

ABB Holdings Pte Ltd and Others v Sher Hock Guan Charles  
[2009] SGHC 157

**Case Number** : Suit 798/2007  
**Decision Date** : 06 July 2009  
**Tribunal/Court** : High Court  
**Coram** : Judith Prakash J  
**Counsel Name(s)** : Tan Tee Jim SC, Julian Tay and Jiang Ke-Yue (Lee & Lee) for the plaintiffs;  
Deborah Barker SC and Ang Keng Ling (KhattarWong) for the defendant  
**Parties** : ABB Holdings Pte Ltd; ABB Installation Materials (East Asia) Pte Ltd; ABB  
Industry Pte Ltd — Sher Hock Guan Charles

*Companies – Directors – Duties – Whether scope of fiduciary duties owed by persons in senior management same as those owed by directors – Whether positive duty to pass on information about competitor to principal existed – Whether assistance might be rendered to competitor while still employed by principal*

*Contract – Contractual terms – Incorporation of terms and conditions found in external document – Ascertaining contractual intention of parties*

6 July 2009

Judgment reserved.

**Judith Prakash J:**

1 The three plaintiffs are part of a worldwide group of companies which bear the name ABB (“ABB Group”) and which manufacture, market and sell several products for industrial and commercial uses. The products include low, medium and high voltage circuit breakers. The plaintiffs are part of the Singapore component of the ABB Group. I will refer to all the Singapore entities, including the plaintiffs, collectively as “ABB Singapore Group”. The first plaintiff which is owned by ABB Asea Brown Boveri Ltd, a Swiss company, was set up in Singapore to be the holding company of the Singapore businesses and is the sole shareholder of the second and third plaintiffs. The second plaintiff, ABB Installation Materials (East Asia) Pte Ltd, manufactures miniature circuit breakers, while the third plaintiff, ABB Industry Pte Ltd, carries on business as, *inter alia*, a manufacturer of switchgears and an installer of electrical works.

2 The defendant, Sher Hock Guan Charles, a Singaporean, worked for various companies in the ABB Group between 1990 and February 2003. In the course of his career he worked in Xiamen, China for ABB China Ltd and ABB Xiamen Switchgear Co Ltd (“ABB Xiamen”). From January 1997 until he left the ABB Group, the defendant was based in Singapore. During this period, he held the following positions with the second and third plaintiffs:

- (a) January 1997 to January 2000 – President, second plaintiff;
- (b) July 1998 to February 2003 – Director, second plaintiff;
- (c) January 2001 to February 2003 – General Manager, third plaintiff; and

- (d) September 2001 to February 2003 – Vice-President and Head of Business Area Low Voltage Products, Automation Technology Products Division Asia South, third plaintiff.

The defendant's employment was governed by three successive employment contracts. Details of these will be given below. Between January 1997 and January 2001, the defendant's employer was the second plaintiff. On 15 January 2001, pursuant to a new organisation structure for the ABB Singapore Group which had come into effect on 1 January 2001, his employment was transferred from the second plaintiff to the third plaintiff with retrospective effect to 1 January 2001.

3 After leaving the third plaintiff, the defendant joined a company in Xiamen, China called Xiamen Huadian Switchgear Co. Ltd ("Huadian") as its General Manager. This appointment took effect on 3 March 2003 and in March 2004, the defendant became the Managing Director of Huadian after a German company (Gelpag mbH), in which he was a shareholder, acquired shares in Huadian. Huadian is a manufacturer of switchgears and circuit breakers, in particular, medium voltage circuit breakers.

4 The plaintiffs commenced this action in December 2007. They asserted that by reason of his employment with the second and third plaintiffs, the defendant owed all the plaintiffs certain express and implied fiduciary and other duties and that he had breached those duties thus causing damage to the plaintiffs. The defendant denied the allegations and the matter duly came to trial. By consent of the parties, the trial was focussed solely on the issues relating to the defendant's liability, if any, to the plaintiffs with the issues regarding quantum to be determined in a separate hearing if liability was established.

### **The pleadings**

5 As stated above, the plaintiffs relied on both express and implied duties allegedly owed to them by the defendant. In para 9 of the statement of claim, the following were asserted to be the express terms of the employment contracts between the second and third plaintiffs and the defendant viz that the defendant should:

- (a) use his best endeavours to promote the interest and welfare of the plaintiffs;
- (b) avoid any conflict between his personal interests and those of the plaintiffs;
- (c) avoid financial, business or other relationships which might be opposed to the plaintiffs' interests or might cause a conflict with the performance of his duties;
- (d) refrain from participating in any business activities, especially those in the plaintiffs' line of business;
- (e) refrain from making or holding any investment in any competitor or other entity if such investment might affect the defendant's business decisions on behalf of the plaintiffs;
- (f) maintain and preserve the secrecy of all matters and information of the plaintiffs and not divulge the same to any third party;
- (g) refrain from sharing proprietary information of the plaintiffs with any third party;
- (h) protect the plaintiffs' assets, confidential and proprietary information (including those which represent a substantial investment of resources of the plaintiffs); and

(i) not appropriate for his own use or make available to others any property for purposes not of the plaintiffs.

6 In para 10 of the statement of claim, the plaintiffs alleged that the following duties were, by implication, owed by the defendant to the plaintiffs:

- (a) a duty of good faith and fidelity to the plaintiffs;
- (b) a duty not to misuse any information confidential to the plaintiffs or to disclose such information to any third party;
- (c) a duty not to use or disclose any trade secrets or other highly confidential information of the plaintiffs;
- (d) a duty to disclose to the plaintiffs any potential threat and/or competitive risk posed to their business;
- (e) a duty to act in the best interests of the plaintiffs;
- (f) a duty to use his best endeavours to promote the interest and welfare of the plaintiffs; and
- (g) a duty not to make improper use of any information acquired by virtue of his position as an officer or agent of the company to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the company.

7 The plaintiffs further pleaded, in the alternative, in para 11 that the defendant owed them fiduciary duties as follows:

- (a) a duty to act in good faith and in the best interests of the plaintiffs;
- (b) a duty not to place himself in a position where his duty to the plaintiffs and his personal interests may conflict;
- (c) a duty to disclose to the plaintiffs information which came to him and which was of concern to the plaintiffs and was relevant to the plaintiffs to know;
- (d) a duty not to disclose information of concern to the plaintiffs and [which] was relevant for the plaintiffs to know to third parties;
- (e) a duty to disclose to the plaintiffs any potential threat and/or competitive risk posed to their business; and
- (f) a duty to inform the plaintiffs of any activity, actual or threatened, which could damage the plaintiffs' interests.

8 The defendant responded to these allegations of the existence of duties on his part by denying paras 10 and 11 of the statement of claim in their entirety and stating in respect of para 9 thereof that save that:

- (a) the employment agreement between him and the first plaintiff dated 19 July 1996 provided

that he should "use his best endeavours to promote the interest and welfare of the ABB Group"; and

(b) the employment agreement entered into between the first plaintiff and himself dated 20 September 1999 provided that he would "undertake to maintain and preserve secrecy in all office matters and not to divulge any information to outside members" and that "[p]rivate participation in other business activities, especially in our line of business is strictly not allowed";

the employment contract did not contain the terms averred by the plaintiffs.

9 By reason of the aforesaid pleadings, one of the main issues in the action was what terms exactly were part of the defendant's employment from time to time and whether he owed any, and if so which, fiduciary duties to the plaintiffs or any of them.

10 Having stated the defendant's alleged duties, the statement of claim went on to plead various ways in which it was alleged that he had breached those duties. The allegations can be summarised as follows:

(a) on 18 February 2002, the defendant's brother, Sher Hock Sing, and two others procured the incorporation of a company called Great Vision International Pte Ltd ("Great Vision") and two months after leaving the plaintiffs' employ, the defendant became a director of Great Vision in place of his brother and also acquired part of his brother's shareholding in Great Vision;

(b) on 24 May 2002, the defendant procured the incorporation of a company known as Webmoney Investment (s) Pte Ltd ("Webmoney") and he became a director of this company two months after leaving the plaintiffs' employ;

(c) in December 2002, whilst the defendant was employed by the plaintiffs, he exchanged e-mail correspondence with one Guenther Leonhardt ("Mr Leonhardt"), a former employee of the ABB Group, in relation to enquiries by a Chinese body, Xian High Voltage Apparatus Research Institute ("XIHARI"), regarding whether Mr Leonhardt would act as XIHARI's technical advisor in research and development projects relating to the development of a new generation of medium voltage switchgear, circuit breakers and vacuum interrupters;

(d) the defendant failed to disclose to the plaintiffs the communications he had with XIHARI and Mr Leonhardt or his involvement in the establishment of Huadian or the potential threat and/or competitive risk posed to the plaintiffs' business by XIHARI and/or Huadian and/or any other parties who might be involved;

(e) sometime in 2002, the defendant obtained a loan of RMB70,000 purportedly for travelling expenses from a company called Xiamen Fu Cheng Real Estate Property Development Co. Ltd ("Xiamen Fu Cheng") and he failed to inform the plaintiffs of this loan or the expenses it purportedly related to;

(f) in May 2003, the defendant procured the incorporation of a company called Gelpag International Pte Ltd and became a director and shareholder of the same;

(g) in March 2003, the defendant was appointed the general manager of Huadian, a company incorporated on 4 December 2002, and in which the founding shareholders were XIHARI and Fu Hsiang International Pte Ltd ("Fu Hsiang"), a Singapore incorporated company, owned by two gentlemen who were also shareholders in Xiamen Fu Cheng;

(h) by 28 March 2004, the shareholders in Huadian were Fu Hsiang (80.5%), XIHARI (3.3%) and Gelpag mbH (16.2%); and

(i) within a very few months after its incorporation in December 2002, Huadian made and was able to make huge and improbable strides in respect of the manufacture, marketing, approval and sale of switchgears, circuit breakers and related parts or products similar to those of the plaintiffs and the ABB Group in terms of characteristics, design, specifications and layout.

11 The plaintiffs did not specify in their statement of claim exactly how the particulars of breach of duty that they had pleaded co-related with the various duties that they alleged the defendant owed them. To be more specific, they did not say in relation to each alleged breach which duty was allegedly breached by that action. In my view, this pleading was somewhat embarrassing and the defendant should have asked for further and better particulars. As he did not, however, I have to some extent to work out for myself which duties would have been breached by the various actions the defendant is said to have taken. For the sake of brevity, I will hereafter in this judgment refer to low voltage switchgear products as "low voltage products" and similarly abbreviate references to high and medium switchgear products.

