IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 70

Civil Appeal No 106 of 2020 and
Summons No 18 of 2021

Between

(1) Teelek Realty Pte Ltd
(2) Chew Kar Lay
(3) Ng Pei Ling Shirlyn
(4) Ng Jin Ping Eugene

… *Appellants*

And

Ng Tang Hock

… *Respondent*

In the matter of HC/Suit 758 of 2017

Between

Ng Tang Hock

… *Plaintiff*

And

(1) Teelek Realty Pte Ltd
(2) Chew Kar Lay
(3) Ng Pei Ling Shirlyn
(4) Ng Jin Ping Eugene

… *Defendants*

JUDGMENT

[Companies] — [Oppression]

Teelek Realty Pte Ltd and others
v
Ng Tang Hock

[2021] SGCA 70

Court of Appeal — Civil Appeal No 106 of 2020 and Summons No 18 of 2021
Sundaresh Menon CJ, Andrew Phang Boon Leong JCA and Judith Prakash JCA
1 March 2021

22 July 2021 Judgment reserved.

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

Introduction

1 The appeal before us concerns an oppression action under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act") and the winding up of Teelek Realty Pte Ltd ("the Company"), the first appellant. This rather banal description belies the passions that had led to the action which was the last salvo in the breakdown of an intimate relationship that had lasted more than 20 years. The main protagonists in these legal proceedings, Mr Ng Tang Hock ("Mr Ng"), the respondent, and Mdm Chew Kar Lay, Wendy ("Mdm Chew"), the second appellant, were married from 1995 to 2012. During this period, they owned and ran the Company jointly. After the divorce, however, their daughter and son ("the children") became involved in the management of the Company under the direction of Mdm Chew. Mdm Chew and the children were found by the

High Court judge (the "Judge") to have conducted the affairs of the Company in a manner that was oppressive to Mr Ng. The children are the third and fourth appellants in the appeal.

2 The present appeal is a contained one. It concerns only the Judge's findings in *Ng Tang Hock v Teelek Realty Pte Ltd and others* [2020] SGHC 214 ("GD") that:

(a) Mdm Chew had misappropriated $12.564m from the Company;

(b) Mdm Chew and the children had conducted the Company's affairs in a manner that was oppressive to Mr Ng; and

(c) the Company ought to be wound up to remedy the oppression.

3 The Company is a nominal party in the appeal and did not put forward any arguments. Accordingly, all references to "the appellants" are references to Mdm Chew and the children only. Where it is necessary to refer to the children individually, we will refer to them as "Shirlyn Ng" and "Eugene Ng" respectively.

4 We heard the parties on 1 March 2021 and reserved judgment. We indicated to the parties that while we were not inclined to overturn the Judge's findings of misappropriation and oppression on the part of Mdm Chew, we were prepared to look into the question of remedies. We therefore adjourned the appeal to allow the parties, and the previously appointed liquidator for the Company ("the Liquidator"), to explore whether it would be possible to arrive at an agreed set of directions that would secure the orderly separation of the

parties' interests in the Company while allowing the Company to continue as a going concern.

5 The parties subsequently wrote to the court on 19 April 2021 putting forward a partial agreement on a buyout proposal ("Buyout Proposal") pursuant to which Mr Ng was to buy all of Mdm Chew's shares in the Company.

6 For completeness, we add that the appeal was heard together with CA/SUM 18/2021 ("SUM 18") – an application by the appellants to strike out the parts of the Respondent's Case and Respondent's Skeletal Arguments which deal with the appellants' rejection of Mr Ng's offer to settle.

Background

The parties

7 Mdm Chew and Mr Ng were married in 1995. Unfortunately, over the years, their relationship deteriorated, and the marriage broke down sometime in 2011.

8 On 11 September 2011, Mdm Chew left the matrimonial home taking the children with her. At that point, both spouses were already legally represented and the correspondence between their lawyers reveals that they were actively negotiating a divorce settlement in August and September 2011. On 28 September 2011, the spouses arrived at an agreement as to the division of their matrimonial assets. On 14 November 2011, Mdm Chew commenced divorce proceedings against Mr Ng. On 1 August 2012, a consent ancillaries order was made in the divorce proceedings ("Ancillaries Order") and the final judgment of divorce was granted on 21 August 2012.

9 The Company is an investment holding company that owns numerous real estate properties in Singapore. From the time the Company was incorporated in 1996 up to the time of the divorce, Mr Ng and Mdm Chew were the only shareholders of the Company, each holding 4.3m shares. During that period, they were also the only two directors of the Company.

10 Mr Ng resigned his directorship on 7 August 2012 (shortly after the Ancillaries Order was made) as he did not wish to have any further management interaction with Mdm Chew. In his place, Shirlyn Ng was appointed a director of the Company on the same day. Eugene Ng became the third director on 1 September 2014.

11 Over the years, Mr Ng made various loans to the Company. As of 15 August 2011, the loans totalled $12.564m ("Loans"). On 1 October 2011, Mdm Chew caused the Loans to be reclassified in the Company's general ledger as amounts owing from the Company to herself. She subsequently withdrew $12.564m from the Company's accounts. Mr Ng contended that this withdrawal constituted misappropriation. In her defence, Mdm Chew asserted that Mr Ng had agreed to transfer the Loans to her.

12 In July 2015, Mdm Chew transferred one share in the Company from herself to each of the children. Mr Ng subsequently challenged these transfers. The Judge invalidated both transfers on the basis that they had been made in breach of the Company's Articles of Association ("Articles") (GD at [139]). No appeal was brought against the invalidation.

13 On 26 May 2017, notice was given for the Company's 20th Annual General Meeting ("AGM") to be held on 12 June 2017. Mr Ng attended the

AGM through his proxy. The meeting was adjourned without any resolution being voted upon. A subsequent notice dated 3 August 2017 was issued for the adjourned meeting to be held on 22 August 2017. This notice included a new proposed resolution to authorise the Company's directors (*ie,* the appellants) to allot and issue shares ("Resolution 6"). Mr Ng objected to Resolution 6 as it had not been proposed or considered at the AGM on 12 June 2017. The appellants refused to remove Resolution 6 from the agenda for the adjourned meeting.

The proceedings

14 On 17 August 2017, Mr Ng commenced HC/S 758/2017 ("Suit 758") against the Company and the appellants. He immediately applied for an injunction to restrain the appellants from, *inter alia,* holding any meeting in his absence and/or holding any meeting for the purposes of considering and passing resolutions to alter the share capital of the Company, pending the determination of Suit 758.

15 On 21 August 2017, parties recorded a consent order under which the 20th AGM would be adjourned to a date after Mr Ng's application for an injunction had been heard. An injunction was subsequently granted by the Judge on 6 October 2017. This restrained the appellants from holding the adjourned 20th AGM with an agenda that differed from that set out in the notice of the 20th AGM dated 26 May 2017.

16 A summary of the main claims advanced by the parties in Suit 758, as well as the Judge's decision in the GD, appears in the table below. The boxes in blue represent issues that remain live on appeal.

Party advancing the claim	Claim	Judge's decision	GD references
Mr Ng	Repayment of the Loans which Mr Ng had advanced to the Company and which had thereafter been misappropriated by Mdm Chew	Dismissed Mr Ng's claim for the repayment of the Loans to himself	[138(a)]–[138(b)]
Mr Ng	Cancellation of the transfers of shares in the Company to the children as the transfers were contrary to the Company's Articles	Allowed	[139]
Mr Ng	Striking off Mdm Chew and the children as directors of the Company	Allowed the children to be struck off	[138(c)]
Mr Ng	Oppression action against the appellants in relation to their conduct of the Company's affairs	Allowed Wound up the Company, ordered Mdm Chew to return $12.564m she had misappropriated from the Company and directed that the Company's accounts be rectified	[140]

The appellants	Transfer of Mr Ng's shares in the Company to the children on the basis that Mr Ng was holding the shares on trust for them pursuant to a Trust Agreement (as defined below at [46]) or that the doctrine of estoppel prevented Mr Ng from claiming that he was the beneficial owner of the shares in the Company which were registered in his name	Dismissed as the Trust Agreement was found to be a complete fabrication and the estoppel claim was not proved	[116], [132] and [138(d)]

Issues

17 The appellants appeal against three aspects of the Judge's decision (see the blue boxes in the table above) leading to the following main issues:

(a) Whether Mdm Chew had misappropriated $12.564m from the Company.

