needed as SWE's loan facility with ABN AMRO ("the ABN AMRO loan") in the sum of US$1,032,403 was due to be repaid by 30 June 2017, and plans for alternative financing had fallen through.[41]

37 In YTP's view, however, the Rights Issue was nothing more than an attempt to dilute his shareholding as YTL and YCW knew that YTP would not be able to meet his obligations in respect of the Rights Issue.[42] By a letter dated 31 May 2017, YTP's solicitors wrote to YCW and YTL's solicitors, stating that YTP would "file an application to rescind and/or restrain any such resolution",

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39 Low's AEIC, 1BA p 657 at paras 22–23.

40 YTP's AEIC, 2BA p 886 at paras 121–122.

41 YCW's AEIC, 1BA pp 33–35 at paras 114–126.

42 YTP's AEIC, 2BA 887 at paras 124–125.

and that if the Rights Issue was proceeded with, such conduct will be relied on as "evidence of further oppression of [YTP]".[43]

38 On 7 June 2017, YCW and YTL's solicitors responded to the 31 May 2017 letter, stating that the Rights Issue was "necessary to ensure that SWE is able to meet its liability to ABN AMRO Bank, and [was] not (as your client alleges) an attempt to dilute his shareholdings in SWE" (emphasis in original).[44]

39 The EGM was convened on 7 June 2017, and a rights issue of 1,771,910 SWE shares was offered at $1 per share to the existing shareholders based on their respective shareholdings. YTL exercised his option pursuant to the Rights Issue and purchased a further 950,000 shares. None of the other shareholders subscribed to the Rights Issue.[45] As a result, YTP's percentage shareholding in SWE decreased to 20.79%, while YTL's stake increased to 78.37% as follows:[46]

Shareholder	**No of shares**	**Shareholding**
YTL	1,395,000	78.37%
YTP	370,000	20.79%
Tang Siew Cheng	5,000	0.28%
Estate of Ng Geok Chuan	5,000	0.28%
Wong Ah Yoke	5,000	0.28%

40 On 22 November 2017, YTP amended his counterclaim to include the facts in relation to the Rights Issue.

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43 YTP's AEIC, 2BA 1166–1167.

44 YTP's AEIC, 2BA 1168.

45 YTL's AEIC, 1BA 637–638 at paras 70–71.

46 YTP's AEIC, 2BA 869 at para 12.

The parties' cases

41 I now turn to the parties' cases. SWE's claim is a straightforward claim for a debt in the sum of $1,805,156.62, being the total of the amounts withdrawn without authority under the BOC Cheques listed below amounting to $1,825,156.62, less a sum of $20,000 returned:[47]

S/N	Date	BOC Cheque No	Amount
1	4 July 2006	394985	$525,000
2	23 April 2007	606009	$500,000
3	24 October 2008	793845	$300,000
4	24 October 2008	793846	$200,000
5	16 June 2009	061687	$300,156.62
	Total		$1,825,156.62

42 According to SWE, it was only in November 2013 that these withdrawals were regularised and treated as interest-free loans by SWE to YTP by way of the 2013 Resolution.[48] There was a repayment of $20,000 by YTP on 6 February 2007.[49]

43 YTP does not deny having received various sums at the material time, but avers that he is not liable to repay them for the following reasons:

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47 Statement of Claim (Amendment No 1) at paras 4–8.

48 Particular 1 in respect of para 14 of the Statement of Claim (Amendment No 1) served on 17 September 2018.

49 Statement of Claim (Amendment No 1) at para 7.

(a) Some of those sums received were shareholder dividends paid in respect of profits made from the sale of various properties between 2006 and 2008.[50]

(b) Further, over the years, both YTL and YTP had at various times deposited money into the accounts of SWE and SWT, which were treated as one entity.[51] Certain sums were paid either as a "refund"[52] or were "meant to be on the account of SWT".[53]

(c) To the extent that these sums were recorded in the companies' accounts as loans, there was a mutual understanding and agreement between the parties that these sums would not have to be repaid.[54]

(d) YTL had himself received two substantial sums of $500,000 and $441,650 pursuant to the aforementioned mutual understanding and agreement.[55] It had also been agreed that YTL could draw additional monthly sums from the Malaysian companies for, *inter alia*, the payment of maintenance towards his ex-wife.[56]

(e) SWE's claim is time barred by virtue of s 6(1) and s 32 of the Limitation Act (Cap 163, 1996 Rev Ed) ("Limitation Act").[57]

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50 Defence and Counterclaim (Amendment No 3) at para 41(a)–(c).

51 Defence and Counterclaim (Amendment No 3) at para 41(i).

52 Defence and Counterclaim (Amendment No 3) at para 41(e).

53 Defence and Counterclaim (Amendment No 3) at para 41(f).

54 Defence and Counterclaim (Amendment No 3) at para 41(d).

55 Defence and Counterclaim (Amendment No 3) at para 41(g).

56 Defence and Counterclaim (Amendment No 3) at para 41(j).

57 Defence and Counterclaim (Amendment No 3) at para 46.

(f) All issues relating to the outstanding sums had already been resolved pursuant to the Suits 235/236 and Suit 664 Settlement Agreements.[58]

44 Turning to the counterclaim, YTP claims that SWE, SWT, YTL and/or YCW had: (i) engaged in a conspiracy with the intention of causing loss or financial harm to him, and (ii) acted oppressively or unfairly under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") against YTP as a shareholder of SWE and/or SWT by way of the following:

(a) Procuring the removal of YTP as director of SWE in breach of the common understanding that both YTP and YTL would have a say in the running and management of the SWE.[59]

(b) Breach of the fiduciary duties and duties of fidelity and good faith owed by YTL and YCW as directors of SWT and SWE[60] in that YCW placed herself in a position of conflict of interest by engaging entities that she owned to carry out the investigative work required, and by charging excessive and exorbitant fees for the investigative work done by S2 and GAO Capital.[61]

(c) Deliberately engineering the dilution of YTP's shareholding in SWE by conducting the Rights Issue despite knowing that YTP would not be able to meet his obligations.[62]

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58 Defence and Counterclaim (Amendment No 3) at para 49.

59 Defence and Counterclaim (Amendment No 3) at paras 15, 29–31.

60 Defence and Counterclaim (Amendment No 3) at paras 32–33.

61 Defence and Counterclaim (Amendment No 3) at paras 34–36.

62 Defence and Counterclaim (Amendment No 3) at paras 58–63.

45 In terms of the relief sought, YTP claims, *inter alia*: (i) damages; (ii) the right to commence a derivative action in the name of SWE against YTL and/or YCW for the breaches of their fiduciary duties; and (iii) a buyout of his shares in SWE at a fair market valuation, *or*, an order that SWE and/or SWT be wound up on just and equitable grounds; (iv) a declaration that resolutions passed since the date of writ be nullified or rescinded; and (v) a declaration that any share transfers made pursuant to the Rights Issue be rescinded.[63]

46 On their part, YTL, YCW and the companies deny that they had engaged in a conspiracy and/or acted oppressively in the manner alleged by YTP.[64]

SWE's claim

47 Based on the parties' cases for the claim, the three main issues are:

(a) Whether the amounts paid out under the BOC Cheques are to be repaid or are recoverable as loans, or whether there was a mutual understanding that there was no need for repayment;

(b) Whether the claim is time-barred; and

(c) Whether the claim is compromised by the Suits 235/236 Settlement Agreement.