12 The defendant denied the allegations of breach and put forward the following positive case:

(a) between January 1997 and February 2003, he was involved only in the business of low voltage products and had no involvement in the medium and high voltage products;

(b) he was a director of the second plaintiff only between July 1998 and February 2003 and during this time he was responsible only for the business of low voltage products in South East Asia, South Asia and Oceania;

(c) the plaintiffs were not involved in the medium and high voltage product business in China during the period of his employment;

(d) he had no access to any confidential technical information or confidential information pertaining to the manufacturing process of medium and/or high voltage products;

(e) Great Vision and Webmoney were not engaged in any business in competition with the plaintiffs or which would affect their interests and in incorporating these companies, the defendant had not intended to and had not competed with the plaintiffs or placed himself in any position of conflict of interest or breach of obligation owed under his employment contracts;

(f) the defendant's correspondence with Mr Leonhardt was not in breach of any duty which he owed the plaintiffs;

(g) the sum of RMB70,000 was a cash advance for the travelling expenses of Huang Jianhuang (a former director of Great Vision) and the defendant's brother in the year 2002 and was wrongly attributed to the defendant;

(h) there were no non-competition clauses or restrictive covenants in his employment agreements with the plaintiffs and his incorporation of Gelpag International Pte Ltd was not a breach of any duty he owed them;

(i) the defendant was fully entitled to take up the position of general manager of Huadian after the cessation of his employment with the first and/or the second and/or the third plaintiffs and

by doing so, he was not in breach of his duties to them since there were no non-competition clauses and/or restrictive covenants in his employment contracts; and

(j) the defendant had no part in the setting up of Huadian and the success of Huadian did not result from any breach by him of any of his duties to the plaintiffs.

13 The issues that arise out of the allegations relating to breach are both factual and legal. Some of the allegations were denied in their entirety and in respect of those allegations, the issues are whether the allegations have been established by the plaintiffs and, if so, which duties were breached by the defendant in relation thereto. As for the other allegations, the facts of which are admitted by the defendant, the issue is what duty if any was breached by the defendant in relation to such facts.

### **The issues relating to duty**

#### ***What were the contractual terms of employment?***

14 To reiterate, the first question is to determine what duties the defendant owed the plaintiffs. In this connection, I have first to ascertain whether the terms of the defendant's employment included the terms contained in the Employee Handbook described in [\[18\]](#) below.

15 The defendant had three employment contracts with the plaintiffs. The first ("first contract") was made on 19 July 1996 between the first plaintiff and the defendant and was stated to cover the period from 1 January 1997 to 31 January 2000. The only relevant provision of the first contract, for present purposes, is cl 1 which reads:

#### **1. Appointment**

The Employee shall subject to the General Terms and Conditions of Employment of the Country Organisation unless altered or amended by this agreement and will faithfully serve the Country Organisation as President [of the second plaintiff] (hereafter called "the Company") with location in Singapore and shall use his best endeavours to promote the interest and welfare of the ABB Group. The Country Organisation reserves the right to assign the Employee different work as required in accordance with his capabilities.

16 The second employment contract ("second contract") was dated 20 September 1999 and was specifically stated to be effective from 1 February 2000. It therefore took effect immediately after the termination of the first contract. It was on the letterhead of the first plaintiff and was signed by both the first plaintiff and the second plaintiff. It stated that the defendant's position was "President" and that the employing entity was the second plaintiff. The second contract did not have any clause obligating the defendant to promote the interest and welfare of the ABB Group. Instead it had the following material provisions:

You will undertake to maintain and preserve secrecy in all office matters and not to divulge any information to outside members. Private participation in other business activities, especially in our line of business is strictly not allowed.

The Management maintains the right to review, change, amend, delete or add to the aforesaid policies, terms and conditions of employment as the Management deem fit.

17 Both the first and second contracts were accepted by the defendant in writing. The third employment contract ("third contract") consisted of a letter dated 15 January 2001 from the third

plaintiff to the defendant accompanied by a document called "Summary of Terms and Conditions of Employment – Staff Category M1/M2" (the "Summary"). This letter stated that with retrospective effect from 1 January 2001, the defendant's employment had been transferred from the second plaintiff to the third plaintiff and that his designation in the third plaintiff was "General Manager BAU LV Products and Systems" and his job grade was "M1". The Summary contained a provision that was identical to the provision set out above at the end of [\[16\]](#). Apart from that provision, the Summary contained the defendant's terms of employment relating to leave and other benefits such as the use of a company car and club memberships.

18 According to the evidence of Mr Sim Boon Kiat, a current employee of the ABB Group and who was also the President and Country Manager of the third plaintiff from 2001 to 2005, at all material times the ABB Singapore Group utilised a document entitled "Employee Handbook" ("the Handbook") which contained the policies, terms and conditions applicable to all employees of this group. The Handbook was made available to all employees. Among the salient provisions of the Handbook are the following:

4.4.5 Private participation in other business activities especially related to the nature of Company business is strictly not allowed. Please refer to the Standard of Business Conduct Policy (Part 10 of this manual) for more details.

#### 4.8 TRANSFER & DEPLOYMENT

4.8.1 An employee may be transferred/redeployed within or to another Company/Division/Department which will make better use of his knowledge and expertise.

#### 8.1 POLICY STATEMENT

8.1.1 Every employee has the duty to protect the Company assets, confidential and proprietary information as well as to avoid any conflict between his personal interests and those of the Company.

#### 8.5 CONFLICT OF INTEREST

8.5.1 Conflicts of interest distort judgment. All employees have a duty to avoid financial, business or other relationships which might be opposed to the interests of the Company or might cause a conflict with the performance of their duties.

8.5.2 To protect yourself and the Company from actual or apparent conflicts:

(a) do not make or hold any investment in any supplier, customer, competitor or other enterprises if such investment might affect your business decisions on behalf of the Company;

(b) ...

- (c) do not accept outside work in your personal capacity from a supplier, client or competitor or do any outside work that may adversely affect your performance or judgment on the job. Do not use Company time, facilities or materials for outside work.

19 The plaintiffs submitted that the reference in the first contract to the "General Terms and Conditions of Employment" was a reference to the terms and conditions set out in the Handbook and that these terms applied not only to the first contract but also to the second and third contracts. They pointed out that whilst the defendant had in court initially claimed not to know what the "General Terms and Conditions of Employment" were, he had later admitted that he was aware of and had access to the Handbook and also conceded that he knew this formed the "General Terms and Conditions" of his employment. He agreed also that the Handbook should govern his practice in the companies.

20 Mr Sim had described the Handbook as a "live document" with regular updating of the terms and conditions. This evidence, the plaintiffs submitted, accorded with the term in the second contract giving the plaintiffs the right to review and amend and change the policies, terms and conditions of employment as they saw fit. This same term had been repeated in the Summary attached to the third contract. Additionally, in the second contract, the provision that the defendant was to undertake and preserve secrecy in all office matters was in accordance with cll 8.1.1, 8.5 and 4.5.5 of the Handbook.

21 The plaintiffs further submitted that the third contract which effected the transfer of the defendant's employment to the third plaintiff did not otherwise change his rights and privileges or the terms and conditions of his employment.

22 The defendant pointed out that the second contract did not refer to the Handbook or any "General Terms and Conditions of Employment". While the specific terms in the second contract arguably reflected two clauses in the Handbook, this of itself did not indicate that the Handbook governed the second contract. Similarly, there was no reference in the third contract to either the Handbook or the "General Terms and Conditions of Employment". In the defendant's submission, the plaintiffs had not shown that the terms of the Handbook had been incorporated into the third contract. There had been no express incorporation of the same or anything to suggest the existence of any contractual intention for the Handbook to apply (as required by the authorities, citing *Intergraph Systems South East Asia Pte Ltd v Zhang Yiguang* [2004] SGCA 52 at 18 ("*Intergraph*"). This was apparent from the fact that the reference to "General Terms and Conditions of Employment" was made only in the first contract and a similar reference could easily have been included in the third contract had the third plaintiff wanted the same to be applicable. Further, the purpose of the Handbook was, as stated in para 1.0 of the same, to "acquaint Managers and staff with human resource policies, practices and procedures governing their employment in ABB Singapore" and policy statements by an employer are generally non-contractual unless introduced in such a way as to show an intent that they should form part of the employee's individual contract. The defendant further submitted that the Summary did not indicate that there were other terms and conditions that should apply or that that document itself was only an excerpt. Instead, the word "Summary" suggested that all applicable terms and conditions had been reduced into a summary form and this was supported by the express words of the third contract which were "a copy of terms and conditions of employment is attached for your information". These words suggested that all the applicable terms were attached.

23 As for the submission that the defendant had in cross examination, acknowledged the application of the Handbook to his employment, it was contended that the defendant should not be



misunderstood as having agreed with the contentions put forward by counsel for the plaintiff. The defendant was asked a series of questions concerning whether the clauses in the Handbook should apply to the third contract. It was difficult for him as a lay person to answer what were essentially legal questions asked by counsel. When the defendant said that the Handbook should govern his "practice" in the company he was referring to matters such as fringe benefits and leave application. Moreover, the defendant made it clear that he regarded the Handbook as containing policies and guidelines as opposed to employment terms. His statement therefore was not an acknowledgment that the terms of the Handbook had contractual effect. Although the defendant may have been in the position of being able to hire and fire employees, he was not in charge of settling the terms or format of their employment contracts. The defendant also argued that the copy of the Handbook produced by Mr Sim was one that was effective as at 4 January 2000. No conclusive evidence was produced by the plaintiffs to show that this was the version of the Handbook that was applicable to the defendant at the material time. Furthermore the defendant's evidence was that no changes to the Handbook were brought to his attention. All in all, therefore, the defendant contended, the provisions of the Handbook were not incorporated in the third employment contract.

24 The legal position regarding incorporation of contractual terms in a contract of employment was well set out in *Alexander v Standard Telephones & Cables Ltd (No 2)* [1991] IRLR 286 ("*Alexander*") where the relevant principles were stated in the headnote to be as follows:

The principles to be applied in determining whether a part of a collective agreement is incorporated into individual contracts of employment can be summarised as follows: the relevant contract is that between the individual employee and his employer; it is the contractual intention of those two parties which must be ascertained. In so far as that intention is to be found in a written document, that document must be construed on ordinary contractual principles. In so far as there is no such document or that the document is not complete or conclusive, their contractual intention has to be ascertained by inference from the other available material including collective agreements. The fact that another document is not itself contractual does not prevent it from being incorporated into the contract if that intention is shown as between the employer and the individual employee. Where a document is expressly incorporated by general words it is still necessary to consider, in conjunction with the words of incorporation, whether any particular part of that document is apt to be a term of the contract; if it is inapt, the correct construction may be that it is not a term of the contract. Where it is not a case of express incorporation, but a matter of inferring the contractual intent, the character of the document and the relevant part of it and whether it is apt to form part of the individual contract is central to the decision whether or not the inference should be drawn.

Thus it is clear that:

- (1) it is the contractual intention of the two parties which must be ascertained in order to determine whether a document is incorporated into an employment contract;
- (2) where the document is expressly incorporated by general words, it is still necessary to consider, in conjunction with the words of incorporation, whether any particular part of the document is "*apt to be a term of the contract*"; and
- (3) where it is a matter of inferring the contractual intention, the "*character of the document*" and the relevant part of it and whether it is "*apt to form part of the contract*" are central to deciding whether or not the inference should be drawn.