(b) Whether Mdm Chew and the children had conducted the affairs of the Company in a manner that was oppressive in relation to Mr Ng.

(c) Whether the Company ought to be wound up.

The Judge's decision in Suit 758

18 The Judge disallowed Mr Ng's claim for the repayment of the Loans to himself as he found that the claims for the individual loans making up the Loans were time barred under s 6(1) of the Limitation Act (Cap 163, 1996 Rev Ed) (GD at [37]–[47], [138(a)]). Further, Mr Ng had waived the Loans as between the Company and himself by signing an audit confirmation dated 12 July 2012

("12 July 2012 Audit Confirmation"). This document stated that nothing was due and owing between them (GD at [56]–[57]).

19 However, the Judge found that Mr Ng had not "waived the Loans in Mdm Chew's favour". The appellants were unable to provide any contemporaneous documentary evidence to support the reclassification of the Loans as amounts owing to Mdm Chew instead of to Mr Ng (GD at [50]). The Judge disbelieved Mdm Chew's evidence in relation to the Trust Agreement which she claimed formed the basis of the "waiver" (GD at [49], [51]–[55]). Furthermore, the Judge did not think that the available documentary evidence in the form of the Company's Annual Reports and the audit confirmations signed by Mdm Chew and Mr Ng sufficed to show that the Loans had been "waived in favour of Mdm Chew" (GD at [56]–[59]).

20 The Judge cancelled the transfers of shares executed by Mdm Chew in favour of the children as the transfers contravened the Articles. Mdm Chew had wilfully failed to give a transfer notice to the Company prior to the transfer of shares as required by Art 29. Further, Mr Ng was not afforded a chance to purchase the shares even though he had a pre-emptive right to do so under Art 30 (GD at [64]–[66]).

21 The Judge found that the following aspects of the appellants' conduct constituted breaches of directors' duties (see generally the GD at [96]):

> (a) Mdm Chew's wrongful reclassification of the Loans as loans made by her to the Company, and her subsequent withdrawal of $12.564m for her own use which constituted misappropriation of the Company's moneys (GD at [69]).

(b) Mdm Chew's transfer of one share to each of the children in contravention of the Articles (GD at [70]).

(c) Mdm Chew's decision, made without Mr Ng's consent, that the 18th and 19th AGMs should be on paper rather than physical meetings (GD at [75]–[76]).

(d) Mdm Chew's failure to timeously provide Mr Ng with a copy of the audited accounts of the Company for Financial Year ("FY") 2016 (GD at [77]–[79]).

(e) Mdm Chew's inclusion of Resolution 6 in the notice of the adjourned 20th AGM in contravention of Art 60 of the Articles, and her insistence on proceeding with Resolution 6 despite Mr Ng's objections (GD at [85]).

(f) Mdm Chew's co-mingling of her own funds with those of the Company and her use of the Company's bank accounts as if they were her own (GD at [92]).

(g) The passive approach adopted by the children to the management of the Company's affairs (GD at [97]).

22 The Judge found that the unauthorised transfer of shares to the children, the failure to hold physical AGMs and the failure to provide Mr Ng with the audited accounts amounted to corporate wrongs against the Company *and* personal wrongs against Mr Ng as a shareholder of the Company (GD at [100]).

23 Despite this overlap, applying the framework set out in *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333

("*Sakae Holdings*"), the Judge found that Mr Ng's oppression action did not amount to an abuse of process as Mr Ng was seeking to vindicate the injury to his interests as a shareholder of the Company and obtain relief for the breach of his legitimate expectations as to how the Company's affairs were to be managed. The appellants had ignored and disregarded Mr Ng's interests and this amounted to distinct personal wrongs that met the threshold of commercial unfairness (GD at [102(a)]). The Judge then concluded that the appellants' conduct satisfied the test of unfairness and found in favour of Mr Ng on his claim of oppression (GD at [104]–[105]).

24 The Judge ordered the Company to be wound up to give effect to his finding of oppression and ordered Mdm Chew to return the sum of $12.564m to the Company (GD at [107]–[108]).

25 As for the alleged Trust Agreement, the Judge found it to be a complete fabrication and rejected the appellants' counterclaim made on that basis (GD at [116]).

The parties' cases on appeal

26 The Company takes a largely passive role and appeals solely against the Judge's decision to wind it up. In that respect, it aligns itself completely with the appellants and relies on their legal arguments, not proffering any proper legal submissions of its own.

27 The appellants run two alternative cases.

28 Their *primary case* is that Mr Ng had "waived" the Loans in favour of Mdm Chew. They argue that this is supported by objective documentary

evidence in the form of: (a) the 12 July 2012 Audit Confirmation; (b) Mr Ng's signature on the Company's FY 2011 Annual Report; and (c) Mr Ng's approval of the Company's Annual Reports in subsequent years. Building upon this, they submit that without the finding of misappropriation, the Judge's finding of oppression can no longer be supported as all the other instances of oppressive conduct complained about by Mr Ng are "either too trivial and resulted in no prejudice, or are wholly consistent with [Mr Ng's] expectation that he would have no role in the conduct of [the Company's] affairs".

29 In advancing this argument, the appellants urge us to depart from this court's view in *Over & Over Ltd v Bonvests Holdings Ltd and another* [2010] 2 SLR 776 at [76] that prejudice is *not* an "essential requirement" in an oppression action. They submit further that Mr Ng's oppression action must fail in the absence of prejudice.

30 The appellants do not challenge the following factual findings made by the Judge in relation to Mr Ng's complaints about Mdm Chew's misconduct:

(a) Mdm Chew had transferred one share to each of the children in breach of the Articles (GD at [70]);

(b) Mdm Chew had failed to hold physical AGMs and dispensed with physical meetings in respect of the 18th and 19th AGMs without Mr Ng's approval (GD at [76]);

(c) Mdm Chew had failed to provide Mr Ng with a copy of the Company's audited accounts for FY 2016 within a reasonable time prior to the 20th AGM (GD at [78]); and

(d) Mdm Chew had treated the Company's bank accounts as her own and used them for purposes that had nothing to do with its business (GD at [92]).

31 In addition to finding that the above conduct was misconduct, the Judge found Mdm Chew's insistence on continuing with Resolution 6 when Mr Ng objected to it, even though it was in contravention of Art 60 of the Articles, to be wrongful as well (GD at [85]). As this finding does not appear to be disputed by the appellants, we refer to all these instances of misconduct (excluding Mdm Chew's misappropriation of the Loans) collectively as the "Misconduct".

32 The appellants' *alternative case* is that even if Mdm Chew had misappropriated $12.564m from the Company, that misappropriation was a purely corporate wrong which should have been pursued through a derivative action, and not via an oppression claim.

33 The appellants add that even if oppression was made out against Mdm Chew, it was not made out against the children as both of them had simply left the management of the Company to Mdm Chew and followed her instructions. Furthermore, even if the Judge had been justified in upholding Mr Ng's oppression claim, the Company should not have been wound up.

34 In response, Mr Ng argues that the objective documentary evidence cited by the appellants does not support their position that he had assigned the Loans to Mdm Chew. He claims that the appellants have painted a misleading picture of his legitimate expectations. This was at all times that "the Company [would] be managed properly". In his view, Mdm Chew's misappropriation of the $12.564m coupled with the appellants' other conduct in the management of the

Company constituted oppression under s 216 of the Companies Act. Mr Ng disagrees that prejudice is an essential element of an oppression claim.

Whether Mdm Chew had misappropriated $12.564m from the Company

A preliminary point on terminology

35 The issue of whether Mdm Chew had misappropriated $12.564m from the Company formed a crucial part of both parties' cases, both at trial and on appeal. In particular, the appellants' primary defence against Mr Ng's oppression action was that if Mr Ng had "waived" the Loans in favour of Mdm Chew, none of the Misconduct had caused prejudice to Mr Ng and, hence, could not amount to oppression under s 216 of the Companies Act. As such, the parties' cases focussed on whether the Loans had been transferred to Mdm Chew so as to entitle her to withdraw the moneys to repay herself.