Whether the amounts are to be repaid or are recoverable as loans

48 In relation to the first issue, YTP raises two broad arguments, as well as specific contentions in relation to each of the BOC Cheques. I begin with the

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63 Defence and Counterclaim (Amendment No 3) at pp 16–17.

64 Reply and Defence to Counterclaim (Amendment No 2) at paras 30–42.

two broad arguments.

49 First, YTP argues that SWE has not identified any contractual basis for his alleged obligation to repay SWE the proceeds of the BOC Cheques.[65] The main thrust of this submission is that the 2013 Resolution, which is central to SWE's case on this point, is not a contractual document setting out the rights and obligations owed between the parties.

50 For completeness, I set out the 2013 Resolution again:[66]

> We, the undersigned, being all the directors of [SWE] do on this date, agree and consent to pass the following resolutions as directors' resolutions in writing:
>
> **Authorising unsecured balances to directors**
>
> APPROVED the sum of … S$2,325,156.62 withdrawn between 2006 and 2008 by YAK THYE PENG using Bank of China cheques 606009, 793485, 793486, 061687, 394985, 394988 less US$300,000 returned on 10 September 2008. The amount withdrawn shall be interest free and repayable on demand to the company.
>
> …
>
> [Signed by YTL, YTP and YCW]

51 While I accept that the 2013 Resolution is not itself a loan agreement, I find that it is evidence of an agreement between SWE and YTP that the proceeds of the BOC Cheques be treated as an interest-free loan to YTP repayable on demand to SWE. I elaborate. The 2013 Resolution, as a resolution of the SWE's board of directors, was a unilateral act of the company. It cannot, on its own, create mutually binding obligations between the company and a third party, even if that third party was one of the directors who had signed the resolution.

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65 Defendant's Reply Submissions ("DRS") at paras 12–13.

66 YCW's AEIC, 1BA p 206.

That said, while the 2013 Resolution is not itself a loan agreement, it is clear evidence that SWE (by resolution of its board of directors) and YTP (in his personal capacity) intended that the proceeds of the BOC Cheques be treated as a loan by SWE to YTP.

52 What is crucial is that there is clear evidence that YTP intended and considered himself bound by an obligation to repay the proceeds of the BOC Cheques in the terms stated in the 2013 Resolution. In this regard, I find YTP's assertion that he did not understand the contents of the 2013 Resolution at the time he signed it[67] to be quite difficult to believe. His evidence on this point is marred by numerous about-turns. During cross-examination, he agreed that the 2013 Resolution was passed for the purposes of approving the cheques withdrawn by him, before asserting immediately after that he did not understand the contents of the resolution.[68] In another exchange, he admitted to understanding the meaning of the word "withdrawal", but then insisted that he did not understand the meaning of the word "withdrawn".[69] These unbelievable assertions were made all the more unsustainable by the fact that he, by his own evidence, was an experienced businessman who had always dealt with the financial matters of the companies and who had passed his O Level examinations in English.[70]

53 For the above reasons, I find that YTP understood the contents of the 2013 Resolution at the time he signed it, and that he understood and intended that the proceeds of the BOC Cheques were to be treated as an interest-free loan

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67 Defendant's Reply Submissions ("DRS") at para 17.

68 Plaintiff's Closing Submissions ("PCS") at para 31; NE/12.10.18/52/28 – 53/3.

69 PCS at paras 34–36; NE/12.10.18/54/13–27.

70 PCS at paras 40–41.

to him by SWE repayable on demand.

54 Next, I turn to YTP's second broad argument that there had been a mutual understanding that the proceeds of the BOC Cheques need not be repaid, whether on the basis of "tradition"[71] or a "running shareholder/directors' account".[72] Much was made of the fact that YTP and YTL used to withdraw sums of money from SWE and SWT. In essence, YTP alleges that there was a mutual understanding shared with YTL to the effect that both YTP and YTL could draw monies from the companies at will, on the basis that these withdrawals would be offset against deposits and advances made by YTP and YTL to the companies from time to time.[73] However, from sometime in 1988, there were other shareholders of SWE, especially Hwee and Siong with 41,500 shares each. Certainly, there is no indication that any such understanding was shared with Hwee and Siong. As I observed at [24] above, in Suits 235/236, Hwee had complained about such withdrawals by YTP and YTL. Therefore, I do not accept that YTP and YTL were permitted to withdraw funds from SWE and SWT after 1988, at the expense of the other shareholders. Further, even if such an understanding had existed after Hwee and Siong became shareholders, I would have thought that that state of affairs clearly came to an end following the passing of the 2013 Resolution.

55 Having dismissed YTP's broad arguments, I turn now to the contentions raised by YTP in respect of the individual cheques.

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71 NE/11.10.18/46/3–11.

72 Defendant's Closing Submissions ("DCS") at paras 39–40; DRS at para 50.

73 NE/11.10.18/46/3–11; DCS at paras 39–40.

Cheques 1 and 2

56 YTP submits that Cheques 1 and 2 were payments of dividends in respect of the sale of certain investment properties.[74] According to YTP, this is supported by the fact that roughly equal sums were similarly paid to YTL by way of two cheques: cheque number 394988 for $500,000 and cheque number 606010 for $500,000.[75]

57 I reject this submission for the following reasons. First and foremost, as YTP acknowledged, the proceeds of Cheques 1 and 2 were recorded in SWE's accounts as *loans* to directors, and not as dividend payments.[76] Second, it was not at all clear that YTL had received roughly identical amounts as dividends. Cheque No 394988 was not a payment to YTL alone, but a payment into an account jointly held by YTL and YTP.[77] In fact, as I stated earlier, while this was originally indicated as a payment out to YTP in the AccVisory email, it was not included as a claim against YTP in the 2013 Resolution: see [28] above. As for Cheque No 606010, I accept YTL's evidence that this sum was not treated by him as a payment of dividends, and that he eventually repaid this amount. Third, on YTP's own evidence (in his affidavit of evidence-in-chief ("AEIC")), Cheque 1 was a "repayment for the monies that [he] had put into the companies", not dividend payments.[78] He has been inconsistent on this point. I therefore reject YTP's submission that Cheques 1 and 2 were payments of dividends.

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74 DCS at para 157.