25 I accept the plaintiffs' submission that in the present case there is evidence that it was indeed

the contractual intention of the parties that the Handbook was, and was to be, part and parcel of the defendant's employment with the plaintiffs from time to time. First, the Handbook states expressly that it is applicable to the plaintiffs as well two other members of the ABB Singapore Group and that all appointments in the plaintiffs are subject to the terms and conditions that appear in the Handbook. From July 1996 the defendant was employed by and held appointments in the plaintiffs and must have been aware of these terms. Secondly, a document like the Handbook is "a common source of terms implied into a contract of employment" (see *Halsbury's Laws of Singapore* (2007 Reissue) vol 9 at [100.039]). Thirdly, the defendant admitted that he had access to and was aware of the Handbook at all material times. He agreed in cross-examination that it should "govern his practice in the companies" by which he meant the plaintiffs. In the *Intergraph* case, unlike the present, there was no evidence of the employee's intention and the court held that the handbook there was not incorporated into the employment contract because a junior employee was not aware of it. Here, as stated, the defendant had not only acknowledged awareness of the Handbook and its applicability to himself but had also testified that he had applied the Handbook to "run the company efficiently" in his capacity as a director, manager and senior employee of the plaintiffs. As for the issue of whether the Handbook (effective as at 4 January 2000) applied to the defendant at the material time, this was not challenged during the hearing and was in fact admitted by the defendant. I should also say that I am not persuaded by the contention that I should disregard the defendant's answers to the questions posed to him by counsel for the plaintiffs because they dealt with legal matters which he as a layman would not appreciate. The defendant was a senior employee of the plaintiffs and was fully capable of understanding straightforward legal matters relating to his employment and the employment of staff that he directed, recruited or terminated. He understood where the questions were leading and whilst he tried to deny familiarity with the terms of the Handbook and also took the position that the contents were simply policies and not contractual terms, he did not at any time indicate that he was uncomfortable with the line of questions because these were legal matters of which he had no knowledge as a layman.

26 The Handbook (as it then stood) was expressly or inferentially incorporated into the first contract by the reference to "General Terms and Condition of Employment of the Country Organisation" in cl 1 of the same. The second contract was essentially a continuation of the first contract and commenced the day after the expiry of the first contract. Also it adopted the same scheme or arrangement as the first contract in that in the second contract, it was the first plaintiff which issued the contract evidencing the employment of the defendant by the second plaintiff in the same position that he had previously occupied (*ie* President of the second plaintiff) although the second plaintiff also signed that letter. Further, the reference to "Staff Category: M1" in the second contract could only be explained by reference to the Handbook. The character of the Handbook itself which sets out not only policies but also terms and conditions strongly indicates that the Handbook was intended to be part of the employment contracts of the plaintiffs' employees including the defendant. Thus though there was no express reference to the Handbook in the second contract, it was incorporated therein by reference.

27 As regards the third contract, I find the Handbook continued to be part of the same by inferential reference. Mr Sim's evidence, which was uncontroverted, was that the third contract did not effect any change in the terms and conditions of the defendant's employment nor any change in the rights and privileges granted to him. The defendant himself agreed on this point. In court he stated that after his employment was transferred from the second defendant to the third defendant, he believed that the Handbook was still applicable to him as an employee. His evidence on this point was quite interesting because on the one hand he appeared to say that the Handbook was not part of his contract but on the other he subsequently agreed that the Handbook governed his practice. The questions and answers were as follows:

Q: What happened to the employee handbook? It's not applicable any more, to you?

A: Your Honour, I didn't say that it was not applicable to me.

Q: So was it still applicable to you?

A: As an employee, I believe so.

Q: Would it not be correct to say that the terms and conditions in the employment handbook, as well as the policies in the employment handbook, still governed your position after January 2001? Is it not correct to say?

A: Your Honour, it's very unfair to me because, you know, when I sign a contract, I am – you know, I read the contract and I believe that the contract governs, you know, on the relationship between the two parties. Of course, every company has, you know, a different internal guidelines and policies, and those are, you know, within the companies. And it was not – I was very sure that, you know, when I signed these documents, it was not form part of the contract and was given to me, but I do admit that –

...

COURT: What did not form part of your contract?

A: I think, you know, the manual, HR manual, was not given to me as part of the contract. If the counsel referred that the general terms and conditions –

COURT: So are you saying that when you signed this letter on 15 January 2001 [third employment contract], you thought that this was your contract and the HR manual did not apply any more?

A: No. I didn't say that, you know, your Honour. The contract I was signing is actually, you know, this contract.

...

A: And, of course, I also agree that, you know, you know, the HR manual, you know, should also govern, you know, my, you know, practice in the companies. I agree – I totally agree with this.

28 I think that the defendant was drawing a fine distinction between "practice in the companies" and "terms of employment". As for the Summary, that could not have been intended to contain all the terms and conditions of the employment but simply extracts from the Handbook that were of particular interest. If it contained all the terms and conditions, the term "Job Grade: M1" in the third contract would be meaningless as the Summary did not refer to it and the only meaning to be given to that term is contained in the Handbook. The term was important to the defendant as it governed his rights and privileges as a senior member of the third plaintiff. If it had not been there, the

defendant would not have been entitled to such rights and privileges and that must be why the defendant agreed in court that the Handbook applied to his employment: he knew that his rights and privileges came from the Handbook because that was the document that set out the benefits of "M1" grade employees. Whilst the defendant submitted that the third contract was a fresh contract that was independent of the earlier terms of the first two contracts, this could not be correct, at least in relation to the second contract. There was no mention in the third contract regarding the defendant's salary and annual increment and the submission was also contrary to the defendant's evidence that the third contract did not effect any change in the terms and conditions of his employment.

29 I therefore find that the relevant parts of the Handbook were intended to form part of the defendant's employment contract throughout the years he spent as an employee of the ABB Singapore Group and that the applicable terms and conditions therein continued to govern him when his employment was transferred to the third plaintiff and throughout his employment with the third plaintiff. I also consider that cll 4.4.5, 8.1.1 and 8.5.1 were provisions that were apt to be terms of any employment contract of persons employed by any ABB Singapore Group company, including in particular, senior employees like the defendant.

30 In this connection, I should state also, that I accept the defendant's submission that there was no express or implied term in the defendant's contract which required him to "use his best endeavours to promote the interests and welfare of the ABB Group". This term was only found in the first contract. That contract ended and its terms were superseded by the terms of the second contract. Neither the second nor the third contracts mentioned the ABB Group at all. The Handbook too is bereft of any reference to the ABB Group. I agree with the submission that the obligation to promote the interests of the ABB Group should not be readily implied into the third contract for the simple reason that this would be a very onerous obligation to impose on the defendant. The ABB Group is a very large group of companies (about 100 different entities) spread out all over the world and if the intention of the plaintiffs was to impose an obligation on the defendant to promote the interests of so many companies in so many different locations, that intention should have been expressly included in the second and third contracts. The plaintiffs drafted the employment contracts and failed to take any steps to incorporate such a condition in the second and third contracts. I agree that they must be read *contra proferentum* in favour of the employee. The term having appeared in the first contract but having been dropped from the next two contracts and omitted from the Handbook cannot be implied as a term of the defendant's employment contract after the expiry of the first contract.

### ***Did the defendant owe the plaintiff fiduciary duties?***

31 The defendant was a director of the second plaintiff between 1998 and 2003 but from January 2001 his substantive employer was the third plaintiff. He served that company first as its general manager and then from 3 September 2001, also as vice president and head of Business Area Low Voltage Products. As a director of the second plaintiff, the defendant occupied a fiduciary position vis-à-vis the second plaintiff and owed it fiduciary duties. The question is whether he owed such duties to the third plaintiff.

32 The plaintiffs submitted that the employment relationship can give rise to fiduciary duties and that a senior employee can owe the same fiduciary duties to his employer as a director of that employer would. The more senior the employee and the greater the responsibility assumed by him, the greater would be the likelihood that he does owe such duties. In support of this proposition, the plaintiffs cited *Shepherds Investment Ltd v Walters* [2006] EWHC 836, an English High Court decision which found that a very senior employee of the plaintiff company, who though never formally appointed director, assumed the role of an actual director of the plaintiff and held himself out as a

director owed fiduciary duties to the plaintiff. The plaintiffs here also relied on the following passage from the Canadian case of *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371 at 384 where Laskin J stated:

What these decisions indicate is an updating of the equitable principle whose roots lie in the general standards that I have already mentioned, namely, loyalty, good faith and avoidance of a conflict of duty and self-interest. Strict application against directors and senior management officials is simply recognition of the degree of control which their positions give them in corporate operations, a control which rises above every day accountability to owning shareholders and which comes under some scrutiny only at annual general or at special meetings.

In an earlier passage, the learned judge had stated:

Like Grant, J., the trial judge, I do not think it matters whether O'Malley and Zarzycki were properly appointed as directors of Canaero or whether they did or did not act as directors. What is not in doubt is that they acted respectively as president and executive vice-president of Canaero for about two years prior to their resignations. To paraphrase the findings of the trial judge in this respect, they acted in those positions and their remuneration and responsibilities verified their status as senior officers of Canaero. They were "top management" and not mere employees whose duty to their employer, unless enlarged by contract, consisted only of respect for trade secrets and for confidentiality of customer lists. Theirs was a larger, more exacting duty which, unless modified by statute or by contract (and there is nothing of this sort here), was similar to that owed to a corporate employer by its directors. I adopt what is said on this point by Gower, *Principles of Modern Company Law*, 3<sup>rd</sup> ed. (1969), at p. 518 as follows:

... these duties, except in so far as they depend on statutory provisions expressly limited to directors, are not so restricted but apply equally to any officials of the company who are authorised to act on its behalf, and in particular to those acting in a managerial capacity.

33 In this case, the plaintiffs submitted, the defendant had held senior executive and managerial positions. In particular, as president and director of the second plaintiff, he was in charge of all aspects of its business. This responsibility continued even after his appointment in January 2001 to positions in the third plaintiff. The defendant was responsible for the general management of the business as well as the business development, marketing and sales of the plaintiffs' installation materials business in the Asia Pacific region. This business included low voltage products for industrial and commercial use. The defendant had agreed in court that he was part of the "top management" of the plaintiffs and that he was in a position to hire and fire employees. He also attended meetings of the Country Management Team where the plaintiffs' various businesses were discussed. During cross-examination the defendant had also agreed that he owed duties to the first plaintiff and the ABB Group.

34 Notwithstanding the defendant's apparent admission in cross-examination, I cannot find that the defendant owed any fiduciary duty to promote or protect the interests of the ABB Group which is not a legal entity or a party to these proceedings. As stated above, there was no express or implied contractual term in the second or third contracts imposing an obligation on him to promote the interests of the ABB Group. The questions put to the defendant related to the first contract and in answering those questions, the defendant was merely agreeing that there was such a contractual obligation to promote the interests of the ABB Group in respect of his first contract. He did not say that a similar contractual term existed in respect of his second or third contracts. Quite apart from the existence of a contractual term, it would be absurd to impose a fiduciary duty on the defendant to companies that he had nothing at all to do with around the world just because the companies in

which he was involved were their associates.

35 As regards the plaintiffs themselves, the defendant submitted that he did not owe them fiduciary duties. In respect of the first plaintiff, he was never employed by that entity because the first two employment contracts expressly stated that his employer was the second plaintiff. Moreover, the plaintiffs' witnesses had established that the first plaintiff is merely a holding company which does not and did not undertake any commercial activity. In respect of the second plaintiff, the defendant's duties as president ended with his employment in January 2001. Whilst he continued to be a director of the second plaintiff until February 2003, the fiduciary duties he owed the second plaintiff had to be, it was submitted, determined in the context of the second plaintiff's business and activities. By January 2001, the second plaintiff had transferred all its business activities to other entities except that it remained the holding company of facilities in Batam and Jakarta which assembled miniature circuit breakers, a low voltage product. The manufacturing facility in Batam closed down in 2002. In any event, the second plaintiff's business at all times related only to low voltage products and its market area was Singapore and South East Asia. It did not deal in medium voltage products.