36 As a preliminary matter, we must disagree with the terminology employed by the parties. As we pointed out during the hearing, the use of the term "waiver" to describe how Mr Ng allegedly passed the benefit of the Loans to Mdm Chew is both legally incorrect and confusing. When a debt obligation is waived, the waiver comes from an action on the part of the creditor directed at the debtor by which the creditor releases the debtor from the obligation to make repayment. Thus, in this case, any waiver of the Loans would only have operated between Mr Ng and the Company and would have had nothing to do with any other party. Indeed, the Judge found that Mr Ng had waived the Company's obligation to repay him the Loans. Once waived, the Company's obligation to repay the Loans would no longer exist, not in favour of Mr Ng and certainly not in favour of the third party, Mdm Chew. In situations where the rights under a contract, whether in respect of a debt or otherwise, are claimed to

have been transferred to a third party, this would have to have been effected by assignment (or novation if both burdens and benefits are transferred – see *Fairview Developments Pte Ltd v Ong & Ong Pte Ltd* [2014] 2 SLR 318 at [46]). We also noted that the use of the term "waiver" tended to divert attention from the real issue at hand because it focussed attention on the extinction of the obligation to repay the Loans, rather than the transfer of the same obligation to Mdm Chew.

37 When we put this to counsel for the appellants, Mr Lee Eng Beng SC ("Mr Lee"), he agreed that "what was in pleaded was, indeed, in layman's terms, that [Mr Ng] allowed [Mdm Chew] to take over the [Loans] … [which] can take place only by way of an assignment or a novation". Mr Lee originally stated that the situation could be characterised as a novation because there were three parties (*ie,* Mdm Chew, Mr Ng and the Company) who came to an agreement to novate the Loans such that they became due to Mdm Chew only. However, he subsequently took the position that the appellants' pleadings in respect of the Loans were sufficient to found Mdm Chew's entitlement to the Loans on the basis of an assignment, and that the parties' *oral* agreement on this point was evidenced by the presence of objective documentary evidence (as listed below at [39]). We therefore proceed to analyse the appellants' case on the basis of an assignment of the Loans.

Mr Ng never intended to assign the Loans to Mdm Chew

38 We agree with the Judge that Mdm Chew's claim that the Loans had been transferred to her was a concoction. There is absolutely no evidence of any such assignment. Our main reasons follow.

39 First, the objective documentary evidence is equivocal as to any such assignment. It does not clearly point to any intention on Mr Ng's part to give up his claim to the Loans and assign them to Mdm Chew *before* the reclassification of the Loans on the Company's general ledger on 1 October 2011. In their submissions and during the hearing, the appellants cited the following documents to us as evidence of a prior *oral agreement* between Mdm Chew and Mr Ng in September 2011 to assign the Loans to Mdm Chew:

(a) the 12 July 2012 Audit Confirmation which stated that a "$Nil" balance was owed from the Company to Mr Ng;

(b) the FY 2011 Annual Report which had been signed by Mr Ng on 12 July 2012 in his capacity as a director of the Company;

(c) the FY 2012 and FY 2013 Annual Reports which reflected that $12,564,950, $5,064,950 and $1,239,318 were "Amount[s] owing to a director" in FY 2011, FY 2012 and FY 2013 respectively.

We analyse each document in turn.

40 As Mr Lee acknowledged during the hearing, the 12 July 2012 Audit Confirmation "only goes halfway" in relation to Mdm Chew's claim because the intention it reflects is only an intention on the part of Mr Ng to waive the Loans in favour of the Company. There is no mention of Mdm Chew in the document and thus it could not be evidence that Mdm Chew had taken over the benefit of the Loans with the agreement of Mr Ng. Indeed, an intention to waive the Loans in favour of the Company would be completely inconsistent with an intention to transfer the Loans to a third party.

41 The appellants referred to the statement in the FY 2011 Annual Report that $12,564,950 (*ie,* the Loans + $950) was an "Amount due to Director**s**" [emphasis added] to show that the Loans which were no longer owing to Mr Ng as of 12 July 2012 must necessarily have been assigned to Mdm Chew. However, a plain reading of these words indicates that both Mr Ng *and* Mdm Chew were owed moneys by the Company. Given that the parties do not dispute the Judge's finding that Mdm Chew was owed $950 by the Company, the plural word "directors" would more logically be interpreted to mean that $950 of the $12,564,950 was owed to Mdm Chew with the remainder being owed to Mr Ng. The mere fact that the FY 2011 Annual Report and the 12 July 2012 Audit Confirmation were both signed on the same day does not show, on a balance of probabilities, that Mr Ng intended to assign the Loans to Mdm Chew.

42 The appellants' final argument was that the reference in the FY 2012 and FY 2013 Annual Reports to the Loans being owed to "a director" could only refer to Mdm Chew as Mr Ng had resigned his directorship on 7 August 2012. Again, the problem is that these two documents do not unequivocally show an intention on Mr Ng's part to assign the Loans to Mdm Chew such that she was entitled to withdraw the money from the Company. While it is true that Mr Ng had signed the Minutes of the 2013 and 2014 AGMs (which adopted the FY 2012 and FY 2013 Annual Reports respectively) and failed to object to their contents till 2017, there is no evidence that Mr Ng's attention had been specifically brought to the status of the Loans at any point from the time they were reclassified on 1 October 2011 to 30 June 2014 when he signed the Minutes for the 2014 AGM.

43 The total principal sum due under the Loans was $12.564m. This was not a trifling sum. Thus, any intention to assign them on Mr Ng's part would almost certainly have been evidenced by some form of documentation. This is especially so since the Loans were allegedly assigned to Mdm Chew in September 2011 in the midst of the breakdown of their marriage. The lack of clear and unequivocal evidence that Mr Ng had intended to assign the Loans to Mdm Chew is therefore fatal to Mdm Chew's case.

44 In response to our observations on the equivocality of the documents, Mr Lee emphasised that the documents merely serve as evidence or confirmation of an underlying *oral agreement* for Mr Ng to assign the Loans to Mdm Chew sometime in September 2011 as part of their divorce settlement. We refer to this as the "Prior Oral Agreement".

45 This brings us to our second point. Given the way in which the appellants have chosen to run their case in this appeal, they are not allowed to argue before us that there was a Prior Oral Agreement. A claim as to the existence of the Prior Oral Agreement was advanced before the Judge albeit it was described as "the Trust Agreement". The Judge rejected this claim. No appeal has been brought against the Judge's finding that the Trust Agreement was a "*complete fabrication*" [emphasis added] (GD at [116]).

46 For context, the Trust Agreement arose from Mdm Chew's pleaded counterclaim that Mr Ng had agreed to an oral trust as part of their divorce settlement. The particulars of the Trust Agreement can be found in the Defence and Counterclaim (Amendment No 5) of the 1st and 2nd defendants ("Mdm Chew's pleadings") as follows:

> 15B. As regards [Mr Ng's] shares and interest in [the Company], in consideration of [Mdm Chew] waiving her right to make a claim for any interest in the Teelek Group of Companies and in the Panama Companies in the divorce proceedings, [Mr Ng] further agreed to the following terms ('the Trust Agreement'):
>
> > a) to hold the 4,300,000 shares in [the Company] on trust for [the children] as follows: (i) 2,150,000 shares for [Shirlyn Ng]; and (ii) 2,150,000 shares for [Eugene Ng];
> >
> > b) [Mr Ng] will transfer the aforesaid shares to [the children] when they are of majority age and when they are mature enough;
> >
> > c) as a mere trustee, [Mr Ng] shall give up his control of the Company; and
> >
> > d) *waive his claim to all monies owed to him by [the Company] in favour of [Mdm Chew].*
>
> 15C. The Trust Agreement was entered into *verbally* between [Mr Ng] and [Mdm Chew] in the course of various conversations (too numerous for [Mdm Chew] to recall each and every conversation) between September 2011 to November 2011. The key terms of the Trust Agreement (as set out in paragraph 15B of this Defence) was agreed to in stages during such conversations between [Mr Ng] and [Mdm Chew].
>
> > a) *In September 2011, [Mr Ng] and [Mdm Chew] agreed to the key term of the Trust Agreement as set out in paragraph 15B(d) aforesaid concerning the waiver of [Mr Ng's] loan in favour of [Mdm Chew].*
> >
> > b) In November 2011, [Mr Ng] and [Mdm Chew] agreed to the key terms of the Trust Agreement as set out in paragraph 15B(a), (b), and (c) aforesaid.
>
> [emphasis added]

47 Surveying Mdm Chew's pleadings as a whole, they reveal no other pleaded agreement which (a) was made orally, (b) in September 2011, (c) as part of the parties' divorce settlement, and (d) resulted in the assignment of the Loans to Mdm Chew. As a matter of logic, the Prior Oral Agreement referred

to in this appeal must necessarily be one and the same as the Trust Agreement that was relied on below.