75 DCS at para 161.

76 DCS at para 167.

77 Plaintiff's Reply Submissions ("PRS") at paras 20, 72.

78 YTP's AEIC, 2BA p 900 at para 198.

58 I turn now to the alternative argument that some of the sums withdrawn by YTP under the cheques were actually repayments of sums that YTP had previously deposited into the companies. Over the years, many deposits and withdrawals were made into and out of the bank accounts of both SWE and SWT. In my view, the onus was on YTP to establish that there existed a sufficient nexus between particular deposits and the withdrawals in question before it could be said that a particular withdrawal (pursuant to a cheque) was a repayment of sums previously put in or has been paid by subsequently.

59 Turning first to Cheque 1, there was no evidence before me as to any specific deposits YTP had made that Cheque 1 might have been repayment in respect of.

60 However, in respect of Cheque 2, YTP refers to a US$300,000 payment he had made to *SWT* in September 2008.[79] In other words, YTP argues that he had repaid the sum. He relies on the fact that at around the same time, YTL also returned a similar sum, and for which he is acknowledged not to owe any sum to SWE for cheque number 606010. Against this, SWE argues that SWE and SWT were separate legal entities, and that monies paid into the latter could not be later withdrawn from the former. This argument is at first blush quite attractive, but, as mentioned, the touchstone is whether YTP could prove a nexus between the sums withdrawn and deposited. Here, YCW had herself accepted – in no uncertain terms – not just that there was a nexus, but that it had been *agreed* that the US$300,000 paid by YTP could be used to offset the sums he owed to SWE:[80]

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79 DCS at paras 193–198; YCW's AEIC, 1BA p 140.

80 NE/10.10.18/25/11–24.

> Q: ---if … Mr Yak Tiong Liew took 500,000 and … that is deemed to be discharge by a [US]$300,000 payment [by Yak Tiong Liew]—
>
> …
>
> Q: ---shouldn't the $500,000 that Yak Thye Peng took at the same time---
>
> …
>
> Q: ---be similarly discharged by his payment of [US]$300,000 that he made? Do you agree?
>
> A: Yes.
>
> Q: Alright. Thank you.
>
> A: Yup. And---and there was a meeting that we actually agreed on that too.

61 Indeed, this appears to have been recorded in the 2013 Resolution in the form of a stipulation that the sum of "US$300,000 returned on 10 September 2008" should be deducted from the total sum owing. While YCW's own record of the US$300,000 payment by YTP states the date of payment as 9 September 2008 (and not 10 September 2008 as stated in the 2013 Resolution),[81] there was nothing to suggest that this was a reference to a different payment. YCW confirmed that the sum claimed in Statement of Claim (Amendment No 1) did not take this US$300,000 deduction into account.[82]

62 For the foregoing reasons, I do not accept the specific defences in respect of Cheques 1 and 2, save for the sum of US$300,000, which I find has not yet been accounted for by SWE in its claim and should be deducted from the overall sum claimed.

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81 YCW's AEIC, 1BA 140.

82 NE/10.10.18/10/26 – 11/1.

Cheques 3 and 4

63 I turn now to YTP's case on Cheques 3 and 4. In the closing submissions, YTP claims that Cheques 3 and 4 were paid to him as repayments for a loan he made in June 2008 to SWT ("the June 2008 loan"). He relies on the listing in the AccVisory email, showing that there was a deposit made by him on 17 June 2008.[83]

64 This position is quite different from YTP's position as stated in his AEIC. In his AEIC, he made no mention of the June 2008 loan. Rather, his evidence was that Cheques 3 and 4 were repayments in respect of two entirely different sums of US$300,000 and S$298,193.67 drawn down from his personal loan facility with Credit Industrial et Commercial (Singapore Branch) around 8 September 2008 and 2 March 2010 respectively.[84] In my view, the shift in his case undermines his contention that the June 2008 deposit and Cheques 3 and 4 had always been linked. In fact, it appears to me likely that YTP was simply trying to pick a deposit which bore sufficient similarities in time and quantum to Cheques 3 and 4 such that they might seem linked. It certainly appeared that he had changed his case because the June 2008 deposit was at least for the same quantum as the sums drawn under Cheques 3 and 4.

65 I should add that contrary to YTP's reading of YCW's evidence under cross-examination, I do not think YCW unequivocally conceded that there existed a correlation between Cheques 3 and 4 and the June 2008 deposit. Her evidence was that any correlation was, at best, "tenuous".[85]

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83 DCS at paras 201–202; YCW's AEIC, 1BA p 120.

84 YTP's AEIC, 2BA p 901 at para 198, pp 1547–1549; PCS at paras 135–139.

85 NE/10.10.18/28/29 – 29/23.

66 I therefore reject YTP's argument that Cheques 3 and 4 were repayments for sums he had previous loaned the companies.

Cheque 5

67 In respect of Cheque 5, YTP submits that this was a repayment of a loan that he had extended to SWT, and refers to a payment of $300,000 which he had made to SWT on 25 June 2009 ("the 25 June 2009 loan").[86]

68 In my view, the correlation between the 25 June 2009 payment and Cheque 5 is not proved. Again, YTP has changed his position regarding which specific deposit correlates to Cheque 5. In his AEIC, he referred to the same loans drawn down from his Credit Industrial et Commercial (Singapore Branch) facility referred to in [64] above. In his closing submissions, he relies on the 25 June 2009 loan, as reflected in the listing provided in the AccVisory email.[87] However, neither the loans referred to in his AEIC nor the 25 June 2009 loan tally with the sum of $300,156.62 drawn under Cheque 5.[88]

69 I therefore reject YTP's stance that Cheque 5 was meant as repayment for the 25 June 2009 loan.

Whether the claim is time-barred

70 I turn to consider whether SWE's claim is time-barred.[89] YTP submits that SWE's claim for sums withdrawn under the cheques is *prima facie* time-

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86 DCS at paras 206–208; YCW's AEIC, 1BA p 120.

87 DCS at para 208; YTP's AEIC, 2BA p 901 at para 198, pp 1547–1549.

88 PRS at para 38.

89 DCS at paras 234–244.

barred by operation of s 6 of the Limitation Act. This submission appears to have been made on the footing that SWE's claim is for recovery of monies withdrawn without proper authorisation, which cause of action would have arisen at the time the BOC Cheques were allegedly improperly drawn – *ie*, from 2006 to 2009.