36 Moving to the third plaintiff, the defendant downplayed the seniority of his position. He said that although he was initially president of the second plaintiff, he was later relegated to the position of general manager of low voltage products and was only a Vice President in the third plaintiff. In these reduced positions, he did not owe any fiduciary duties to the third plaintiff. His transfer to the third plaintiff was in effect a demotion effected when there was restructuring of the organisation. Whilst the defendant was in charge of low voltage products in a specific area (Asia South) and attended the third plaintiff's monthly management meetings, these facts were not sufficient, the defendant contended, to support a finding that he owed fiduciary duties to the third plaintiff. The top manager of the third plaintiff at the material time was Mr Sim, its President, to whom the defendant and all other vice presidents reported. The defendant and the other vice presidents owed duties of fidelity to the third plaintiff and there was no reason why they should be found to owe fiduciary duties as well.

37 I agree that there is no basis for imposing any fiduciary duty on the defendant in respect of the first plaintiff. He was never an employee of the first plaintiff, let alone a senior employee. No evidence was given as to any powers or responsibilities that he had in relation to the first plaintiff.

38 In respect of the second plaintiff, the defendant would have owed it fiduciary duties, as I have already stated, by virtue of his position as its director. According to Mr Sim's evidence, the second plaintiff was still an operating company at the time when the defendant was a director and it continued to own and run two manufacturing plants in Indonesia. Notwithstanding that evidence, whether the defendant's later activities could be said to have been in any way in breach any of these duties is more uncertain since the second plaintiff was not in the medium voltage product business.

39 As regards the third plaintiff, whilst there was a change of titles, it appeared from the defendant's own evidence that when he was transferred to the third plaintiff, no change took place in his rights and privileges and there were no changes in the terms and conditions of his employment. He remained part of the top management and attended meetings of the Country Management Team at which medium voltage products were discussed even though that was out of his direct area of interest. He was able to hire and fire for the third plaintiff. The defendant did not argue that an employee with a top management position did not owe his employer fiduciary duties. What he sought to do as I have stated above was to contend that his employment position was not at that level and therefore it would not be right to impose any fiduciary duties on him in addition to his duties of fidelity as an employee. I cannot agree. The defendant was transferred from the second plaintiff to the third

plaintiff because of a change in the way that the ABB Singapore Group carried out its business. The work that he did and his responsibilities were not changed but his title changed because he could no longer hold the title of "President" since Mr Sim was then the third plaintiff's President. The defendant was not demoted but remained a part of senior management as he himself agreed in court. He was a very senior employee indeed, on the facts here established. As such, I find he was in such a position that owed fiduciary duties to the third plaintiff.

40 The defendant contended that even if he owed the third plaintiff fiduciary duties, these duties must relate to and be commensurate with the duties imposed on him by his employment contract. From the third contract, it was clear that he was general manager for low voltage products for the Asia South area. As he was put in charge of a specific business area, the defendant contended that any fiduciary duties imposed on him had to be confined to that product and that marketing area. The third plaintiff's business was mainly concerned with low voltage products and its marketing area was Singapore and South East Asia. It did not at any time manufacture or assemble medium voltage products and only sold these products, if so requested, as part of a project or package. The ABB Group had companies in many countries involved in the switchgear business, including companies in China which manufactured and sold such products there. It was therefore not surprising that the third plaintiff did not sell medium voltage products, save as part of a package, and did not export such products to China. The defendant pointed out that the plaintiffs' witness, Giandomenico Testi, the Strategic Intellectual Property Manager for the Power Technology Business of the ABB Group, had conceded that whatever happened in China would have no impact on the plaintiffs themselves. In all the circumstances, it was clear, the defendant said, that *prima facie* a company set up in China to manufacture medium voltage products would not be competitive with the third plaintiff.

41 On the other hand, it was plain to me from the evidence that the third plaintiff was involved in the sale of medium voltage products even if such products were sold only as part of particular projects. The defendant was privy to some information at least about the third plaintiff's sales of medium voltage products through his attendance at the Country Management Team meetings and he agreed in cross-examination that if, in the course of his employment with the third plaintiff he had been contacted by a potential customer for medium voltage products, he would normally not have turned that customer away but would have passed the customer and the information to the manager responsible for these products. In the circumstances, I accept the contention of the plaintiffs that the fiduciary duties which the defendant owed the third plaintiff were not limited to matters concerning the third plaintiff's low voltage products but also concerned its medium voltage products.

42 The fiduciary duties which the plaintiffs contended were owed to the second and third plaintiffs are those set out in [7] above. I find that the defendant owed each of those plaintiffs the duties set out in [7(a)] to [7(f)]. Those duties have been formulated in various authorities as the duties owed by a director to his company and there is no reason to formulate the fiduciary duties of a very senior employee any differently.

## **The issues relating to the alleged breaches**

### ***Factual background***

43 The allegations of breach on the part of the defendant have been summarised in [10] above. They fall into two categories: allegations relating to Huadian and the defendant's involvement in the establishment of that company and, secondly, allegations relating to his participation in other businesses. In order to understand these allegations, a further account of the facts and various persons involved in the various companies is required. The account that follows is taken primarily from the affidavits filed by the witnesses called by the defendant.

44 First, a word about XIHARI. According to the evidence of Yuan Fuxing, currently the Vice Chief Engineer of the Industry Management Unit of XIHARI, XIHARI is China's national certification board. Its primary roles include:

- (a) carrying out product type-testing and giving certifications as authorised by China National Laboratory Recognition Bureau;
- (b) conducting high voltage research and development and issuing licences;
- (c) administering the China High Voltage Switchgear Association, a quasi-governmental organisation, to which most switchgear companies in China belong, providing industry services to switchgear companies; and
- (d) setting standards for high voltage products in China.

Mr Yuan has worked with XIHARI since 1983. From 2001 to 2005, he was Deputy Chief Engineer in the Research & Development Unit and is an expert in high voltage switchgear technology. His expertise also covers medium switchgear technology.

45 Lin Qunxing is a Chinese businessman and currently a director of three companies which have some part to play in these proceedings namely, Huadian, Fu Hsiang and Yong Ying (Xiamen) Science and Technology Co Ltd ("Yong Ying") a company incorporated in China. Mr Lin started out in the property business in 1994. In 2002, the defendant approached Mr Lin with an investment opportunity for the development of a particular plot of land in Xiamen. For this purpose, Great Vision was incorporated in February 2002 with himself, Mr Sher Hock Sing (the defendant's brother) and one other person, one Huang Jianhuang, as shareholders. Subsequently, the development was undertaken successfully through a subsidiary project company incorporated in China, viz Xiamen Fu Cheng. The project was completed in 2007.

46 Liu Chunguang is another Chinese businessman and is currently the Chairman of Huadian. He has been involved in several business projects with Mr Lin. Mr Liu first met the defendant in 1992 and subsequently he worked in ABB China Ltd and ABB Xiamen. He left ABB Xiamen in September 1996. Thereafter with Mr Lin, he was involved in the setting up of Yong Ying (in December 1996) and Fu Hsiang. Eventually, in June 2003, Fu Hsiang became the holding company of Yong Ying. Mr Liu remained on friendly terms with the companies in the ABB Group even after he left ABB Xiamen and both Yong Ying and Fu Hsiang had dealings with some of these companies including the second plaintiff.

47 Zheng Minsheng also known as Franklin Zheng is an electrical engineer who is currently the Deputy General Manager and Research & Development Director of Huadian and also the General Manager of Yong Ying. Mr Zheng was employed by ABB Xiamen from January 1993 to March 1998 and during that period he became acquainted with the defendant. Subsequently, Mr Zheng joined a company belonging to Mr Liu and in the year 2000, he commenced working for Mr Liu in Yong Ying.

48 According to Mr Zheng's evidence, some time in 2001, he and Mr Liu decided to go into the business of making circuit breakers. After carrying out a feasibility study, he did the design for the circuit breakers and obtained the necessary components from various sub-suppliers. By 2002, he had completed the prototype but Yong Ying was unable to develop the product further due to its limited resources. They then considered cooperating with XIHARI as the latter had the necessary software and testing facilities. An approach to that institute proved successful and in April 2002, pursuant to a letter of intent, Yong Ying entered into a joint design project with XIHARI to jointly design, develop,



produce and manufacture medium voltage vacuum circuit breakers with oval moulded poles. Subsequently, Yong Ying transferred its interest in this joint project to Fu Hsiang and Fu Hsiang and XIHARI subsequently agreed to advance the joint project by way of a joint venture pursuant to which a new company would be set up which could handle the commercial exploitation of the new products. In November 2002, Fu Hsiang entered into a joint venture agreement with XIHARI for this purpose and Huadian was subsequently established as the joint venture company.

49 By the end of 2002 and in early 2003, most of the development of the vacuum circuit breaker had been completed. By 31 January 2003, Huadian had finished prototyping and the most critical type testing. The testing of the product had begun on 25 October 2002 and was fully completed on 13 March 2003. Mr Zheng said that this development project was initiated by Mr Liu and himself. He was chiefly responsible for the design and development of the new product and several other products which were subsequently marketed by Huadian. The defendant who is not a technical man had nothing to do with the design of any of Huadian's products and he became involved in the development of the products by providing marketing input only after his appointment as general manager in March 2003. As at January 2009, Huadian had successfully obtained 30 patents pertaining to vacuum circuit breakers and medium voltage products.

50 According to Mr Zheng, after Huadian was formed, Mr Liu looked for a general manager. He considered that Mr Zheng would not be suitable for that post as he was a technical rather than a marketing man. In Mr Liu's view, the defendant was the more suitable candidate and therefore in or about December 2002, Mr Liu spoke to the defendant to offer him the job. According to Mr Liu himself, when he first approached the defendant, the latter was not keen on the position. Mr Liu had further discussions with the defendant and gave him the pertinent details of Huadian and its business plan. The defendant accepted the employment offer at the end of January 2003.

51 Huadian commenced marketing its vacuum circuit breaker in July 2003 and received the first order for the same in September 2003.

52 The defendant's own account of how he became involved with Huadian was as follows. In late October 2002, he attended the 10<sup>th</sup> anniversary celebrations of ABB Xiamen. Among the guests at the event were Li Zhao Lin and Pei Zhengjiang ("Mr Pei"), respectively the then Chairman and then General Manager of XIHARI. During conversations with them the defendant learnt that XIHARI was looking for a technical adviser for its research and development ("R&D") projects. However, at this time no specific R&D project was mentioned. In November 2002, Mr Pei and another officer of XIHARI, one Zheng Jun, mentioned in various telephone conversations with the defendant that they wished to engage an internationally known technical adviser. They mentioned Mr Leonhardt's name and the defendant agreed that he was a suitable candidate for the position. Consequently, the defendant communicated XIHARI's interest to Mr Leonhardt and the latter responded positively. Between 3 December 2002 and 3 February 2003, nine e-mails were exchanged between the defendant and Mr Leonhardt. The defendant asserted that in so communicating with Mr Leonhardt he was not in breach of any duties to any of the plaintiffs. He believed that XIHARI as a research institute could not pose any potential threat or competitive risk to the plaintiffs' business.