48 Furthermore, having regard to para 15B as quoted above, it is clear to us that the Trust Agreement was only ever pleaded and presented as a composite agreement. It cannot therefore be treated as a buffet spread from which the appellants can choose which parts they wish to appeal against and which parts they do not – the Judge's finding as to the non-existence of any Trust Agreement must be challenged as a whole, or not at all. Paragraph 1 of the Appellants' Case makes clear that in this appeal the appellants are abandoning their counterclaim relating to the Trust Agreement. The appellants also explicitly confirm at para 10 of their Case that they accept the Judge's ruling that Mr Ng was not holding his shares in the Company on trust for the children – something they had earlier asserted was an explicit term of the Trust Agreement. In their Appellants' Case, the appellants are content to accept the Judge's finding that the entire Trust Agreement was a "complete fabrication", and it is therefore not open to them to raise it again under another guise in this appeal.

49 Third, even if we were to permit the appellants to argue that the Prior Oral Agreement existed, the evidence militates against any finding of an agreement to assign the Loans to Mdm Chew as part of the divorce settlement.

50 The parties entered into the Ancillaries Order by consent on 1 August 2012. The alleged transfer was allegedly agreed to prior to that date according to Mdm Chew (we note that her account as to when it was actually agreed changed several times when she was being cross-examined). Paragraphs 12 and 13 of the Ancillaries Order stated that:

> The terms of this Order shall be in *full and final settlement* of all [of Mdm Chew's] claims for division of matrimonial assets and maintenance and *[Mdm Chew] shall have no further claims against [Mr Ng]* for maintenance and or division of the assets.
>
> [Mdm Chew] and [Mr Ng] shall henceforth retain all other assets in their names.
>
> [emphasis added]

51 There is no mention of the Company or the Loans in the Ancillaries Order, nor in their lawyers' correspondence during the divorce proceedings. The Loans amounted to a sum that exceeded Mdm Chew's gross annual salary of $150,000 in 2011 by 80 times. If Mr Ng had truly agreed to assign the Loans to her, it seems strange that Mdm Chew would be content to leave this agreement out of the Ancillaries Order. She was legally represented at the material time and had she mentioned the assignment to her lawyer, it would certainly have found its way into the Ancillaries Order.

52 As the Judge observed, there is no contemporary evidence supporting Mdm Chew's claim that Mr Ng had assigned the benefit of the Loans to her. From an accounting standpoint, even the proper double entries (*ie,* to reduce the Loans owed to Mr Ng to zero and then to credit the sum to Mdm Chew's director's loan account) were not made to reclassify the Loans as amounts due to her (GD at [50]).

53 In our judgment, Mdm Chew's conduct in relation to the Loans is highly suspicious. On 1 October 2011, the Loans simply appeared in the Company's general ledger as a loan from Mdm Chew to the Company. This was despite the fact that Mdm Chew acknowledged that effecting the proper double entries was the way to "properly record the said waiver".

54 Mdm Chew's explanation for this truncated accounting treatment in her affidavit of evidence-in-chief was that the Company was switching accounting software at the time of the reclassification and no longer used the original software in September 2011. This explanation was rejected by the Judge as the new accounting software was able to allow for the proper double entries (GD at [50]). The appellants' response is that this required Mdm Chew to have the electronic versions of the Company's account books and she did not wish to ask Mr Ng for them as they were having difficulties communicating. The appellants also urge this court to view Mdm Chew's thought processes in the context of the shattered relationship between her and Mr Ng at the material time.

55 We agree with the appellants that in analysing the credibility of their position one must factor in the breakdown of the matrimonial relationship in 2011. This context, however, is entirely detrimental to the appellants' case. Mdm Chew left the matrimonial home with the children on 11 September 2011. She was legally represented as early as 23 August 2011 and thereafter her lawyers were actively negotiating a divorce settlement with Mr Ng's lawyers. As the marriage had already broken down, the entry of the Loans in the ledger occurred at a time when Mdm Chew would have been actively protecting her own interests and assets and seeking to maximise her share of the matrimonial assets. Seen in this context, Mdm Chew's conduct in regard to the Loans points to an improper motive on her part for the reasons that follow.

56 First, the new entry was made on 1 October 2011 when, even on Mdm Chew's own account, there was no documentary evidence that unambiguously showed that Mr Ng intended to assign the Loans to her. Mdm Chew was only able to point to the 12 July 2012 Audit Confirmation as evidence of his intention. That document, as its name suggests, only came into

being on 12 July 2012, some nine months later and, in any event, did not pertain to any assignment of the Loans to Mdm Chew (as we have discussed above at [40]).

57 Second, Mdm Chew's explanation regarding the need for electronic account books does not stand up to scrutiny. Mdm Chew's testimony on this point is worth setting out in full:

> Court: Why didn't you ask the plaintiff for the soft copy? I would imagine you can transfer the soft copy into some form that you can then use on your EZ accounting system.
>
> A: Cannot enter his premises.
>
> Court: Did you, you said you didn't ask. I'm asking why didn't you ask for it?
>
> A: *No, I didn't ask.*
>
> Court: I know. Why didn't you ask for it? Remember you went to collect the documents. You said he agreed with it, he had no problems with it.
>
> A: But --
>
> Court: So why didn't you ask?
>
> A: Difficult in talking. When ever [*sic*] I request, he always say no to me.
>
> Court: He agreed to let you take the books [*ie*, the physical accounting records for the Company], according to you?
>
> A: The girls already prepare it. Just ask me to take the whole carton desk only.
>
> [emphasis added]

58 This was not a situation in which Mdm Chew's requests had been rejected by Mr Ng. While we appreciate that relations were strained at the time, this cannot explain Mdm Chew's failure to even *ask for* the electronic copies. Mdm Chew has a diploma in accounting and during the trial had painted a

picture of herself as a competent businesswoman who was in charge of the administration and finance of some of Mr Ng's companies – she would, at the very least, have known then the importance of keeping proper accounting records. If her story that Mr Ng had agreed to transfer the Loans to her is to be believed, there is no reason why she could not have simply asked for the electronic copies to effect the proper double entries. This is especially since her case is that Mr Ng had already released the hardcopy records to her and had no issue about forgoing the Loans. The Loans would be a substantial addition to her share of the matrimonial assets and Mdm Chew had instructed her lawyers to negotiate with Mr Ng's lawyers over assets that were likely worth far less (*eg,* CPF refunds and the outstanding purchase price for various properties). Seen in this light, Mdm Chew's cavalier attitude towards the Loans does not stand up to scrutiny.

59 Finally, as observed by the Judge, Mdm Chew was not a credible witness. Having presided over an eight-day trial, the Judge was well-placed to assess the veracity and credibility of the witnesses. The Judge's finding that Mdm Chew had given various conflicting versions of the waiver and her agreement with Mr Ng is amply justified. It is borne out by the transcripts and the fact that Mdm Chew's lawyers had to take out an application to amend their pleadings after Mdm Chew gave her evidence. Thus, the finding by the Judge that any oral agreement on Mr Ng's part to transfer the Loans was a concoction by the appellants must be upheld.

60 To conclude, the appellants' case that Mr Ng had transferred the Loans to Mdm Chew was totally rejected for good reason. Therefore, there was no basis on which Mdm Chew was entitled to withdraw the $12.564m from the

Company and the Judge was entirely correct to find that she had misappropriated the money.