71 It is clear to me, however, that this is in fact a claim for a debt arising from a loan agreement. The nature of SWE's claim is clarified in Particular 1 of the Further and Better Particulars furnished on 17 September 2018 ("the Particulars"), in which para 14 of the Statement of Claim (Amendment No 1) was particularised as follows:

> **1. Under paragraph [14] of Statement of Claim (Amendment No. 1)**
>
> 14. Despite numerous demands from SWE, YTP has failed, neglected and/or refused to repay the sum of S$1,805,156.62 to SWE.
>
> **Particulars**
>
> a. Monies withdrawn by YTP and YTL without proper authorisation, including the cheques stated at paragraph 4 above, were acknowledged and recorded as debts owing by both of them to SWE;
>
> b. There was a director's resolution dated 14 November 2013 (the "November 2013 Resolution") that approved the amount withdrawn by YTP in respect of, amongst others, the cheques stated at paragraph 4 above as interest free loans repayable on demand to SWE;
>
> …

72 At this juncture, I should state that there is some inconsistency in SWE's case as to the time the agreement was reached. In particular, there is some discrepancy as to whether this was in 2013 or in 2014. Paragraph 9 of the Statement of Claim (Amendment No 1) states that YCW discovered the

unauthorised withdrawals in or around 19 May 2014 and that an agreement to repay the amounts was only reached subsequently, whereas, Particular 1 of the Particulars provides that the 2013 Resolution regularised the withdrawals (though I note that Particular 3 of the Particulars claims that SWE first found out about YTP's drawings "in or around 2014"). Notwithstanding the discrepancies in the pleadings on this aspect, YCW's evidence is that the discrepancies were raised in or around October 2013 and that the decision to regularise them was made on 14 November 2013. This is corroborated by the AccVisory email (dated 9 October 2013)[90] and the 2013 Resolution respectively.

73 In any case, this discrepancy is not material. SWE does not need to rely on the later dates in 2014. As I discussed at [53] above, in my view, the loan agreement was made sometime around the execution of the 2013 Resolution on 14 November 2013. The present suit was commenced on 25 January 2017, well within the six-year time bar provided for contractual claims as provided within s 6 of the Limitation Act.

Whether the claim is compromised by the Suits 235/236 Settlement Agreement

74 I now go to the third issue. YTP submits that the present claim has been compromised by virtue of the Suits 235/236 Settlement Agreement.[91] In my view, the Suits 235/236 Settlement Agreement has no such effect on the present claim.

75 By way of reminder, Suits 235/236 were brought by SWE and SWT against, *inter alia,* Hwee, Siong, Khim in February 2014. The Suits 235/236

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90 YCW's AEIC, 1BA p 104.

91 DCS at para 245.

Settlement Agreement was meant to resolve the disputes in connection with Suits 235/236, as well as loans involved in Suit 664 ("the defined subject matter"). Clause 2.1 provides that the Settlement Agreement only binds parties who have executed it. Further, cl 2.2 states as follows:[92]

> This Settlement Agreement and the Suit 664 Settlement Agreement shall be in full and final settlement of all or any claims whatsoever between SWE, SWT, YTP, YTL, [YCW]…on the one hand, and SWA, [two Malaysian companies], Siong, Hwee … on the other hand arising out of or in connection with [the defined subject matter] and the said parties shall upon execution of this Settlement Agreement, hereby irrevocably waive any existing claims (whether known or unknown) arising out of or in connection with the same.

76 I note that YTP is not a party to the Suits 235/236 Settlement Agreement. Although he is listed as one of the parties in the text of the document, cl 2.1 provides that the Settlement Agreement only binds parties who have executed the agreement, and it is beyond dispute that YTP did *not* sign the Suits 235/236 Settlement Agreement.[93]

77 I should add that YTP had taken pains to ensure that he would not be personally bound by the Suits 235/236 Settlement Agreement. On 2 March 2015, slightly over a month before the Suits 235/236 Settlement Agreement was entered into, YTP's then solicitors wrote to SWE's solicitors stating that "[a]ny proposal for settlement or concluded settlement of the entire matter on a global basis made at the mediation [of Suit Nos 235 and 236 of 2014] will not bind our client".[94] In fact, as Low stated, YTP did not wish to be personally involved in

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92 YCW's AEIC, 1BA p 143.

93 PCS at para 149; PRS at para 98.

94 PCS at para 150; 3AB p 1721.

the lawsuit.[95]

78 In any case, the terms of the Suits 235/236 Settlement Agreement do not purport to settle any disputes between SWE and YTP. In my view, the only reasonable interpretation of cl 2.2 is that that the agreement was entered into in settlement of disputes between two groups of entities and individuals, and not between entities and individuals within each group.[96] For clarity, SWE, SWT, YTP, YTL and YCW belong to one group, while SWA, Siong, Hwee and others form the other group. I am fortified in this conclusion by the fact that the Suits 235/236 Settlement Agreement was concluded at a time when there was no dispute nor legal proceedings between SWE and YTP.[97]

Conclusion on SWE's claim

79 To conclude, I find that SWE's claim is neither time-barred nor compromised by the Suits 235/236 Settlement Agreement. Therefore, I allow SWE's claim in the sum of S$1,805,156.62, less the sum of US$300,000. For the purpose of the set-off, it would be appropriate for the exchange rate on 10 September 2008 (being the date reflected in the 2013 Resolution) to be applied.

80 For completeness, I reject YTP's submission that a lesser sum (than what is claimed) cannot be awarded in this case because SWE has failed to include in its plea for relief the words: "or such other sum as the court deems

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95 Low's AEIC, 1BA p 653 at para 17(d).

96 PRS at para 89.

97 PRS at para 95.

fit".[98] In *Edmund Tie & Co (SEA) Pte Ltd v Savills Residential Pte Ltd* [2018] 5 SLR 349, it was made clear that a court "may award less but not more than what an applicant claims" (at [10]).

YTP's counterclaim

81 Turning to YTP's counterclaim, I note that in his closing submissions, YTP has not pursued his pleaded counterclaim for conspiracy to injure. Therefore, the sole remaining cause of action in the counterclaim is that of minority oppression under s 216 of the Act. I further note that although SWT was added as a defendant in the counterclaim, YTP has confirmed that the counterclaim pertains only to his interests as minority shareholder in SWE, and not SWT.[99]

82 In order to make out such a claim, a minority shareholder must demonstrate that the conduct complained of amounts to commercially unfair conduct, and such unfairness will generally be found where there has been 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: *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 ("*Ho Yew Kong*") at [81].

83 In the case of an ordinary company, *prima facie,* the company's formal documents set out the basis of the association exhaustively. However, informal agreements, understandings or promises as between members of a company could also give to legitimate expectations on the part of minority shareholders.

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98 DCS at para 273.

99 NE/16.10.18/36/22 – 37/7.

The onus is on the minority shareholders to show that such informal or implied understandings give rise to certain expectations, and the conduct of the majority in conflict with such expectations might be challenged for being unfair: *Eng Gee Seng v Quek Choon Teck and others* [2010] 1 SLR 241 ("*Eng Gee Seng*") at [10].

84 Based on the closing submissions, YTP's complaint pertains to five aspects of YTL and YCW's conduct:[100]

(a) Causing YTP to be removed as a director of SWE;

(b) Proceeding with the Rights Issue which led to the dilution of YTP's shares in SWE;

(c) Committing various breaches of fiduciary duties as directors of SWE;

(d) Failing to provide documents and information as requested by YTP; and

(e) Commencing the present proceedings against YTP.