53 The defendant went on that in January 2003, he was approached by Mr Liu to join Huadian. At that stage, Huadian had two shareholders: Fu Hsiang (90%) and XIHARI (10%). Mr Liu told him that Yong Ying had been working with XIHARI in researching and designing new switchgear and circuit breaker products since December 2001 and Huadian had been incorporated at the end of 2002 to inject these new products into the market. The defendant, whose area of expertise was and is in general management and marketing, was interested in this Chinese company as it would allow him to return to the burgeoning market in China. By this time, he had already decided to leave the third

plaintiff's employ and had told this to a senior officer, one Tom Sjoekvist. In discussing terms with him, Mr Liu offered him up to 20% of the shares in Huadian which he would be able to purchase at any time at par value. The opportunity of becoming a shareholder attracted the defendant and he agreed to join Huadian. His employment as general manager commenced on 3 March 2003.

54 After joining Huadian, the defendant took the view that to develop the company as a joint venture between a Singapore company and XIHARI, it needed an international brand name. To enhance Huadian's image, the defendant thought it should acquire a German technical consultant. On 5 or 6 March 2003, he called Mr Leonhardt and invited him to visit Huadian's premises in Xiamen. When this visit took place, Mr Leonhardt agreed to become Huadian's technical consultant and a formal technical consultancy agreement was signed between him and Huadian in late March 2003 but backdated to 1 March 2003.

55 Later in 2003, the defendant sought to enhance Huadian's association with Germany by incorporating a company in Germany for purposes of holding shares in Huadian. Needing a local director and shareholder, the defendant approached Mr Leonhardt who agreed to his request and Gelpag mbH was incorporated in October 2003. The defendant owns 85% of the shares in Gelpag mbH whilst Mr Leonhardt owns 10% thereof. In late March 2004, Gelpag mbH purchased 16.2% of the shares in Huadian at par value and the defendant was appointed a director of Huadian. As at 20 March 2004, the shareholders of Huadian were Fu Hsiang (80.5%), XIHARI (3.3%) and Gelpag mbH (16.2%). According to the defendant, with a German partner involved in product development, a Singapore partner financing the company and a Chinese state owned research institute with immense research and product type testing capabilities, Huadian's performance took off in the second half of 2004 and it became a very successful business.

### ***Allegations of breach relating to the defendant's involvement in businesses other than Huadian***

#### *Great Vision/Xiamen Fu Cheng*

56 The details of the alleged breach of duty in relation to Great Vision are found in para 12(1) of the statement of claim (summarised in [10(a)] above) and those in relation to Xiamen Fu Cheng are found in para 12(3)(A) of the statement of claim (summarised in [10(e)] above).

57 In their closing submissions, the plaintiffs noted that Great Vision was incorporated on 18 February 2002 and its initial shareholders and directors included Mr Sher Hock Sing. The defendant was then still employed by the third plaintiff. On 25 April 2003, within two months of his resignation from the third plaintiff, the defendant was appointed a director of Great Vision. Concurrently his brother resigned as director and transferred all his 153 shares in Great Vision to the defendant. The plaintiffs submitted that this suggested that Mr Sher Hock Sing was holding the shares and directorship as well as carrying on the business of Great Vision on the defendant's behalf.

58 The plaintiffs submitted that the suggestion was supported by the defendant's lack of candour. In his further and better particulars filed on 16 May 2008, the defendant had averred that between February 2002 and April 2003, he was not involved in Great Vision and could not say what its business was. In his affidavit of evidence-in-chief, however, he shifted his position by saying that he "did not actively involve himself in the business of Great Vision" but that he was aware that Great Vision had been able to obtain the necessary approval from the Xiamen government in September 2002, set up its subsidiary Xiamen Fu Cheng and carry out its development project in Xiamen ("the Xiamen project") through the investment of Mr Lin. In court, the defendant admitted that in February 2002, he knew that Great Vision was set up to carry out the Xiamen project through its subsidiary. He also

recounted how Mayor Hong Yong Shi had told him about the opportunity to develop the land in Xiamen and that he passed this opportunity to Mr Lin and his brother. Mr Lin said he was willing to invest in the project if the defendant could obtain the approval of the Xiamen government for the development. The defendant showed himself to be aware of the processes involved in obtaining the approvals. The defendant did not, however, admit to having obtained the approvals himself. He said they were obtained by his brother, Mr Lin and a third shareholder.

59 The plaintiffs also pointed to evidence that the defendant had been rewarded for his involvement. The defendant had testified that Gelpag mbH had funded its investment in Huadian from the returns which he had obtained from the Xiamen project. Huadian had a registered capital of RMB30m at this time and therefore the 16.2% share purchased by Gelpag mbH must have cost RMB4.86m (or about \$1m). The defendant owned 90% of Gelpag mbH and therefore must have invested about RMB4.374m (or about \$900,000) in this company. He agreed in cross-examination that this \$900,000 was part of the profits he had made from the Xiamen project.

60 The plaintiffs then submitted that in order for the defendant to make such a substantial profit, he must have been directly or indirectly involved in the project. This involvement was contrary to his express duty not to be involved in any private participation in other business activities.

61 Xiamen Fu Cheng itself was established in July 2002 with Great Vision holding 90% of its shares and a Chinese company holding the balance. In the plaintiffs' opinion, the company records of Xiamen Fu Cheng confirmed the defendant's involvement and participation in the Xiamen project. The "Notes to the Financial Statements" for the year 2002 recorded that there was an outstanding amount of RMB70,000 owing from the defendant in respect of what was described as a "Travel Expenses Loan". There was also a payment voucher dated 3 December 2002 confirming the RMB70,000 loan to the defendant. In the voucher, the defendant was reflected as both "payee" and "applicant" and payment was purportedly received by Huang Jianhuang on 3 December 2002. The plaintiffs submitted, after discussing the evidence, that this sum was indeed received by the defendant or on his behalf for the travelling expenses incurred by him or by his brother or by Huang Jianhuang on his behalf in respect of the Xiamen project and it was not a mistake that the sum was booked in his name.

62 The defendant, agreeing that he had passed the opportunity in respect of the Xiamen project to his brother, argued that it was not a breach of fiduciary duty to pass on an opportunity in a business that is unrelated to that carried on by one's employer. Whilst it is true that a director or fiduciary has a duty not to divert any business opportunity in which the company is interested or for which it has been negotiating, into his own business, this principle was not applicable here. Great Vision and Xiamen Fu Cheng being in the property development business were not engaged in any business in competition with the plaintiffs or which would affect their interests. Mr Sim himself had admitted that there was no competition between Great Vision and the third plaintiff.

63 As for his own involvement, the defendant submitted that he did not participate either directly or indirectly in the business of Great Vision or Xiamen Fu Cheng when he was employed by the third plaintiff. He only became a director and shareholder of Great Vision after he left the third plaintiff. Even then his involvement was limited since about a year later, on 28 July 2004, he ceased to be such shareholder and director. At all times, before April 2003, it was Sher Hock Sing and Huang Jianhuang who were involved in the process of obtaining government approval from the Xiamen authorities and this was verified by Mr Lin, the principal financial investor. There was no evidence to support the plaintiffs' allegation that the defendant was the one actually involved in getting the government approval. The alternative argument that Sher Hock Sing was holding the shares in the company for the defendant was without merit. The defendant had passed the opportunity to his brother as he had no time to be involved. Mr Lin had also testified that Sher Hock Sing was actively

involved in the business. As for the fact that the defendant replaced his brother as shareholder and director after he resigned from the third plaintiff that should not lead to the conclusion that Sher Hock Sing was merely the defendant's nominee. There was a valid reason for the transfer of ownership in that in March 2003, the defendant began working full time in Xiamen and could conveniently take over the process of liaising with the Xiamen authorities which his brother did not want to continue doing, having had enough of travelling to and fro between Singapore and Xiamen.

64 In respect of the alleged outstanding amount of RMB70,000, the defendant submitted that the reference to this amount in the Notes was an error. This was in fact a cash advance for travel expenses incurred by Sher Hock Sing and Huang Jianhuang which was mistakenly recorded in the voucher as being in the defendant's name. He was not involved in Xiamen Fu Cheng and did not undertake any travel on its behalf. Mr Lin had confirmed that Huang Jianhuang had approached him personally to obtain the cash advance which was needed for travel to Xiamen to get government approvals. The voucher also showed that Huang Jianhuang had signed to acknowledge receipt of payment. The defendant himself did not sign the form and he only found out that his name had been put in the form after this action was started. The defendant could not have rectified the form at that stage as by then the document had been filed and Xiamen Fu Cheng had been closed.

65 As can be seen from the evidence and submissions above, the defendant admitted only to receiving and passing on a business opportunity to his brother during the time he was employed by the third plaintiff. Mr Sim agreed in court that merely passing a property development opportunity to one's brother would not be a breach of the defendant's employment contract. I agree. There was nothing in the third contract that prohibited such an action. Further, none of the fiduciary duties that I have found the defendant to owe the second and third plaintiffs prevent such activity. The question of fact to be decided is therefore whether the defendant himself took advantage of this opportunity utilising his brother as a nominee. If this question is answered in the affirmative then the legal question is whether in so doing the defendant was in breach of duty.

66 Having considered the evidence very carefully, I think that there is not enough evidence to show that apart from receiving and passing on the opportunity the defendant during the period of his employment with the third plaintiff actively participated in Great Vision or the Xiamen project. There was no evidence that during the period between the formation of Great Vision and the defendant's resignation, he spent any time in China during which he could have been working on the project. The fact that the defendant made a substantial profit from the Xiamen project is not indicative of any active participation by him during this period: such payment could well have been his reward (or commission) for simply obtaining the opportunity and passing it on to his brother to develop in conjunction with Huang Jianhuang and Mr Lin. Again the documentation relating to the so called loan of RMB70,000 is equivocal. The defendant firmly maintained that his name was reflected by mistake and the document itself showed that the money was received by someone else. Even if the defendant was the ultimate recipient of the loan, this would not be sufficient to prove that he was actually engaged in any business in relation to the Xiamen project. The plaintiffs' submissions as I have noted above ended rather weakly in that they averred that the money was received "by the Defendant or on his behalf for the travelling expenses incurred by him or by his brother and/or Huang Jianhuang on his behalf" in respect of the Xiamen project. If, as this submission contemplates, the travelling expenses were actually incurred by Sher Hock Sing or Huang Jianhuang how would the money have been received on the defendant's behalf? Sher Hock Sing and Huang Jianhuang, who were directors of Great Vision and were implementing the Xiamen project, were perfectly entitled to be paid by Xiamen Fu Cheng for the cost of travelling on that company's business.

67 If, contrary to my finding above, the defendant was actively involved in Great Vision before March 2003, this would have been a breach of the third contract as the contract expressly prohibited

him from any “private participation in other business activities, especially in [the third plaintiff’s] line of business”. He would not, however, have been in breach of any fiduciary duties owed to either the second or the third plaintiff as participation in a property development project in China would not infringe any of the fiduciary duties that I have found the defendant to owe those plaintiffs. Further, even though participating in the Xiamen project would be a breach of the defendant’s obligation not to privately participate in business activities outside the third plaintiff’s business, it appears to me that in the circumstances of this case such breach would have been a very technical breach and the likelihood of it having caused any damage to the third plaintiff was remote. The third plaintiff was not in any way involved in the business of property development whether in Singapore or in China. Also, as I have said, there was no evidence of any active participation by the defendant during his employment such as to interfere with the proper performance of his work for the third plaintiff. Accordingly, the damage sustained by the third plaintiff would have been nominal at best.