Whether the appellants had conducted the affairs of the Company in an oppressive manner

61 As we have upheld the Judge's finding that Mdm Chew had indeed misappropriated $12.564m from the Company, it is not necessary for us to deal with the appellants' primary argument – a point that Mr Lee accepted during the hearing. As we elaborate below, this misappropriation was clearly prejudicial to Mr Ng's interests as a 50% shareholder of the Company. This being the case, the question of whether "prejudice" is a crucial prerequisite to the bringing of an oppression action is purely academic. We therefore turn directly to the question of whether Mdm Chew's conduct on the one part, and the children's conduct on the other, amounted to running the Company in a way that was oppressive to Mr Ng.

Whether Mdm Chew's conduct amounted to oppression under s 216 of the Companies Act

62 It is well established that s 216 of the Companies Act should not be used to vindicate wrongs which are in substance wrongs committed against a company and which are corporate in nature: *Suying Design Pte Ltd v Ng Kian Huan Edmund and other appeals* [2020] 2 SLR 221 at [30]. However, the law is also clear that the same set of facts can give rise to both personal wrongs and corporate wrongs.

63 In *Sakae Holdings,* this court held that the overriding inquiry in cases involving overlapping corporate and personal wrongs is whether it would amount to an abuse of process for a particular claim to be brought under s 216

as opposed to under s 216A. In this regard, the court laid down the following analytical framework:

(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 of the Companies Act?

In the following section, we deal with the points relating to the injury caused to Mr Ng (at [72]–[80] below) before turning later to the nature of the remedy sought (at [85]–[90] below).

A preliminary point – the nature of Mr Ng's legitimate expectations

64 Before turning to analyse the individual requirements under the *Sakae Holdings* framework, we deal briefly with the exact nature of Mr Ng's legitimate expectations given its centrality to the issue of commercial unfairness.

65 The appellants submit that "[Mr Ng's] expectations were that he would have no role in the management of [the Company] and full reins would be handed over to Mdm Chew". Mr Ng calls this a "false narrative" and claims that he expected the Company to be managed properly.

66 We accept that Mr Ng had taken a less active role in the supervision and management of the Company's affairs after his divorce from Mdm Chew. Mr Ng had resigned as a director on 7 August 2012 and given up his role as the signatory for the Company's bank account because he did not wish to have any further dealings with Mdm Chew and "didn't want to talk to her". That said, we agree with Mr Ng that he still had an expectation that the Company and its affairs would be managed properly. Mr Ng also expected to be able to play a supervisory role in its affairs or, at the very least, to be kept updated about its affairs.

67 We reject the appellants' contention that Mr Ng had completely relinquished control of the Company after November 2011 because this was part of the asset division agreement he made with Mdm Chew in their divorce. As mentioned above at [47], the alleged asset division agreement is simply another form of the Trust Agreement. As the appellants have chosen not to appeal against the Judge's finding that there was no such Trust Agreement, they cannot be allowed to put it forward in another form to bolster their contention regarding control of the Company.

68 Further, it is highly unlikely that Mr Ng had completely given up his interest in how the Company was managed since he continued to hold his substantial stake in the Company. Mr Ng had consistently maintained that he only resigned because he did not wish to have any further interaction with

Mdm Chew. He consented to Shirlyn Ng's appointment as a director in his place so as to "allow her to learn". It appears to us that while Mr Ng was prepared to accept some mistakes in the management of the Company due to his daughter's lack of experience, he did not expect that this would lead to overall mismanagement or to deliberate disregard of his interests as a shareholder.

69 Mr Ng testified that even after he resigned as a director, he believed that he would still have an important role in the Company because it is a company which is in the business of investing in real estate *and* the signatures of *both shareholders* are necessary to enable it to sell and purchase properties. The appellants did not dispute the necessity for Mr Ng to be involved in the investment and disposition of assets by the Company.

70 This being the case, an assertion that Mr Ng's expectation was that "he would have no role in the conduct of [the Company's] affairs" has little credibility. Further, his understanding that he would have to sign and hence approve the Minutes for the Company's meetings indicates that Mr Ng expected that he would have to continue to have a part to play in overseeing its investments and affairs so long as it continued to operate as an investment holding vehicle.

71 Mr Ng's expectation that he would at least play a supervisory role can also be seen from his repeated e-mails to Mdm Chew in 2015 demanding the Annual Reports for FY 2010 to FY 2014, as well as his refusal to rubber stamp the Minutes for the 18th and 19th AGM (FY 2014 and FY 2015) on account of the fact that the relevant account statements were not provided to him.

Mr Ng's oppression action was not an abuse of process

72 The real injury which Mr Ng seeks to vindicate is the breach of his legitimate expectations that the Company and its financial affairs would be managed properly and that he would at least be updated about its affairs. For four reasons, Mdm Chew's conduct as a whole caused distinct personal injury to Mr Ng that is separate from the injury caused to the Company.

73 First, Mdm Chew had transferred shares to the children in contravention of the Articles. In particular, Art 30 required her to inform Mr Ng who had a prior right to purchase the shares as the only other shareholder. While the appellants rightly point out that Mr Ng could not compel Mdm Chew to sell her shares to him, the crux here is that Mdm Chew did intend to transfer her shares but chose to wilfully contravene Art 30 (GD at [64]–[65]). Mr Ng would, at the very least, have had an expectation that Mdm Chew would abide by the Articles. The share transfers must be seen in their proper context – as a 50% shareholder of the Company, the prospect of obtaining even one extra share through the exercise of his right of pre-emption would be of great importance because it would afford him majority status and allow him to outvote Mdm Chew.

74 Second, Mdm Chew effectively prevented Mr Ng from playing any part in the Company's affairs by depriving him of information. Mdm Chew dispensed with physical meetings for the 18th and 19th AGMs (*ie,* FY 2014 and FY 2015) without seeking Mr Ng's approval (GD at [76]). Mr Ng was not provided with the Company's accounts statements for these two AGMs and did not sign the Minutes for them. Mdm Chew also failed to give Mr Ng the audited accounts within a reasonable time prior to the 20th AGM which was held on 12 June 2017, a Monday. Mr Ng received a notice of the AGM on 26 May 2017

but only received the audited accounts on 9 June 2017, *ie,* the Friday immediately preceding the AGM. As the Judge observed, Mr Ng was entitled to a reasonable time to review these accounts so that he could raise questions about them at the AGM. Mr Ng had to resort to letters from his lawyers (one of whom threatened legal action in the form of an injunction from the court) before the accounts were finally released to Mr Ng.

75 None of the above is disputed by the appellants whose only response is that Mr Ng has not raised any objection to the substance of these Minutes or the audited accounts for FY 2016. However, this misses the point because Mr Ng, as a shareholder, is entitled to be given these basic pieces of information about the Company's financial state.

76 Third, Mdm Chew also displayed flagrant disregard for Mr Ng's wishes in relation to the conduct of the adjourned 20th AGM. When the 20th AGM was adjourned from 12 June 2017 to 22 August 2017, Mdm Chew attempted to include Resolution 6 in the agenda for the adjourned AGM. Resolution 6 was intended to authorise her and the children to issue and allot shares to themselves without being constrained by Art 30 of the Articles. Resolution 6 read as follows:

> That pursuant to the provision of section 161 of the Companies Act (Cap. 50), the Directors of the Company be and are hereby authorised to allot and issue shares of the Company to such persons at any time and upon such terms and conditions whether for cash or otherwise and with such rights and restrictions as the Directors may, in their absolute discretion deem fit, and that such authority shall continue in force until the conclusion of the next Annual General Meeting or the expiration of the period within which the next Annual General Meeting of the Company is required by law to be held, whichever is earlier.

77 This inclusion of Resolution 6 was itself contrary to Art 60 of the Articles which provided that no business could be transacted at an adjourned meeting other than the business left unfinished at the previous meeting. It is not disputed that Mdm Chew insisted on proceeding with the resolution in the face of Mr Ng's objections and was stopped only by an injunction issued by the Judge (GD at [80]–[82]). This conduct evinced Mdm Chew's clear disregard for Mr Ng's interests.