85 I shall now consider each aspect of YTL and YCW's conduct complained of in turn, and in the round.

Removal as director

86 Once again, the essential facts pertaining to YTP's non-election as director are as follows. The notice of the AGM issued on 21 August 2015

100 DCS at para 55.

contained the proposed Resolution 3, "[t]o re-elect [YTP], [YTL] and [YCW] retiring under Article 74 of the Company's Articles of association".[101] On 4 September 2015, YTP did not attend the AGM. As stated above at [31], YTL's ex-wife and Low (as proxy for YTL) attended. YCW attended and chaired the AGM, while Low voted on the resolutions as YTL's proxy. On Resolution 3, YTL and YCW were re-elected, but not YTP.[102]

Mutual understanding

87 In relation to his removal, YTP contends that this was a departure from the mutual understanding between YTL and himself that both men would have a say in the running and management of SWE.[103] Thus, I begin by considering whether there was such a mutual understanding.

88 SWE is clearly a family business, managed and run by YTP and YTL since its incorporation. On the evidence, there existed a relationship of mutual trust between YTP and YTL, at least until the subsequent breakdown of the relationship. In the circumstances, it seemed an obvious inference that there existed a mutual understanding that both YTP and YTL would have a say in the running and management of the company. This position did not change with Hwee and Siong becoming shareholders, as YTP and YTL continued to be the sole directors of SWE. Indeed, YTL agreed, under cross-examination, that this was the case:[104]

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101 1BA 221.

102 3AB p 1802.

103 DCS at para 26.

104 NE/04.10.18/36/6–15.

> Q: … [YTP's] case is that there was an understanding between you and him that you would both have a say in the running and management of Swee Wan Enterprise.
>
> A: Yes.
>
> Q: Okay.
>
> Court: I am not sure whether your question is that this is your case or whether he agrees with it.
>
> …
>
> A: Yes, that ought to be the case.

89 Nonetheless, in closing submissions, YTL and YCW contend that based on SWE's articles of association ("the Articles"), there cannot be such a mutual understanding. In particular, they point to arts 74 and 75 (which contemplate the retirement of directors at annual general meetings so as to stand for re-election), art 79 (which provides for the removal of directors) and art 82 (which concerns the vacation of office of directors if requested to resign). However, I disagree with this argument.

90 The mere fact that the Articles provide for various mechanisms for the removal of a director does not preclude the formation of such a mutual understanding. Under s 216 of the Act, the court is empowered to take into account wider equitable considerations which go beyond what was formally recorded in the constitutive documents of the company, and to find the existence of informal understandings that trump the express provisions of those formal constitutive documents: Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 3rd Ed, 2017) ("*Margaret Chew*") at para 4.061.

Commercial unfairness

91 That said, proving the existence of a legitimate expectation (founded on a mutual understanding) that both parties would have a say in the running and management of the company is but the first step for YTP. It must also be

established that the conduct complained of is contrary to or has departed from such expectations, *and* that the departure was of such an extent as to become unfair (see *Eng Gee Seng* at [11]).

92 The test of commercial unfairness is a necessarily fact-sensitive one. Whether or not the impugned conduct is unfair is an objective inquiry; but one which must be assessed within the context of the actual, circumstantial and relational scenario of the dispute: *Margaret Chew* at para 4.042. Therefore, in determining whether the majority has acted unfairly, it seems only right that the court also takes into account the conduct of all the parties in determining whether there has been unfairness as a whole. As Quentin Loh JC (as he then was) explained in *Tan Yong San v Neo Kok Eng and others* [2011] SGHC 30 at [103]:

> Since considerations of fairness and equity play a crucial role in an action under s 216, a court should rightly be able to take into account the conduct of all the parties in determining whether there has been unfairness as a whole warranting the grant of relief under s 216(2). After all, *fairness is a relative concept*. Furthermore, because the court has a very wide discretion in granting such relief, *it would only be natural to consider the relative equities of both the minority and majority shareholders in determining the appropriate form of relief*… [emphasis added]

93 Thus, in determining whether the dismissal of the aggrieved party in violation of his legitimate expectation to be involved in management constitutes oppression, the *reasons* for the aggrieved party's removal are a relevant factor (see *Eng Gee Seng* at [56]; *Grace v Biagioli and others* [2006] 2 BCLC 70 ("*Grace*") at [65]). If the removal of the aggrieved party was justified, it will not be considered unfair, even if done in breach of that party's expectation to remain involved in management.

94 Essentially, YTP argues that in his removal, there were various breaches

of the Articles, and other procedural irregularities, which caused him to suffer substantial prejudice. His removal amounted to unfair and oppressive conduct.

95 First, YTP submits that there were breaches of arts 74–75.[105] Article 74 states that at every annual general meeting, one third of the directors shall retire. A retiring director is eligible for re-election. Then, art 75 provides that the directors who have served the longest would be the ones to retire, and if the directors are appointed on the same day, they shall draw lots as to who should retire, unless they agree who should do so. Contrary to art 74, the proposed Resolution 3 was for all three directors – YTP, YTL and YCW – to retire at the same time. As between YTL and YTP who served for the same length of time, there was no determination who should retire pursuant to art 75.

96 YCW candidly admitted to non-compliance with these twin articles.[106] According to her, she had initially wanted to remove YTP under art 79, as she felt that "he was incompetent as a director", and "had done various things that were harmful to SWE". In the course of Suits 235/236, Hwee and Siong produced some evidence to suggest that YTP had given them "gifts" from SWE, and that YTP was aware of certain withdrawals amounting to about $1,150,000. Upon discussion with YTL, it was decided that rather than remove YTP, they would give YTP a chance to explain himself at the AGM. Thus, they decided to put YTP up for re-election. Upon the suggestion of AccVisory (the company secretary) that it might appear "unfair" to put up only YTP for re-election, it was decided that all three directors would be subject to re-election. Quite clearly, there was no need for YCW to be subject to this, given that she was the

105 1BA 254.

106 PCS at para 179; PRS at para 116; NE/09.10.18/56/30 – 57/16.

most recent appointee.[107] I accept YCW's explanation for the departure from strict compliance with arts 74–75. Ironically, it was meant for YTP's benefit. Certainly, there was nothing sinister in the non-compliance with arts 74–75.