#### *Webmoney*

68 Webmoney was incorporated in Singapore on 24 May 2002. On incorporation its directors were a Chinese businessman, one Luo Baocheng and one Mr Chen Wei Ting who was then living in Singapore. Its registered address was the defendant’s home address. The defendant became a director and shareholder on 25 April 2003 at which time he acquired one \$1 paid up share in the capital of Webmoney. The defendant assisted in the incorporation of Webmoney by filing documents with the authorities and providing his address as its registered office. The plaintiffs contended that in doing so, he had breached his contractual and fiduciary duties to them because he had failed to act in the best interests of the plaintiffs by failing to give undivided attention to their business.

69 The defendant’s explanation was that his involvement in incorporating Webmoney was simply to help his friend Mr Luo who wanted to set up a Singapore company for the purpose of a reverse takeover of a listed company in Singapore. The defendant acted as director and shareholder in order to assist Mr Luo who needed a Singapore resident as a co-director. The defendant asserted, and Mr Luo confirmed, that the defendant’s \$1 share was held by him as Mr Luo’s nominee. The defendant did not invest any money in that company.

70 I find very little substance in the complaint about Webmoney. The company did not carry out any business at all after its incorporation. As at the date of hearing, the company remained dormant. Its original purpose did not materialise as an Australian company was used instead as the vehicle for the reverse takeover. The defendant did not spend any time on the company aside from providing his address and therefore it did not cause him to fail to “give full and undivided attention to the plaintiffs’ business” as alleged by the plaintiffs. I accept the defendant’s submission that since Webmoney did not carry out any business at all, the defendant could not and did not participate in any business so far as Webmoney was concerned. I also agree that the prohibition against private participation in other businesses cannot be construed so widely that merely owning shares in another company regardless of its line of business would amount to a breach of the relevant prohibition clause. In any case, holding a \$1 share as a nominee cannot amount to participating in another business. This complaint must therefore fail.

#### ***Allegations of breach relating to Huadian***

##### *Huadian’s similar and competing medium voltage products*

71 The defendant became general manager of Huadian on 3 March 2003. According to the plaintiffs, soon thereafter the ABB Group learnt that Huadian was advertising and offering for sale medium voltage products which were very similar to the Group’s products in terms of design,

specifications, lay-out and function and which competed strongly with the Group's products. These similarities were set out in the affidavit of evidence-in-chief of Markus Heimbach, the Group Senior Vice-President and Head of Business Unit Medium Voltage Products of a company called ABB Management Services Ltd.

72 The plaintiffs said that it was not disputed that Huadian competed in the same product and geographical markets as they themselves did. According to Huadian's own website, it was "aggressive in developing global markets and its products has [sic] been sold in Southeast Asia, Africa and Europe" and it had set up liaison offices and partner channels in Germany, Poland, Australia, Malaysia, Indonesia, Thailand, UAE, Saudi Arabia and South Africa. It obtained the first batch of orders from Southeast Asian countries for its medium voltage products in 2004 and this "laid a good start" for the company in entering the markets in those countries. During cross-examination, the defendant readily agreed that Huadian was a competitor of the plaintiffs.

73 The defendant on the other hand submitted that the medium voltage products sold by the ABB Group (collectively "ABB products") and Huadian are not similar, save to the extent that all such products are similar. He pointed out that Mr Heimbach had admitted that there were design differences between Huadian products and ABB products. The defendant contended that what similarities existed would be in outward appearance, and in particular, in the dimensions because these had to comply with regulations and all products were made for a similar purpose. The dimensions of all medium voltage products would therefore accord with certain pre-determined standards so that these products could fit other products and be readily used for the purposes for which they were designed. The defendant also relied on Yuan Fuxing's evidence that there may be similarities in outward appearance but many other companies also produced similar looking products. Mr Heimbach himself had admitted that the products of companies such as AREVA T&D, Cooper Nature (Ningbo) Electric Co., Ltd, and Beihai Yihe Hi-Tech Industrial Co., Ltd were similar to the ABB products and had similar dimensions.

74 The defendant further submitted that the plaintiffs had not proven that any information relating to the ABB products was in fact confidential. First, the tube used by ABB for its embedded pole was not patented and was in fact purchased from 3M. Secondly, the dimensions of the products, for example, the dimensions of the tube and the distances between contacts, may be ascertained simply by buying an ABB product. Further, the embedded pole technology was not invented by the ABB Group but had been used since the 1960s. Mr Leonhardt who was one of the inventors of the ABB embedded pole circuit breaker gave evidence that ABB could not get a patent in 1997 for it because the embedded pole technology was already well known. Both Mr Zheng and Mr Leonhardt gave evidence that many other companies were currently lawfully using the embedded pole technology.

75 The defendant also submitted that the material or process used as a buffer within the embedded pole was not secret or confidential. According to Mr Leonhardt's evidence, the cold shrinking material used in the ABB products was supplied by 3M. ABB was only able to get a patent for this in 2004 and according to the evidence of Mr Testi, this patent extended only to the cold shrinkable process and did not cover the hot shrinkable process or the liquid silicon injection process. The evidence was that Huadian had been using a liquid silicon rubber injection process prior to April 2004 and subsequently obtained a patent for it. There was also a large amount of information relating to the ABB products that was publicly available and could not be said to be confidential. ABB Group itself had published an article containing technical information about its circuit breakers and had also published information on its website. Various scientific papers had been published containing diagrams and technical information relating to the circuit breakers. Mr Heimbach himself admitted that given sufficient time a person with the right expertise could make a circuit breaker simply from observing the ABB breaker.

76 It is plain from the evidence and submissions of both parties that there are many similarities between ABB products and Huadian products. It is not, however, necessary for me to make a finding on the degree of similarity since this is not an action against Huadian for passing off or infringement of patent. It is also plain that Huadian is a competitor of the ABB Group generally but does not compete with the second plaintiff as it does not manufacture low voltage products. It may, however, be a competitor of the third plaintiff in relation to the third plaintiff's business of supplying medium voltage products to projects.

77 Notwithstanding all this, it was not and could not be established that the defendant was in any way responsible for the similarities between the Huadian products and the ABB products. Although in their pleadings the plaintiffs had alleged that the defendant had breached an express term of his employment requiring him to protect the plaintiffs' confidential information and had also breached a fiduciary duty not to disclose information of concern to the plaintiffs to third parties, the plaintiffs never went to the extent of specifying the particulars of the confidential information that the defendant allegedly misappropriated or misused. In court, it was not put to the defendant that he had disclosed confidential information to XIHARI or Huadian or any of the other parties involved in Huadian and there was no suggestion in the plaintiffs' closing submissions that the defendant had done this. Accordingly, all the evidence that was adduced showing the similarities between the Huadian and ABB products must have been intended to establish Huadian as a competitor rather than that the development of the Huadian products arose from information supplied by the defendant. In any case, it was clear from the evidence that the defendant was, during his employment with the plaintiffs, active in managerial and marketing positions. He was not involved in the manufacturing of their products; was not privy to any technical information and had no access to confidential information relating to the embedded pole technology while he was working in ABB Xiamen. From 1996 onwards, the defendant was involved only in business pertaining to low voltage products and had no access to any confidential information pertaining to the manufacturing process of medium or high voltage products. The defendant therefore was not capable of supplying technical information to XIHARI or Huadian or Yong Ying.

78 In view of the above findings, when I go on to consider below whether the defendant was, in relation to Huadian, in breach of any of his duties to the second and third plaintiffs, it must be understood that such breaches as may be found cannot be directly co-related to any similarities between Huadian's products and ABB products.

*E-mail exchange between the defendant and Mr Leonhardt*

79 The plaintiffs' pleaded particulars of the defendant's alleged breaches in relation to his correspondence with Mr Leonhardt have been summarised in [10(c)] and [10(d)] above. The defendant's account of how that correspondence arose and his response to the allegation of breach of duty are set out in [\[52\]](#) above.

80 Mr Leonhardt testified for the defence. In his affidavit he stated that he was originally employed in 1958 as a design and development engineer for a company that produced medium voltage products. This company subsequently became a member of the ABB Group and was renamed ABB Calor Emag AG ("ABB Calor"). Mr Leonhardt was a director of ABB Calor from 1988 until he retired in 1997. During this period he was responsible for research, development, quality assurance, licence agreements, technology transfer and vacuum technology for the ABB Group worldwide.

81 Mr Leonhardt first met the defendant in about 1992 when the latter was the general manager of ABB Xiamen. At that time, ABB Xiamen produced medium voltage products. In 1996 the defendant was transferred to Singapore pursuant to his appointment as President of the second plaintiff. As

Mr Leonhardt was not involved in low voltage products, he lost contact with the defendant thereafter. In 1997, Mr Leonhardt retired as a director of ABB Calor but continued as a consultant for a related company. He completely retired from his employment and all positions and responsibilities held by him with the ABB Group on 31 March 2001. He met the defendant again only in October 2002 when both men attended the 10<sup>th</sup> anniversary celebrations of ABB Xiamen.

82 The plaintiffs noted that the e-mail exchange between the defendant and Mr Leonhardt concerned the search by XIHARI for a “technical adviser” to assist in developing “a new generation of MV switchgear, circuit breaker and vacuum interrupter (12kV, 24kV, and 36/40.5kV)” as well as “to act as technical controller for the manufacturing company” that would manufacture and market the new products not only in China but also in other Asian markets. Mr Testi stated that the defendant’s approach to Mr Leonhardt was considered by the ABB Group to be morally inappropriate and clearly against the interests of the plaintiffs and the ABB Group. This was not only because the approach was made for and on behalf of XIHARI (who, as the defendant must have known, was a shareholder of a company (Huadian) that would and did compete strongly with the ABB Group) but also because Mr Leonhardt was an expert in the design and manufacture of medium voltage switchgears, circuit breakers and vacuum interrupters. By introducing and recommending Mr Leonhardt to XIHARI (and ultimately Huadian), the defendant knew or must have known that XIHARI and Huadian would, with the help of Mr Leonhardt, pose a grave competitive threat or risk to the plaintiffs and the ABB Group.

83 The plaintiffs submitted that the defendant knew or ought to have known that XIHARI was a potential threat and/or competitive risk to them. By failing to disclose the same to the plaintiffs, he acted in breach of his fiduciary duties through them. He should not have withheld the knowledge from them and should not have assisted XIHARI in its search for a technical adviser. In this respect, the plaintiffs relied on the following passage from the judgment of Hart J in *British Midland Tool v Midland International* [2003] EWHC 466 (“*British Midland*”) at [\[89\]](#):

A director’s duty to act so as to promote the best interests of his company prima facie includes a duty to inform the company of any activity, actual or threatened, which damages those interests. The fact that the activity is contemplated by himself is, on the authority of Balston, a circumstance which may excuse him from the latter aspect of the duty. But where the activity involves both himself and others, there is nothing in the authorities which excuses him from it.

The plaintiffs also noted that in *IDC Ltd v Cooley* [1972] 1 WLR 443 at 451, Roskill J had observed that information which went to the defendant there while he was managing director of the plaintiff company and which was of concern to the plaintiffs and was relevant for the plaintiff to know, was information which it was the defendant’s duty to pass on to the plaintiff because between himself and the plaintiff, a fiduciary relationship existed.