78 Finally, and most importantly, the misappropriation of the Loans is both a classic example of a corporate wrong and a distinct personal wrong against Mr Ng. As we pointed out to Mr Lee during the hearing, it is difficult to think of a more direct example of an injury to shareholders than reducing their value in a company by draining it of $12.564m. The wrongdoing was particularly acute in this case given that Mr Ng had *personally advanced* the Loans to the Company to help it to pay off its bank loans. The Loans may thus be seen as his personal investment in the Company. His legitimate expectations thus could not have included the Loans being siphoned out of the Company for the benefit of his ex-wife.

79 The appellants claim that Mr Ng only objected to the way that the Company was being managed in February 2015 after he saw photos of Mdm Chew and her boyfriend, one Mr Chai, on Facebook. They contend that Mr Ng was acting for "purely emotional reasons" rather than on the basis of the frustration of his legitimate expectations as a shareholder of the Company. In support of this, they cite the various angry e-mails that he sent to Mdm Chew in February and March 2015 alleging that she and Mr Chai were "dating" and that they were "show[ing] off" to him. This is not a fair characterisation of the facts.

80 Mr Ng admitted that the photos sparked his anger. It is also clear that the e-mails were sent during an emotional outburst. However, reading the e-mails as a whole, it is clear that Mr Ng was also greatly concerned that Mdm Chew and Mr Chai had cheated him of various sums in relation to the Company. Notably, a consistent thread in a number of these e-mails was his repeated requests for Mdm Chew to appoint him as a director of the Company and send him the financial statements for the years from 2010 to 2014.

Our conclusion on Mdm Chew's conduct

81 On the totality of the evidence, we are satisfied that with respect to Mdm Chew's actions the threshold for oppression under s 216 of the Companies Act has been made out – regardless of whether prejudice is an essential element of oppression. The above instances of misconduct were contrary to Mr Ng's legitimate expectations as a shareholder. Even if Mr Ng was content to step back from the active management of the Company's affairs, the Misconduct and Mdm Chew's misappropriation of the Loans do not simply present a situation of financial mismanagement. Nor is this a case of being outvoted by the majority. Rather, what we see is a picture of systemic abuse by Mdm Chew who appropriated Mr Ng's personal investment in the Company for her sole benefit, flagrantly flouted the Articles on numerous occasions, and kept Mr Ng in the dark about the Company's operations and finances by withholding basic information from him over the years. These actions easily crossed the threshold of commercial unfairness.

Whether the children's conduct amounted to oppression under s 216 of the Companies Act

82 As observed in *Woon's Corporations Law* (Walter Woon gen ed) (LexisNexis, 2019, April 2021 release) at para 51, relief under s 216 of the Companies Act can only be granted against a person who is implicated in the oppressive conduct. A person whose involvement is minimal should not have an order made against him, even if he is nominally part of the dominant group.

83 The acts of oppression that occasioned personal injury to Mr Ng stemmed from Mdm Chew's conduct. There is no evidence that either of the children had actively participated in those acts. They each held only one share in the Company out of a total of 8.6m issued shares (prior to the invalidation of the share transfers by the Judge). Further, given their youth and inexperience in business matters, it is wholly unlikely that they had joined forces with Mdm Chew to manage the Company in a fashion that was oppressive to their father. In 2015, Eugene Ng was 20 years old and serving National Service while Shirlyn Ng was 22 years old and had just entered the workforce after completing her studies. During the hearing, counsel for Mr Ng, Mr Ong Ziying Clement ("Mr Ong"), agreed that the evidence showed that the children had simply left decisions about the Company to their mother, Mdm Chew. They trusted her and were content to be guided by her. While such an attitude is understandable and excusable in the family setup, especially where children are being inducted into the management of a family company's affairs, it will not be condoned in general as directors are usually expected to inform themselves about their company's affairs and exercise independent judgment in managing them. Whether a director's lack of participation in a company's affairs, particularly when a dominant director is running matters, will allow the passive director to

escape from liability for oppression is a fact-centric inquiry that will have to be determined separately in each case.

84 We therefore find that Shirlyn Ng and Eugene Ng had not conducted the Company's affairs in a manner that was oppressive to Mr Ng and allow their appeals on this point.

Whether the Company ought to have been wound up as a remedy for the oppression

Remedy sought and abuse of process

85 The real remedy that Mr Ng sought when he started Suit 758 was to bring an end to his association with Mdm Chew in the Company either by buying her out or being bought out himself.

86 Having regard to Mr Ng's pleaded reliefs in his Statement of Claim (Amendment No 2), it is clear that Mr Ng is ***not*** merely seeking the return of the $12.564m to the Company (*ie,* a remedy that may be seen as being solely for the Company's benefit and hence the proper subject of a derivative action). In prayer 8, Mr Ng seeks an order that Mdm Chew sell her shares to him. In prayer 9, Mr Ng states his *alternative* prayer which is that the appellants be ordered to purchase his shares. In effect, either order would complete the divorce between the ex-spouses and release them from having to deal with each other in any way.

87 The other prayers relevant to this appeal are as follows:

> 5. An Order for a special audit to be conducted into the accounts and affairs of the [Company] to investigate and determine the extent of [the appellants'] extraction(s) of fund(s) from the [Company];

> 6. An Order that [the appellants] jointly and severally and/or each of them as found appropriate be liable in restitution and/or pay damages to the [Company] for any loss or damage caused to the [Company] and/or that they account to the [Company] for any profits or monies obtained and/or derived by them by reason of the matters pleaded herein;
>
> 7. In the alternative to Prayer 6 above, an Order that civil proceedings be brought in the name of or on behalf of the [Company] for the recovery of such damages and/or profits or monies (referred to in Prayer 6 above) from [the appellants];
>
> …
>
> 10. An Order that a Valuer be appointed for the purpose of Prayers 8 and 9 above or such directions as the Court may consider necessary, including a direction that the Valuer conduct a Special Audit of the [Company] to investigate whether there are any matters which are required to be taken into account for any adjustments to the value of [Mr Ng's] shares to be purchased (or to be sold, as the case may be) and to verify in particular whether there are any other contracts entered into by [the appellants] with entities associated with or owned or controlled by [the appellants].
>
> …
>
> 12. An injunction restraining the [appellants] from calling and/or causing the calling of and/or convening and/or holding any meeting of the shareholders of the [Company] **except with** the written approval of [Mr Ng] **or** an Order of Court allowing the same aforesaid actions;
>
> [emphasis in original]

88 Prayers 5 and 10 are ancillary to prayers 8 and 9 as they appear to be for the purpose of ascertaining the fair value of the Company's shares in the event a buyout order is granted. Prayer 12 is an interim remedy pending a buyout because an injunction restraining the appellants from calling for a shareholder meeting is only relevant if both Mr Ng and Mdm Chew are shareholders – there is no danger that Mr Ng's interests would be affected if he bought out Mdm Chew's shares or *vice versa*.

89 While prayer 4 refers to breaches of directors' duties and prayers 6 and 7 seek to vindicate the injuries caused to the Company, this must be seen in the context of Mr Ng's original position in Suit 758 that he should be allowed to bring a common law derivative action and the composite nature of his oppression claim against the appellants. We agree with the Judge that the restitutionary order in prayer 6 is not the essential remedy sought by Mr Ng. Rather, the return of any moneys due directly to the Company by Mdm Chew is necessary to ensure a fair exit value for himself and Mdm Chew (see also *Sakae Holdings* at [128]).

90 Bearing in mind the foregoing, the real remedy sought by Mr Ng is a buyout order for himself or Mdm Chew which is a remedy that is only available in an action under s 216 of the Companies Act. As such, we agree with the Judge that Mr Ng was seeking to vindicate his personal legitimate expectations concerning the management of the Company, and thus that the action commenced by Mr Ng cannot be regarded as an abuse of process.

Ought the winding-up order have been made?

91 Section 216(2) of the Companies Act vests a court with wide powers if it finds that oppression is established under s 216(1). The court may "with a view to bringing to an end or remedying the matters complained of, *make such order as it thinks fit*" [emphasis added].

92 As mentioned at [90] above, the remedy Mr Ng sought in his action was a buyout order. He did not seek a winding-up order in either his pleadings or in his submissions before the Judge. In fact, the first time a winding-up order was brought up in Suit 758 was during oral closing submissions, upon a suggestion by the Judge. However, as the appellants rightly concede, the court's discretion

under s 216(2) of the Companies Act is a broad one and it is not constrained by the parties' pleadings when it comes to crafting a remedy under s 216(2) of the act (*Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 at [30]).