97 However, the nub of YTP's complaint concerns art 76, which provides that where a director retires, and if the place is not filled, in default, the retiring director "shall if *offering* himself for re-election… be *deemed* to have been re-elected, unless at that meeting it is expressly resolved not to fill the vacated office, or unless a resolution for the re-election of that director is put to the meeting and lost" [emphasis added]. YTP contends that when he received the notice of the AGM, Resolution 3, as proposed, it would not have given him any indication that his re-election was at stake[108] since he might reasonably have expected that he would be deemed re-elected pursuant to art 76. Given the poor relationships among the parties then, he decided not to attend the meeting; he did not wish to exacerbate matters. During cross-examination, YTP recalled that he was not feeling well and chose not to attend the meeting.[109]

98 Contrary to what YTP expected, at the AGM, the voting was not in accordance with the way the proposed Resolution 3 was tabled. While it was tabled as a resolution for the re-election of all three directors collectively, the actual vote was done for each director individually, with the result that YCW and YTL were re-elected, but not YTP.[110] Had art 76 been strictly applied, YTP argues that he would have been *deemed* re-elected at the AGM. Further, the conduct of the meeting was in breach of art 59 (see [101] below).

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107 NE/10.10.18/52/23 – 53/10.

108 DCS at para 70; NE/09.10.18/58/16 – 59/9.

109 NE/16.10.18/14/23–25.

110 DCS at para 69; DRS at para 68.

99 In my view, as YTL and YCW contends, YTP could have but did not attend the AGM to seek re-election.[111] I note that YTP has been inconsistent in his reasons for *not* attending the AGM. Putting aside the reasons for his non-attendance, what is more critical to me is the issue of whether YTP should have expected that he would be *deemed* re-elected pursuant to art 76. I see little basis for this expectation. Article 76 requires the retiring director to *offer* himself for re-election so as to be *deemed* to be re-elected. YTP conceded that he did not inform anyone of his intentions to carry on being a director.[112] Further, art 76 provides that the *deemed* re-election takes effect, "unless a resolution for the re-election of that director is put to the meeting and lost". In other words, the deeming mechanism provided for in art 76 will only apply where there is no vote (or perhaps no valid vote) on the re-election of a director. YTP provided no reasons for believing that the meeting would *not* vote against his re-election.

100 Indeed, from YCW's evidence, the meeting voted on the re-election of each of the three directors separately. YTP's re-election was defeated. Although the proposed Resolution 3 was framed as a resolution "[t]o re-elect [YTP], [YTL] and [YCW] retiring under Article 74 of the Company's Articles of association", I do not consider it improper to vote on the re-election of each of the directors separately, rather than as a group. In fact, I thought it appropriate for the meeting to have done so, in accordance with art 74, as each of the three individuals had to agree to continue to be a director, and each re-election must not be turned down by the meeting.

101 That said, I should add that the conduct of the meeting was in breach of

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111 PRS at para 116.

112 NE/16.10.18/19/23–25.

art 59,[113] which provides that if there is no chairman of the board of directors to preside over a general meeting, a shareholder (elected among those present) shall chair it. As SWE did not have a formal chairman for its board of directors, either YTL's ex-wife or Low (as proxy for YTL), should have chaired the meeting. In breach of the article, YCW, a non-shareholder, did so. That being said, this was a minor irregularity which did not cause any prejudice to YTP.

102 In the round, I accept that YTP's non-election at the AGM involved breaches of arts 59, 74 and 75. Nonetheless, contrary to YTP's argument, I did not form the view that those breaches were so egregious as to render the removal of YTP as a director commercially unfair.

103 With that, I move to the issue of whether YTP's removal was justified. In *Grace*, the English Court of Appeal affirmed the trial judge's finding that the aggrieved party's dismissal was justified in circumstances where that aggrieved party had, without prior disclosure or discussion with his fellow directors, negotiated to purchase (for himself) the business of a potential competitor to the company in question, and then attempted to conceal the existence of those negotiations. This is, of course, but an example, and whether or not dismissal as a director was justified is ultimately an intensely fact-sensitive question which entails a balancing of the equities of the case. Past authorities, even those with seemingly similar factual circumstances, are of limited precedential value and much will depend on the precise facts of the case.

104 As I mentioned at [96] above, in the course of investigations, there were allegations by Hwee and Siong against YTP. This formed the basis of the

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113 1BA 252.

counterclaim in Suits 235/236. Oddly, YTP decided not to get involved in the lawsuit, and left it all to YCW to handle.[114] Whatever the merits of these allegations, it seems to me that there was some basis for YTL and YCW to be concerned about YTP's prior management of SWE (especially in terms of the financial management). In such circumstances, I do not consider YTP's removal as a director unjustified.

105 Further, I note that YTP did not take any steps – immediately or at all – to protest his non-election, the breaches of the Articles, or to seek re-election at a subsequent AGM.[115] If indeed YTP had considered that his exclusion from the management of the company as a director was so unfair as to constitute oppression, I would have expected him to have taken immediate steps to protest his non-election. This he did not do until the filing of his counterclaim in this suit almost two years later.

106 To sum up, while the removal as a director was a departure from the expectation of YTP based on the mutual understanding that he would remain a director, and involved some breaches of the Articles, taking into account the conduct of the parties, there was really no commercial unfairness to YTP.

The Rights Issue

107 I come to YTP's allegation that YTL and YCW had improperly proceeded with the Rights Issue to dilute his shareholding in SWE.[116] The issue of shares for any reason other than to raise capital – for instance, to dilute the

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114 YTP's AEIC, 2BA p 878 at para 69.

115 PCS at paras 189–193; NE/16.10.18/19/26 – 20/1.

116 DCS at para 86.

voting power of others – may amount to oppression if the directors representing the majority cast their votes in bad faith: *Over & Over Ltd v Bonvests Holdings Ltd and another* [2010] 2 SLR 776 at [122]. However, in my judgment, YTP has not discharged his burden of proving that YTL and YCW had called for the Rights Issue to dilute his voting power and had thereby acted in bad faith.

108 YTL and YCW's defence is that the Rights Issue was necessary to urgently raise funds to repay an ABN AMRO loan which had fallen due. It is undisputed that the ABN AMRO loan was for business purposes, and that it had been negotiated and managed by YTP.[117] It was secured by a personal guarantee put forth by YTP and by SWE's properties.

109 Notice of the cancellation of the loan facility dated 28 March 2017 was sent to YTP's residential address, stating that an outstanding sum of US$1,032,403 had to be repaid by 30 June 2017. It was brought to YTL's attention only sometime in April 2017 when he received a call from ABN AMRO.[118] It was clear that YTL and YCW had nothing to do with the cancellation of the loan. By the time they learned about the problem, there was less than three months for SWE to repay ABN AMRO.

110 YTP argues that there was no need for the Rights Issue, as there should have been other means to raise funds to repay the loan. However, I note that upon finding out about the repayment obligation sometime in April 2017, SWE took reasonable steps to find alternative means of financing. In particular, attempts were made to obtain re-financing from no less than four different banks, being Maybank, United Overseas Bank, Standard Chartered Bank and

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117 PCS at paras 199–200; NE/11.10.18/26/3–22.