84 The plaintiffs further suggested that the defendant’s failure to disclose the activities and information concerning XIHARI and Huadian was prompted by his involvement in the setting up and affairs of Huadian in 2002, which involvement he did not want the plaintiffs to know. By taking active steps to assist XIHARI to engage Mr Leonhardt despite knowing that XIHARI could be a potential threat or competitive risk to the plaintiffs, the defendant had acted in breach of contractual duties to use his best endeavours to promote the interests and welfare of the plaintiffs, to avoid financial business or relationships which might be opposed to the plaintiffs’ interest and to act in good faith and fidelity and in the best interest of the plaintiffs.

85 The defendant submitted that in communicating with Mr Leonhardt he was not in breach of his contractual duties to the third defendant as the third contract did not prohibit him from communicating with a former employee of the ABB Group. In any case, he was not acting contrary to



the interests of the plaintiffs or even of the ABB Group in communicating with Mr Leonhardt. The ABB Group had, at that time, no further use for Mr Leonhardt's services and the latter was not subject to any restrictive covenants. Any person knowing these facts could reasonably conclude that the ABB Group had no further interest in Mr Leonhardt or in any activities that he should choose to undertake.

86 The defendant noted that the scope of duty of fidelity of employees included not "knowingly, deliberately and secretly [setting] themselves to do in his spare time something which would inflict great harm on their employer's business" (as per *Hivac Limited v Park Royal Scientific Instruments Limited* [1946] Ch 169. The defendant was not in breach of his duty of fidelity in corresponding with Mr Leonhardt with regard to his possible engagement by XIHARI. Mr Leonhardt was not an employee of the plaintiffs and XIHARI was not in any event a rival of the plaintiffs.

87 The defendant emphasised that XIHARI as a Chinese government-owned research facility could pose no potential threat or competitive risk to the business of the second and third plaintiffs. The geographical market of both these entities comprised Singapore and Southeast Asia. However, XIHARI being a Chinese research institute was only involved in the China market and licensed its technology only to Chinese manufacturers. Any activities of XIHARI could have no impact on the second or third plaintiffs and there was no reason for the defendant to anticipate that introducing a consultant to XIHARI would be detrimental to the second or third plaintiffs in Singapore. Even if XIHARI could be said to be competing in the marketing areas of ABB Group companies in China, the defendant would not be in breach of any duty in communicating with Mr Leonhardt as he did not owe any duties to the ABB Group as a whole, whether fiduciary or contractual.

88 Further, XIHARI produced "low-end" products. This meant that XIHARI's products were in a lower price range and of lower quality and this would not compete with ABB's products which were "high-end". This was readily conceded by Yuan notwithstanding he was the Vice Chief Engineer of XIHARI. Yuan admitted that Chinese products are generally less reliable with shorter usage life due to differences in material and technology. This was corroborated by Mr Leonhardt's evidence that there were different qualities of breakers and the ABB products occupy the highest level, and would thus never compete with the low-price low-quality breakers. There was, the defendant said, nothing wrong with Mr Leonhardt taking up a consultancy after his employment with the ABB Group had ceased as long as the ABB Group's trade secrets were not divulged. Likewise there was nothing wrong in an ABB employee assisting Mr Leonhardt to take up a consultancy.

89 In my judgment, in undertaking a commission from XIHARI to communicate with Mr Leonhardt with a view to engaging the latter's services as a consultant for XIHARI, the defendant acted in breach of his contractual duties to the third plaintiff and his fiduciary duties to the second and third plaintiffs. The correspondence made it clear that the defendant was aware that XIHARI was intent on developing a new generation of medium voltage products and that it wanted to ensure that these products were of international standard. The defendant knew that the intention was to market the product first in China and, potentially, in other Asian markets. Thus he must have known there was a potential for these products to compete in the same markets as those the second and third plaintiffs sold their products in. He approached Mr Leonhardt to be the technical adviser of XIHARI and also technical controller of the new manufacturing company. He must have known that Mr Leonhardt's services in these roles was regarded by XIHARI as very important for the successful development and marketing of the new products.

90 Whilst there was nothing in his contract to prohibit the defendant from communicating with Mr Leonhardt such communication could still be a breach of duty depending on the purpose and contents of the communications. As I have said, in this case, the purpose was to assist XIHARI to enlist the assistance of an expert in relation to the development of products which posed a potential

threat to the plaintiffs' products. The evidence indicated that it did cross the defendant's mind during the communications as to whether XIHARI and the manufacturing company it was setting up could pose a potential threat or competitive risk to the plaintiffs' business. It was wrong for him to dismiss entirely the existence of such a threat and risk because in doing so, he ignored the interests of his employer. The correct action on the defendant's part would have been to inform the second and third plaintiffs of XIHARI's plans and to politely refuse to assist XIHARI in its search for a foreign technical adviser.

91 The defendant's argument that because XIHARI was a government-owned research facility that produced low-end products which were of lower quality and in a lower price range than the ABB products it was not harmful to the plaintiffs for him to assist XIHARI cannot be accepted. That argument ignored the reality that XIHARI had (or was intending to have) a stake in the success of a commercial entity (namely Huadian). There was no evidence also to support the claim that the products were of lower quality than the ABB products. In fact, there was evidence that showed that Huadian intended to compete with international companies like the ABB Group in the markets for the medium voltage products. After joining Huadian, the defendant gave an interview for an advertisement and during the course of that interview, he stated:

At the very beginning of the creation of Huadian Switchgear, we had an accurate positioning for us, that is, to produce **the latest generation of electrical products**, such as the first range of VEP medium voltage circuit breaker recently launched by us. ... The results show that our product is leading the industry in China in terms of technology and **is on par with world-class products**. [Emphasis added]

Also Huadian's website states that:

The research and develop [sic] panel of ZN96-12(VEP)/T1250-31.5 indoor alternating current high voltage vacuum circuit breakers was composed by people who came from Xiamen Huadian Switchgear Co., Ltd, professional researcher of Xi'an High Voltage Apparatus Research Institute Co., Ltd and Guenther Leonhardt who was the German technical consultant, **the products were the latest generation of vacuum circuit breakers, which can satisfy the market demand of top products** ... with the strong R&D strength, first-class production equipment and internationalized management, Xiamen Huadian Switchgear Co., Ltd enabled **the products to reach the international advanced level whichever on production, appearance, performance, and other aspects**. [Emphasis added]

Marketing hype aside, evidence such as this indicates the intention of XIHARI to produce and market a product that could compete widely with established medium voltage products like those marketed by the third plaintiff. In fact, such an intention was implicit in the earliest e-mail correspondence that the defendant exchanged with Mr Leonhardt. As a director of the second plaintiff and a very senior officer of the third plaintiff, the defendant could not dismiss such intentions as being irrelevant to the second and third plaintiffs. At the least the information was of concern to these entities and should have been passed on to them whether or not they would have been able to take any steps to reduce the potential competition. Even if the defendant had not thought it relevant that the plaintiffs should have this information, he was not acting in their best interests by liaising with Mr Leonhardt to procure the latter's services for XIHARI and any manufacturing company it was setting up.

92 That it was important to XIHARI to engage Mr Leonhardt's services was shown by the fact that in November 2002, Mr Pei of XIHARI met the defendant in Singapore and asked him to check with Mr Leonhardt on the possibility engaging the latter as XIHARI's technical adviser. The fact that Mr Pei came all the way to Singapore to meet the defendant indicated XIHARI's need for an adviser and its

keenness to ensure the viability of the product. There were altogether between three and five conversations between the defendant and Mr Pei and his colleague, Zheng Jun, on the issue of securing Mr Leonhardt's assistance. Mr Leonhardt subsequently spent ten days in China and later was employed by Huadian as a consultant. Obviously he was of use to XIHARI and Huadian in relation to the production and marketing of medium voltage products. Having said that, I accept the defendant's submission that on the evidence, the main development of Huadian's products was carried out by Yong Ying in conjunction with XIHARI. I will deal with this aspect in more detail below.

*Was the defendant involved in setting up Huadian?*

93 The plaintiffs submitted that the defendant was in breach of duty because while he was still working for the third plaintiff, he had instigated or been involved in the setting up of Huadian, a potential rival. They alleged that he arranged for his former colleagues and existing business associates, Mr Liu, Mr Lin and Mr Zheng, to set up Huadian. After all, he had recently persuaded both Mr Liu and Mr Lin to invest in the Xiamen project and there was no reason why they would not also invest in a medium voltage product business, especially if it was to be run by the defendant who had headed a multi-national corporation and had the relevant experience.

94 The plaintiffs relied on the following evidence to substantiate their case. First, there was an interview published in October 2003 in which the defendant was quoted as stating that "towards the end of 2001, we had begun" the preparations to set up Huadian. The defendant's explanation was that the word "we" referred to Mr Zheng and Mr Liu and did not include him. However, Mr Zheng said he was asked to join Huadian at the end of 2002 and only knew of the agreement to set it up after he joined it in March 2003. As for Mr Liu, the plaintiffs said that he was more involved in the property business and left it to others to run the businesses that he and Mr Lin had jointly set up concerning medium voltage and low voltage products. Further, he had confirmed that he had not much knowledge about these products and their components.

95 During the interview, the defendant had also said that the preparations involved multiple parties and Huadian was set up by a team comprising Fu Hsiang, XIHARI and a German company called "Gelpag Electricity Facility System Ltd". The plaintiffs stressed that the directors and shareholders of Fu Hsiang were Mr Liu and Mr Lin and the only German company which was a shareholder of Huadian was Gelpag mbH which was set up in 2004 and owned by the defendant and Mr Leonhardt. According to Huadian's website, however, Huadian was established in December 2002 by Gelpag and partners from China and Singapore. Further, in March 2004, Fu Hsiang and XIHARI reduced their initial shareholdings in Huadian in order for Gelpag mbH to increase its stake to 16.2%.

96 The plaintiffs submitted that the above facts suggested the defendant's involvement and vested interest in Huadian prior to his resignation in 2003. At all times, the general perception and understanding of the directors of Huadian were that the defendant and Mr Leonhardt had been involved in the company since its founding. Otherwise they would not have authorised the website message referred to above. The defendant was clearly in breach of his duty as shown by another pronouncement of Hart J in the *British Midland* case to the effect that:

A director who wishes to engage in a competing business and not to disclose his intentions to the company ought, in my judgment, to resign his office as soon as his intention has been irrevocably formed and he has launched himself in the actual taking of preparatory steps.

97 The plaintiffs further submitted that by 3 December 2002, the defendant knew much more about XIHARI's plans for the development of the new general of medium voltage products and the establishment of a manufacturing company than he was prepared to reveal during the trial. His reason

that his assistance was sought (*ie* that he could act as an interpreter) was not convincing because Mr Zheng who had worked on a development project with XIHARI could also speak and write English. The defendant knew from Mr Pei and Mr Li that they were making a third generation of circuit breakers. He also gained much information concerning XIHARI's research and development projects not only from his discussions with Mr Pei in Singapore but also from his telephone conversations with the latter.

98 The plaintiffs stressed that in 2002, the year in which there was documentation of the joint efforts being made first between Yong Ying and XIHARI and subsequently between Fu Hsiang and XIHARI in relation to the development of the new products, Mr Liu and Mr Lin were also involved in the Xiamen project. As such, the plaintiffs reasoned, they must have been in constant contact with the defendant that year and he must have been aware of what was going on. Even if he was not personally involved in the various negotiations, it was probable, the plaintiffs submitted, that Mr Liu and Mr Lin must have sought his advice since they had little knowledge of medium voltage products. The plaintiffs suggested that Mr Liu and Mr Lin were the defendant's representatives in respect of these negotiations and efforts and the setting up of Huadian. They also stressed that Mr Liu had confirmed in court that he did not conduct any search for a person to head Huadian because he considered that there was only one suitable candidate, the defendant. They submitted that his evidence in court that the defendant was, originally, not keen to head Huadian, should not be accepted as it was not logical or believable. It was also at odds with the defendant's affidavit in which he did not mention any lack of keenness to join Huadian.