93 That said, we do not think that a winding-up order was warranted on the facts of the present case. It is well established that the court should only grant a winding-up order as a "last resort". As stated by this court in *Lim Swee Khiang and another v Borden Co (Pte) Ltd and others* [2006] 4 SLR(R) 745 at [91]:

> … the court's discretion under s 216 of the [Companies Act] should be exercised with a view to bringing to an end or remedying the matters complained of. *If the state of affairs in a particular case can be remedied by an order other than winding up, there is no reason for a court to wind up the company.* Further, we are of the view that winding up should only be ordered if, having taken into account all the circumstances of the case, it is the best solution for all the parties involved. In general, the courts are not minded to wind up operational and successful companies unless no other remedy is available. [emphasis added]

94 The Judge's reasons for ordering a winding up were threefold: (a) Mr Ng and the Judge had no confidence in the accuracy of the Company's financial records; (b) the Liquidator would be in the position to investigate the accounts and affairs of the Company; and (c) the Company was just an investment holding company and did not have any ongoing business operations (GD at [105]–[106]).

95 With respect, our view is that none of the reasons given justifies a winding-up order in this case. An order for a special audit (as pleaded) would allow Mr Ng to investigate the extent of Mdm Chew's financial mismanagement of the Company's affairs and provide him with all the information that Mdm Chew had kept from him over the years. Further, as both Mr Ong and Mr Lee informed us during the hearing, the Company remains a going concern.

It is an operational company with active revenue streams – it holds the unencumbered title to six commercial properties. Five of these units are occupied by paying tenants and generate profit for the Company. They also need to be managed. It also holds approximately $10m in cash. Finally, it is arguable that in present conditions a winding-up order would be far from the "best solution for all parties involved". The COVID-19 pandemic has caused a fall in the value of commercial real estate such that a winding-up order at this point could foreseeably result in the Company's properties (*ie,* its main and only ongoing source of revenue) being sold at an undervalue.

96 Bearing in mind the foregoing, we are satisfied that the winding-up order was not legally justified.

Matters arising after the hearing

97 The question that remained at the hearing of the appeal was the remedy that should be granted for the oppressive acts. Having regard to the fact that the appellants' chief objection to the winding-up order is that this was not a remedy prayed for by either party, we adjourned the appeal to allow the parties and the Liquidator to attempt to come to a consensus on the remedy. As stated earlier, the parties were able to agree subsequently on a buyout proposal under which Mr Ng would buy over Mdm Chew's shareholding. We endorse this as being the most sensible way of proceeding. The parties were not, however, able to agree on certain terms, basically relating to procedure and expense, and wrote to the court for directions or determination on the same. The next portion of this judgment deals with those points.

98 On 19 April 2021, the solicitors for the appellants, PK Wong & Nair LLC ("PKW"), and the solicitors for Mr Ng, Damodara Ong LLC ("DO"),

separately wrote to the court to report on the parties' agreement. The details of this agreement were contained in a document titled the "Buyout Proposal" which recorded the parties' areas of agreement as well as four points on which they could not agree. These were:

(a) Point A: What should be done with a sum of $1m that Mdm Chew had paid to the Company in November 2020 after the Judge had found her liable to repay the Company the $12.564m?

(b) Point B: What arrangement should be made for the payment of the Liquidator's fees?

(c) Point C: What order as to costs should be made?

(d) Point D: Should an exception should be made to the mutual release of liability?

99 The parties provided multiple versions of various buyout proposals which had been repeatedly amended in the course of negotiations. We need refer only to the most recent Buyout Proposal which was attached to the letter from the Liquidator's lawyers, PRP Law LLC ("PRP"), to the solicitors for the appellants and Mr Ng dated 16 April 2021.

100 On 21 April 2021, PKW wrote to court explaining why the appellants had deemed it necessary to instruct solicitors to represent the Company in this appeal ("PKW 21 Apr Letter"). This was in response to DO's letter dated 19 April 2021 which stated that such a move was entirely unnecessary. On 29 April 2021, DO wrote to court with further rebuttals to the PKW 21 Apr Letter.

101 On 5 May 2021, after reviewing the parties' letters and the arguments contained therein, we directed the parties to proceed with the Buyout Proposal in accordance with their agreement (albeit on a modified timeline). We also made a determination on Points A, B and D. Point C is dealt with at the end of this judgment.

102 On Point A, we took the view that the sum of $1m paid by Mdm Chew to the Company on 30 November 2020 should not be returned to her or used to reduce the principal of the judgment debt (*ie,* the $12.564m). Instead, the $1m should only be applied to reduce the *interest on the judgment debt.* Mdm Chew had previously sought an order to compel the Liquidator to accept her proposal which included, *inter alia*, a stipulation that she be allowed to provide a sum of $1m which "should be sufficient to cover interest at the rate of 5.33% per annum on the sum of $12,564,000 up to the hearing of [this appeal]". In HC/ORC 6547/2020, the Judge ordered the Liquidator to accept Mdm Chew's proposal. Furthermore, the $1m sum was never treated as having formed part of the Company's disposable assets. This being the case, we did not think that Mdm Chew should now be allowed to renege on her proposal in relation to the application of the $1m.

103 On Point B, we directed that the fees of the Liquidator "are to be borne entirely by Mdm Chew". The Liquidator had a long list of roles to perform in relation to the implementation of the Buyout Proposal which included appointing valuers to determine the fair market value of the Company's assets and furnishing various reports to the parties. The parties' dispute over Point B was whether the Liquidator's fees ought to be fixed at an early stage so that the valuation of the Company could take those fees into account, and whether any subsequent reduction in the Liquidator's fees should be shared between the

Company and Mdm Chew. We took the view that the Liquidator's involvement in the Company and the Buyout Proposal was entirely due to Mdm Chew's oppressive conduct. This being the case, she ought to be entirely responsible for his fees and there was accordingly no need to order that the Liquidator's fees be fixed in advance.

104 On Point D, the parties were agreeable to a mutual discharge and release of all claims between them in relation to the management, shareholding, or liquidation of the Company (*viz*, para 20 of the Buyout Proposal) ("Release Clause"). The Release Clause provides for a mutual discharge with two exceptions. It reads as follows:

> 20. On the Completion Date, there shall be a mutual discharge and release of all claims, to the extent allowed by law, between the Liquidator, the Company, [Mr Ng] and each of [Mdm Chew and the children] in relation to the management or shareholding or liquidation of the Company save for the following:-
>
> a. The representations and warranties contained in **The Schedule** provided by [Mdm Chew] in favour of [Mr Ng] for the period of 7 August 2012 to the Completion Date;
>
> b. Any regulatory offences, penalties, charges, interest and/or fees imposed by the Government or public or regulatory agencies (such as any offences under the purview of the Inland Revenue Authority of Singapore, Building and Construction Authority, Urban Redevelopment Authority, Singapore Civil Defence Force, etc.) for the period of 7 August 2012 to 29 June 2020.
>
> [emphasis in original]

105 The parties were unable to agree on the inclusion of a further exception to the proposed discharge. The disputed exception related to the litigation in Suit 758 and this appeal and it was proposed that it read as follows:

> c. Any findings made by the Court pursuant to [Suit 758] and [this appeal].

106 Mr Ng argued for the inclusion of the further exception. He argued that leaving it out would constitute "attempted whitewashing of findings" in the present legal proceedings and would render any findings made by the court "nugatory". The appellants disagreed as, on their view, any claims arising from the courts' findings would have been fully dealt with in Suit 758 or this appeal.

107 While we are of the view that Mr Ng's submission was somewhat overblown, we agreed with him that the further exception should be included in para 20 of the Buyout Proposal. This is because the Release Clause (read without the disputed exception) suggests that even the $12.564m misappropriated by Mdm Chew need not be repaid to the Company.