118 PCS at para 201; YTL's AEIC, 1BA p 637 at para 67.

Bank of China. YTP argues that from the email correspondence with the banks, options were proposed by the banks but with no follow up from YCW and/or YTL.[119] Having reviewed the evidence, I do not agree that these were mere token efforts; no less than four banks were contacted, but, unfortunately, those attempts were ultimately unsuccessful.[120]

111 Further, despite YTP's argument, I accept that YTL was under no obligation to apply the proceeds of the Suit 664 Settlement Agreement – to which he was entitled to personally – to the discharge of the debt owed by SWE under the ABN AMRO loan.[121] As for the sum of $600,000 due from Hwee under the Suits 235/236 Settlement Agreement, it appeared that Hwee had not fully paid up the sum in May and June 2017.[122] There was no evidence adduced to show that at the material time, SWE had any other sources of funds from which to repay the ABN AMRO loan.

112 Second, YTP takes issue with the manner in which the Rights Issue was carried out. In particular, YTP contends that there was short notice given to him, that no proper explanation for the number of shares to be issued had been given, and that no valuation was done to support the share price. However, I do not think that anything untoward can be inferred from the conduct of the Rights Issue.

113 In terms of the short notice given to YTP, as set out above, the urgency in the situation was because YCW and YTL only learned about the cancellation

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119 DCS para 91.

120 PCS at para 203.

121 PCS at para 223.

122 1BA pp 633–634 at paras 51–53.

of the facility in April 2017. In fact, it would seem that YTP was the one who first received notice of ABN AMRO's intention to cancel the loan in late March 2017, but failed to take any appropriate action to handle the matter.

114 The Rights Issue was for 1,771,910 ordinary shares at the par value of $1 per share. Each shareholder was entitled to subscribe for the number of shares as follows: YTL (950,000), YTP (798,888) and YTP's wife (Wong Ah Yoke), YTL's then wife (Tang Siew Cheng) and the estate of Ng Geok Chuan, 10,674 shares each.[123]

115 As explained by YCW, while the initial outstanding amount was US$1,032,403, YTL made a partial repayment on behalf of SWE, reducing the outstanding amount to about $900,000. Although the quantity of shares issued was far in excess of what was required to pay off the ABN AMRO loan (given the price per share),[124] I accept YCW's evidence that she had operated on the assumption that only YTL would be willing and able to subscribe so as to raise around $900,000, given that there would not be enough time to call for multiple rights issues if the first did not raise enough capital.[125]

116 As for the valuation of the shares, which was fixed at $1 per share, I note and share YTP's concern that YCW had made no serious attempt to ascertain the market value of the shares.[126] However, this alone does not demonstrate a lack of good faith. YTP's complaint appears to be that the price could have been

123 PCS at para 208.

124 DCS at paras 93–96.

125 PCS at paras 209–210.

126 DRS at para 76.

set lower than book value,[127] but this submission is in my view double-edged; a lower share price would also mean that more shares would have to be issued in order to raise the same amount of funds should YTL be the only one to subscribe, resulting in a more serious dilution of his shareholding. Indeed, YCW candidly acknowledged that a rights issue would be issued at less than current value, so that existing shareholders can have a chance to participate, and to incentivise them to do so. Therefore, the rights issue could have been set at a lesser value per share. However, the price was set at $1 per share because SWE had always issued new shares at the book value previously.[128] In contrast, when asked why he did not subscribe for the shares if he thought the price was low, YTP had no satisfactory explanation to give.[129]

117 Having carefully considered the evidence, I accept YTL and YCW's stance, and find that the Rights Issue was called to raise capital. This was a commercial decision, prudently made in light of the financial situation faced by SWE. It was not for the purpose of diluting YTP's share.

Alleged breaches of fiduciary duties

118 YTP also claims that YTL and YCW had breached their fiduciary duties owed to SWE, and that this was further evidence of oppressive behaviour. In particular, YTP claims that: (i) YCW had acted in conflict of interest by engaging entities related to her to carry out the investigative work, and by overcharging SWE for the services rendered;[130] and (ii) YTL had failed to

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127 DCS at para 100; DRS at para 76.

128 NE/9.10.2018/69 line 28 to 70 line 11.

129 NE/16.10.2018/23 line 27 to 24 line 12.

130 DCS at para 113.

properly account to SWE for the settlement proceeds that he received on behalf of SWE in respect of the Suits 235/236 Settlement Agreement.[131]

Conflict of interest and overcharging

119 YTP's grievance is that there is a form of *indirect* diversion of monies away from SWE by YCW and YTL. In *Margaret Chew* at para 4.144, it is observed as follows:

> Instead of direct diversions of monies or assets from the company, a more insidious form of self-serving conduct occurs where the controller causes the company to enter into a contract with the controller or with entities associated, related or connected with him. However, such transactions could conceivably benefit the company. The threat that interested transactions pose to the shareholder is the possibility that the transactions are not arm's length deals reflective of market conditions, and thereby favour the controller at the expense of the company (in particular, the minority shareholders)…

120 For a start, I note that YTP conceded that he had, in 2012, agreed to bring YCW and Low on board for the investigations.[132] Further, he agreed that they should be remunerated, was aware that payments had to be made for the work done and that payments had been made.[133] He also agreed to appoint YCW as a director of SWE on 2 October 2012 to facilitate the investigative process.[134] Therefore, the involvement of YCW, S2 and or Gao Capital is not tainted by conflict. Certainly, there is no room for YTP to protest that YCW placed herself in position of conflict of interest.

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131 DCS at para 110.

132 YTP's AEIC, 2BA p 882 at para 94; NE/16.10.18/26/2–10.

133 NE/16.10.18/27/1–3, 22–32.

134 YTP's AEIC, 2BA 871 at para 23; NE/11.10.18/45/5–12.

121 It remains for me to consider whether YTL and YCW allowed S2 to overcharge SWE, as a "self-serving" means of diverting funds out of SWE to enrich themselves at the expense of YTP. Viewed in context, I do not think that there is this form of oppressive conduct.

122 As I set out above at [32], the agreed hourly rate was $100, for the lead partners, YCW and Low, as well as the staff. In my view, this is an eminently reasonable rate. Indeed, it seems to me that the rate of $250 per hour contained in the Letter of Engagement is also reasonable, especially taking into account the fairly substantial experience of YCW and Low (which I shall not set out here). I should add that I do not accept YTP's claim that there was an agreement with Low to cap professional fees at 8% of the recovered sum. This was a bare and vague assertion, with no real explanation of what was meant by the "recovered sum". Thereafter, a first payment of $301,881.70 was made on 16 December 2014 by SWT: see [33] above. This was more than two years after work commenced, which pointed away from YTL and YCW trying to siphon money away from SWE. Low explained that this first progress bill was in respect of 2,988.5 hours of work done (charged at $100 per hour) plus $3,038.70 in disbursements. In my view, this seemed to be sufficient justification for the amount.