99 The plaintiffs have the onus of proving their case on a balance of probabilities. Having considered the evidence carefully, I can see why they suspect that the defendant was involved in the setting up of Huadian. However, I do not consider that they have established that proposition on the balance of probabilities.

100 The first thing to remember is that Yong Ying, a Chinese company with whose establishment and operations the defendant had nothing at all to do, was dealing in both low and medium voltage products from the time it was set up in 1996. According to the forms filed with the authorities in China, the scope of its business from then on included the "production and processing of medium and low voltage equipment". Mr Liu and Mr Lin were the movers behind Yong Ying and they employed Mr Zheng as its general manager. Mr Zheng had considerable experience in the circuit breaker business, having previously worked for ABB Xiamen. Mr Liu too had worked with ABB Xiamen and, even if not knowledgeable technically about the products, must have acquired some familiarity with the business. It was clear also from the evidence that Mr Liu and Mr Lin were canny businessmen and interested in developing profitable businesses. It is therefore not difficult to believe that Yong Ying would have considered improving its business by developing a better product which could compete with the already established brands. I see no reason why Mr Liu and Mr Lin would need any encouragement from the defendant (a person who did not contribute either in time, money or expertise to the development of the new project) in order to branch out into a new business area. It is equally probable that they and Mr Zheng conceived the idea without any input from the defendant at all. The fact that he was friendly with them is not sufficient to establish that he was the prime mover in the initiation of the new product. The fact that the defendant later became the general manager of Huadian also does not establish that he must have been involved in the company from the time that the idea of developing the new product first took root.

101 It is not as if Yong Ying just jumped into the project without any preparatory work. Mr Zheng confirmed that a feasibility study had been carried out before any work was undertaken on the new product. Mr Liu confirmed that the feasibility study related to issue of production and market demand for circuit breakers. Mr Zheng started looking for suppliers of parts in July or August 2001 and

subsequently undertook the initial research and development work. Although Mr Liu was not involved in the technical aspects, it was clear from his evidence that he was involved in and aware of the business of Yong Ying and therefore quite capable of conceiving plans for the development of its business.

102 The plaintiffs submitted that Mr Zheng was not capable of developing a new circuit breaker. They asserted that he made "huge and improbable strides" in manufacturing and marketing circuit breakers and switchgears that were similar to those of the plaintiffs, thus insinuating that he had copied the ABB products. I should state here that whether or not he copied the ABB products is not an issue in this case because neither Mr Zheng nor XIHARI nor Yong Ying nor Huadian is being sued in this action for patent infringement or passing off. Further, as I have already made clear, there was no evidence that any confidential information relating to any product of the ABB Group was passed by the defendant to any of those parties. There was, however, evidence that Mr Zheng was a senior engineer and he testified that he was chiefly responsible for the design and the development of the new vacuum circuit breaker and had commenced research relating to medium voltage products from some time in 2001 when he was working for Yong Ying.

103 Counsel for the plaintiffs submitted that Mr Zheng could not have designed Huadian's circuit breakers and switchgears as he did not have access to samples or drawings of other companies to aid his design process nor was he in touch with the ABB embedded pole technology. This argument was inherently flawed as it presupposed that any engineer who wished to design circuit breakers or switchgears had to rely on the embedded pole technology used by ABB. I accept the defendant's submission that the evidence indicated that Mr Zheng could and did design Huadian's circuit breakers. He showed that he had an excellent understanding of the embedded pole technology and other technical details. Mr Leonhardt testified that Mr Zheng's knowledge and experience must have been critical in the development of the new family of circuit breakers. It should also be noted that Mr Zheng did not work alone and had a number of support staff. Further, after the conceptual prototype was developed, there was a joint venture with XIHARI to further develop it and make it suitable for commercial sale and there was no doubt from the evidence that XIHARI had the necessary facilities and the expertise to assist in these aspects. The evidence was that XIHARI provided analysis software and professional engineers which made further improvements possible.

104 Mr Leonhardt testified that by the time of his visits to the premises of XIHARI in February 2003, various prototypes had already been completed. He had seen at the premises of Yong Ying and Huadian, a complete family of switchgears that was distinct from those of the ABB Group. As Mr Leonhardt was one of the originators of ABB's embedded pole circuit breakers, his evidence must be given some weight. Having seen these products, he concluded that they were different from the ABB products and that the only similarity was in the dimensions. This was consistent with the defendant's case that in order to enable such products to fit into switchgear panels, there is considerable standardisation in their dimensions. Whilst originally Huadian's circuit breakers incorporated what was referred to as the "cold shrinking process" to create a buffer layer around the embedded pole and this was a process that was first used by the ABB Group, the evidence was that the ABB Group did not have a patent over the process at that time and that when the ABB Group obtained a patent for the same in China in 2003, Huadian began using a different process for its breakers which was not covered by ABB's patent. Even if Huadian had copied some aspects of the ABB products, such copying does not establish any involvement of the defendant in the development of the product. Nor does it establish any assertion that the defendant encouraged Yong Ying or XIHARI to copy ABB products.

105 I should also state that although the defendant was involved in the communications that led eventually to Mr Leonhardt visiting XIHARI and Huadian in February 2003, there is insufficient

evidence to establish that Mr Leonhardt contributed to the development of Huadian's first set of circuit breakers. Mr Zheng's evidence was that he had commenced the research and development in 2001 and that the development of the circuit breaker had been completed by the time of Mr Leonhardt's first visit. The conceptual prototype had been completed by the time the letter of intent between Yong Ying and XIHARI was signed in April 2002. Mr Yuan of XIHARI confirmed the existence of the conceptual prototype as he had seen photographs of it at the end of March or in early April 2002. There were therefore drawings and samples at the time the letter of intent was signed. By June or July 2002, the prototyping had been completed and two prototypes made. The stage of type testing was reached before the end of September 2002 and the process of type testing was well underway when Mr Leonhardt visited XIHARI in February 2003. The testing of the first set of circuit breakers was officially completed on 13 March 2003. The evidence as to the above sequence of events was given by Mr Zheng and confirmed by Mr Yuan. I see no reason not to accept this evidence.

106 Although I have found that it has not been established that the defendant was involved in conceiving and implementing the idea of developing a new generation of circuit breakers to compete with the plaintiffs' products, I think that the evidence shows that his involvement in Huadian probably predated January 2003 when he said Mr Liu approached him to be its general manager. From the evidence, it appears to me to be more likely that he was first approached to run the new company in October 2002 when he met Mr Pei in China and that he had probably confirmed his interest by November 2002 when Mr Pei came to see him in Singapore. Thus, by the time that he communicated with Mr Leonhardt, the defendant had probably decided to leave the third plaintiff and join Huadian once it had been formed and was ready to go into operation. I do not think that the defendant was responsible for the formation of Huadian because it had been decided by XIHARI and Fu Hsiang that they would establish a commercial company to market their products and there is no evidence that the defendant was involved in those discussions at all. In fact the incorporation of a dedicated company to manufacture and sell the product developed by Yong Ying and XIHARI had been contemplated in the letter of intent of April 2002 and the subsequent establishment of Huadian was in line with the original intentions albeit that Fu Hsiang had taken over Yong Ying's role. Even if the defendant had refused to participate in Huadian, its incorporation would have proceeded. His refusal to participate may have been a stumbling block but could not have halted a project that was already well underway.

107 It was not a breach of fiduciary duty or of fidelity for the defendant to accept an offer to join and run a company that might become capable of competing with his current employers. However, having done so, he was not entitled while still in the third plaintiff's employ to do any work that would assist in the establishment and subsequent operations of Huadian. In this respect, the evidence supports a finding that the defendant was in breach of his obligations not to actively assist in Huadian in two ways. The first was in relation to his communications and dealings with Mr Leonhardt which resulted in the latter travelling to China in February 2003 to look into and advise on the new product. Although Mr Leonhardt said that he simply gave certain lectures and did not advise on the product, it is clear that he did see it. Whilst he asserted that during this trip he was not asked to become a consultant of Huadian, he also testified that he was told that they needed technology and equipment for their technology for casting their poles. He further testified that he considered this problem when he went back to Germany and by the time he returned to China in the second half of March 2003, he already had some ideas about the equipment necessary to deal with the problem.

108 The second way in which the defendant was in breach was that he must have spent some time, after November 2002, thinking about and developing a business plan for Huadian. This was clear from the slide presentation that he made to the board of directors of Huadian at its first board meeting on 3 March 2003. Whilst the defendant maintained that he had drawn up a very basic

business plan after arriving in China on 2 March 2003 on the basis of information given to him by Mr Zheng, this evidence was not convincing. The resolutions which the board passed after the defendant's presentation showed that the defendant must have expended some time and effort prior to the meeting on 3 March 2003 in research, data collection and collation and in compiling and preparing the information contained in the forecasts and proposals referred to in the resolution. The defendant rather belatedly produced a number of powerpoint slides which he alleged were the forecasts and proposals referred to in the board resolution and which he had prepared on Sunday, 2 March 2003 after arriving at Xiamen at noon that day. He asserted that he had prepared them on an urgent basis because Mr Liu had told him he wanted the defendant to present something to the board the next day. There was no reason why the meeting had to be held on 3 March 2003 and why the presentation had to be given during the meeting. I accept the plaintiffs' submission that the slides and/or the information presented at the meeting must have been prepared some time in advance of it and indicate the defendant's prior involvement in Huadian.

## **Conclusion**

109 To summarise, I have found the defendant to have been in breach in the following respects only:

- (a) he was in breach of his fiduciary duty to the second and third plaintiffs and in breach of his duty of fidelity to the third plaintiff when he failed to inform them of XIHARI's intention to develop and market a new generation of circuit breakers;
- (b) he was in breach of his fiduciary duty to the same parties when he communicated with Mr Leonhardt with a view to obtaining the latter's services as a consultant for XIHARI and Huadian; and
- (c) he was in breach of his duty of fidelity to the third plaintiff when he spent time after about November 2002 working on plans to develop and run the business of Huadian.

110 The plaintiffs' statement of claim as summarised in [\[10\]](#) above contained more allegations of breach of duty. Some of these were dropped and not pursued in the plaintiffs' closing submissions. In respect of those that were pursued, [\[109\]](#) above contains the summary of my findings in favour of the plaintiffs. Apart from those matters, I hold that the plaintiffs have not established the other breaches which they asserted.

111 There will be judgment for the second and third plaintiffs against the defendant for either damages to be assessed or an account of the defendant's profits to be taken, at the election of the second and third plaintiffs. The claim of the first plaintiff against the defendant is dismissed with costs to be fixed by me after hearing submissions on quantum. As for the question of costs in relation to the claims of the second and third plaintiffs, I will leave that to be decided at the assessment because whether the successful plaintiffs are entitled to recover substantial costs against the defendant or not will very much depend on the quantum they recover in relation to the breaches of duty that I have found to have been committed.

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