108 It is common ground between the parties that the Buyout Proposal relates *only to the appeal in respect of the Judge's winding-up order*, and it clearly contemplates that Mdm Chew must return the misappropriated sum of $12.564m to the Company. Given the parties' history of acrimony, we took the view that including an exception to the Release Clause would serve to forestall any future conflicts between them. There will, at the very least, be follow-up liability for costs which the Buyout Proposal does not currently contemplate. To make things clearer for the parties, we modified the further exception and directed the parties to include the following modified exception in the Buyout Proposal (with the court's amendments in italics):

> Any finding made by the Court pursuant to HC/S 758/2017 and CA/CA 106/2020, *insofar as it has not been addressed or otherwise dealt with by provisions in this Buyout Proposal.*

109 We provided our directions to the parties on 5 May 2021. On 4 June 2021, the Liquidator's solicitors, PRP, wrote to court seeking further directions on three new areas of dispute which had arisen between the Liquidator and Mdm Chew:

(a) Point E: After Mdm Chew's $1m had been applied towards the interest payable on the judgment sum of $12.564m, how should the remainder of the $1m be used?

(b) Point F: What is Mdm Chew's liability for the payment of the fees of the Liquidator and his solicitors ("Outstanding Liquidator Fees") incurred up to and including 2 August 2021 (*ie,* the Completion Date of the Buyout Proposal)?

(c) Point G: Which party should be liable to bear the costs and disbursements incurred in relation to taxation proceedings, if any?

110 On Point E, the Liquidator informed us that after the interest payable on the debt of $12.564m has been deducted from Mdm Chew's payment of $1m, a balance of $304,889.73 will remain. The Liquidator submitted that that sum ought to be used to pay his fees since these are to be borne by Mdm Chew entirely. Mdm Chew's position is that the sum should be applied to reduce the $12.564m debt. In our view, once the $1m has been applied to fulfil its original purpose of reducing the interest on the judgment debt, Mdm Chew would be entitled to have the balance of her money applied by the Company in accordance with her directions. Thus, as she has indicated that she wishes to use the balance to reduce the judgment debt, it should be applied accordingly.

111 We recognise the Liquidator's interest in ensuring that there is an available fund from which he could promptly receive payment of the Outstanding Liquidator's Fees. However, there is no legal basis on which we can direct Mdm Chew to use the balance to pay the Liquidator rather than the judgment debt. Mdm Chew has a legal right to apply her money as she chooses. The Liquidator might find it less convenient to ask Mdm Chew for payment of his fees once the amount has been fixed. He will however have the legal right to do so and she will have to pay them.

112 On Point F, the Liquidator took the position that all of the Outstanding Liquidator Fees "are to be borne entirely by Mdm Chew". Mdm Chew's view (as set out in PKW's letter to the Liquidator and DO on 24 May 2021) was that the Company is entitled to be indemnified by Mdm Chew for the Outstanding Liquidator Fees and that she would have a right to require the Outstanding Liquidator Fees to be taxed. Mdm Chew also denied any personal liability to the Liquidator. As we mentioned above in respect of Point B and in our letter to the parties on 5 May 2021, the fees of the Liquidator "are to be borne entirely *by Mdm Chew*" [emphasis added]. It should be clear from our directions that Mdm Chew is to be personally liable for the Outstanding Liquidator Fees. After all, it is Mdm Chew's actions which have necessitated the services of a Liquidator. We agree, however, with Mdm Chew that she may require the Liquidator to tax his bill before payment.

113 Turning finally to Point G, the Liquidator submitted that if taxation proceedings are brought, Mdm Chew should be liable for all the taxed costs stated in the Registrar's Certificate(s) and all the costs and disbursements incurred in the taxation proceedings. This was on the basis that any taxation proceedings will arise only pursuant to Mdm Chew's request and would not be

necessary if not for her refusal to approve the Outstanding Liquidator Fees. In response, Mdm Chew argued that the costs and expenses incurred in relation to taxation should be decided by the court hearing the taxation proceedings. We agree with Mdm Chew. Mdm Chew is to be personally liable for the Outstanding Liquidator Fees, but this does not mean that she should be penalised for opting for taxation of those fees. Mdm Chew is not bound to accept any fees which are disproportionate to the work done or have been erroneously added to the Liquidator's bill of costs. The Liquidator's proposal amounts to requiring Mdm Chew to bear the costs of the taxation proceedings on an indemnity basis even before any taxation proceedings have commenced.

114 To summarise, as for the parties' points of disagreement in relation to the Buyout Proposal, we resolve them as follows:

(a) Point A: The sum of $1m paid by Mdm Chew to the Company is not to be returned to Mdm Chew. Instead, it is to be applied to reduce the interest on the judgment debt.

(b) Point B: The fees of the Liquidator are to be borne entirely by Mdm Chew.

(c) Point D: An additional exception to the mutual release of liability as between the parties and the Liquidator is to be included in the Buyout Proposal. This is to read as follows:

> Any findings made by the Court pursuant to HC/S 758/2017 and CA/CA 106/2020, insofar as it has not been addressed or otherwise dealt with by provisions in this Buyout Proposal.

(d) Point E: Once the sum of $1m paid by Mdm Chew to the Company has been applied to settle the interest on the judgment debt, Mdm Chew is entitled to apply the balance to reduce the judgment debt.

(e) Point F: Flowing from our directions on Point A, Mdm Chew is to be personally liable for all the Outstanding Liquidator's Fees.

(f) Point G: The costs and expenses incurred in relation to taxation of the Liquidator's bill, if any, should be decided by the court hearing the taxation proceedings.

Conclusion

115 For the reasons stated above, we make the following orders:

(a) We dismiss Mdm Chew's appeal on the merits.

(b) We allow the children's appeal against the Judge's finding that they had been party to the oppressive management of the Company's affairs.

(c) Finally, while we agree with the Judge that Mr Ng's claim under s 216 of the Companies Act was made out against Mdm Chew, we set aside the Judge's winding-up order and replace it with a buyout order in accordance with the parties' agreement and our determination at [114] above.

116 We make no orders on SUM 18. We do not think that the references to the "without prejudice" correspondence in Mr Ng's submissions had any relevance to or impact on the substantive outcome of this appeal. Nor do we

think it is appropriate for Mr Ng to refer to the "without prejudice" correspondence and their contents.

117 Bearing in mind our decision on the appeal and factoring in the outcome of SUM 18, we order Mdm Chew to pay costs of $35,000 (all-in) to Mr Ng. Mdm Chew is to also to be entirely liable for the Company's costs. There was no need for it to have been actively involved in this appeal, a point that is best demonstrated by paras 7 and 8 of the Company's Appellant's Case which state:

> 7 *We shall leave the legal arguments against the winding up of [the Company] to our colleagues* acting for the other protagonists because we are of the further view that [the Company] *should remain largely neutral* even if exceptional and compelling circumstances have arisen …
>
> 8 Of course, if Your Honours are of the view that [the Company] should not be actively involved in this appeal, it follows that Your Honours *need not read further* since what we would state below would *not be, in reality, legal submissions*. It follows that what we would state below would not, *sensu strictu,* form an Appellants' case.
>
> [emphasis added]

118 PKW stated in the PKW 21 Apr Letter that Mdm Chew had only appointed lawyers for the Company as Mr Ng had objected to PKW representing both the appellants and the Company. The Law Society had been consulted and recommended that PKW should not act for the Company. In our view, the solution for this conflict of interest would have been either for the Company not to be represented or, if the circumstances required it to have legal advice, for it to appoint different solicitors to hold a watching brief. In this case there was absolutely no need for the Company's lawyers to have taken part in the appeal in any way. Mdm Chew's decision to appoint lawyers for the

Company was therefore unnecessary and it would be fair for the legal fees and expenses incurred by the Company in that regard to be borne by her.

Sundaresh Menon
Chief Justice

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Anthony Wee and Pang Weng Fong (Titanium Law Chambers LLC) for the first appellant;
Lee Eng Beng SC, Sim Jek Sok Disa, Cheong Tian Ci Torsten (Rajah & Tann Singapore LLP) (instructed), Ang Chee Kwang Andrew, Tan Jinjia Andrea (Chen Jinjia) and Chan Ejia Sabrina (PK Wong & Nair LLC) for the second, third and fourth appellants; and
Ong Ziying Clement, Suresh s/o Damodara, S.M. Sukhmit Singh and Ning Jie (Damodara Ong LLC) for the respondent.