123 It seems to me what YTP really takes issue with is the mention of the "incurred" sum "capped" at $1,500,000 for work done from 2012 and ending 31 December 2016, as stated in the account summary dated 15 May 2017 which enclosed the second progress bill for $520,000. A sum of $250,000 was paid on 1 August 2018, which means that a total amount of $551,881.70 had been paid

to S2. While the remaining amount has not been billed to SWE and SWT, Low confirmed that he would be billing for the balance of the $1,500,000.[135]

124 At this juncture, I turn to the work done by S2. In the Letter of Engagement, S2 was engaged to "provide a comprehensive financial review of [SWE and SWT]", and to "represent [SWE and SWT] in any discussions with service providers including legal counsel and accountants".[136]

125 Given the dismal state of the financial records of SWE and SWT, with misappropriation by Khim, Hwee and Siong, and withdrawals by YTP and YTL, I accept Low's evidence that there was substantial work done by S2 to review and match the bank records, the cheque images, the general ledger books and the payment vouchers not just of SWE and SWT, but also of some of the individuals involved. There were also many other areas S2 assisted with, including liaising with AccVisory, the lawyers, the authorities, such as the CAD, suppliers and customers, and so on.[137]

126 In terms of time frame, the work was done over more than four years beginning in early 2012 and ending 31 December 2016.[138] Contrary to YTP's submission, it would appear that the work continued well after 2015, after the settlement agreements were entered into.

127 Further, again, contrary to YTP's submission, I do not think S2's work was essentially a duplication of efforts by other professionals, particularly

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135 NE/10.10.18/89/5-6.

136 YCW's AEIC, 1BA p 76.

137 YCW's AEIC, 1BA pp 648 – 650 at para 11.

138 YTP's AEIC: 2BA 1208–1209.

AccAssurance and STRIX. AccAssurance was tasked to prepare a report for court proceedings, and quoted $10,000 for its work.[139] As was explained by Chua Choong Thoong, a partner of AccAssurance, the documents provided were voluminous and not arranged in order – they came in "dribs and drabs" – and S2 assisted in identifying the documents and searching for the documents.[140] In other words, AccAssurance relied on S2's work. As for STRIX, its scope of work was to review AccAssurance's work and to present and defend the report in court,[141] for which STRIX quoted $45,528.[142] These were separate areas of work.

128 In terms of outcome, the work done aided in summary judgment of $4,100,000 being obtained against Khim in Suits 235/236, as well as the Suits 235/236 Settlement Agreement.[143] It also resulted in the commencement of the present proceedings against YTP. There was commercial benefit to SWE and SWT.

129 While there was, admittedly, little in the way of documents prepared by S2 as evidence of the work done, Low explained that this was because the bulk of S2's work comprised in retrieving documents and collating them so that they could be presented in a comprehensible manner.[144] Also, one must bear in mind that the nature of such work is such that not all searches will bear fruit; the time and effort spent on a search may well be disproportionate to what is eventually

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139 YCW's AEIC, 1BA p 271.

140 NE/11.10.18/6/21-23.

141 YCW's AEIC, 1BA p 279.

142 YCW's AEIC, 1BA p 281.

143 PRS at para 132.

144 NE/10.10.18/86/20–25.

found.[145] Taking all of this into account, it might fairly be said that the paucity of documents produced belied the true extent of the work done.

130 As Low explained, the invoice for $1,500,000 was based on the total number of hours worked by YCW, S2's staff and him from 2012 to 2016, as well as disbursements. To support this, Low pointed out that he had put in a total of 6,845.5 hours of work.[146] Based on the agreed rate of $100 per hour, the professional fees incurred would have amounted to some $684,550 for Low's work alone. This is without taking into account the substantial work done by YCW (also at the rate of $100 per hour), the hours put in by S2's staff, as well as disbursements incurred. Once all of this is accounted for, I do not think it can be clearly said that the invoice for $1,500,000 constitutes overcharging.

131 In light of the substantial work done, the significant commercial benefit of the work to SWE, and the agreed rate for charging for the work, it seems to me there is some basis for the proposed quantum of fees. That said, of course, it remains for SWE and SWT to peruse any bill rendered, and to raise appropriate queries with S2, if and when necessary. On balance, however, I do not find that the amount of fees charged and proposed to be charged by YCW and her affiliated companies is so excessive as to support a finding that this was a scheme to divert funds from SWE. I also do not find that YTL and YCW have already made payments of such excessive amounts so as to constitute oppressive conduct. At the end of the day, apart from some bare assertions, YTP has simply failed to produce any evidence to prove that the acts are clearly meant to favour YTL and YCW at the expense of the company (and therefore YTP).

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145 NE/10.10.18/96/29.

146 PCS at para 246.

Accounting for the settlement proceeds

132 I turn next to YTP's allegations that YTL had failed to properly account to SWE for the settlement proceeds in respect of the Suits 235/236 Settlement Agreement. In my view, these allegations are not proved on the facts. Although there may have been some discrepancies in YTL's account of the monies received, the monies received have been substantially accounted for and further sums have yet to be paid in.[147]

Failure to provide documents and information

133 I do not accept YTP's submission that SWE's refusal to provide certain documents as requested constituted minority oppression. On his own admission,[148] YTP's request for documents was not made in his capacity as shareholder of SWE, but was made in connection to his defence to SWE's claim against him. The proper avenue for such a request would be to seek specific discovery of the documents sought; it does not lie in YTP's mouth to allege that SWE, YTL or YCW were acting improperly in declining to disclose the documents sought.[149]

Commencement of the present proceedings

134 YTP's submission that the mere commencement of the present proceedings constituted oppressive conduct is wholly without merit. It goes without saying that it is not commercially unfair for the majority shareholders in a company to cause proceedings to be commenced by the company against a

147 YTL's AEIC, 1BA 633–634 at paras 51–55.

148 DCS at para 135.

149 PCS at paras 260–267; PRS at paras 134–135.

minority shareholder to recover debts owed to the company.[150] Indeed, SWE's action is vindicated as I have found in its favour for the claim.

Conclusion on YTP's counterclaim

135 Having considered the evidence and the parties' submissions, I am of the view that while there was a departure from the mutual understanding held among the shareholders for YTP to have a role in the management of SWE, the conduct complained of did not rise to the level of commercial unfairness required to sustain a claim under s 216 of the Act. Accordingly, I dismiss YTP's counterclaim in its entirety.

Conclusion

136 To sum up, I allow SWE's claim for S$1,805,156.62, less the sum of US$300,000 with the exchange rate for the conversion to be fixed on 10 September 2008, with interest at the rate of 5.33% from the date of writ to the date of judgment. I dismiss YTP's counterclaim. I shall hear the parties on costs.

Hoo Sheau Peng
Judge

150 PCS at para 259.

Vikram Nair and Ngo Wei Shing (Rajah & Tann Singapore LLP) for the plaintiff and defendants in counterclaim;
Tan Sia Khoon Kelvin David and Sara Ng Qian Hui (Vicki Heng Law Corporation) for the defendant and plaintiff in counterclaim.
