Chan Tong Fan and another *v* Chiam Heng Luan Realty Pte Ltd (Chiam Toon Tau and another, non-parties)
[2013] SGHC 192

Case Number : Originating Summons No 933 of 2012

Decision Date : 27 September 2013

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Gregory Vijayendran, Rachel Chow and Benjamin Smith (Rajah & Tann LLP) for the plaintiffs; Kong Man Er (Drew & Napier LLC) for the defendant; Nish Shetty and Jared Chen (Cavenagh Law LLP) for the non-parties.

Parties : Chan Tong Fan and another — Chiam Heng Luan Realty Pte Ltd (Chiam Toon Tau and another, non-parties)

Companies – Directors – Duties

27 September 2013

Judith Prakash J:

Introduction

1 This application came before me as one of a pair of matters involving essentially the same parties. The relief sought in both applications was the same, *viz*, that the plaintiffs be allowed to commence derivative actions in the names of the defendant companies against the directors of the same for breach of various duties.

2 The company involved in this application is Chiam Heng Luan Realty Private Limited ("CHLR") and the company involved in the other application, Originating Summons No 935 of 2012 ("OS 935/2012") is Sloane Court Hotel Pte Ltd ("SCH"). On 23 April 2013, I allowed the plaintiffs' application herein but only in respect of one proposed cause of action, dismissing the plaintiffs' prayers to be allowed to pursue the other proposed claims. I dismissed the application in OS 935/2012 in its entirety. The plaintiffs are dissatisfied with the outcome and have appealed against both decisions. These are my grounds for the decision regarding CHLR but, in the course of these grounds, I will have to give the background and some of the facts relating to SCH as well.

The background

3 CHLR and SCH were incorporated on or about 24 May 1971 by Mr Chiam Heng Luan ("HL Chiam"), who was the patriarch of the Chiam family. He and his wife, Mdm Lim Wee Leng ("Mdm Lim"), were the first directors and, for a considerable time, the only shareholders of the two companies. They had ten children, the first plaintiff being their eldest son and second child. The second plaintiff is the wife of the first plaintiff.

4 CHLR has a paid up capital of $342,002 comprising 342,002 ordinary shares of $1.00 each. In October 2012, when this action was commenced, all of the shareholders of CHLR, apart from the second plaintiff and her daughter, were the children of the founders (or their legal representatives). About 16.4% of the shares was in the hands of the plaintiffs and their daughter, the first plaintiff

having distributed his share amongst his family a few years earlier. There were four directors of CHLR, all being the first plaintiff's siblings. The directors also held shares in CHLR, about 43.3% in total.

5 CHLR is a property holding company. Its main asset is the land at 17 Balmoral Road, Singapore ("the Balmoral Property"), on which stands a 32-room hotel, the Sloane Court Hotel ("the hotel"), and a restaurant. The hotel and restaurant are operated by SCH.

6 The Chiam family is an enterprising family. In the 1950s, HL Chiam was a partner in a hotel business. He subsequently decided to go into business for himself and therefore used his savings to buy the Balmoral Property which was then a piece of empty land, and to undertake construction on it. The building that HL Chiam erected eventually became the Sloane Court Hotel which was run by HL Chiam and Mdm Lim as a family business. Later, they decided to incorporate their business and set up CHLR and SCH for that purpose. It was decided that CHLR would be the land-owning entity and that SCH would manage the hotel operations. The Balmoral Property was transferred to CHLR, and SCH rented the hotel building from CHLR at a rental fixed by HL Chiam. It was agreed that SCH would pay for all repairs to and renovations of the hotel. SCH and CHLR were funded completely by HL Chiam and Mdm Lim. In due course, they allocated shares in both companies to all the children. As they grew up many of the children, including the first plaintiff, played a part in running the business of the companies.

7 Initially, as stated above, there were only two directors of the companies. In about 1988 or 1989 however, three of HL Chiam's children were appointed directors of both CHLR and SCH. These were Ms Chiam Ai Thong ("Ai Thong"), Mr Chiam Toon Tau ("Toon Tau") and Mr Chiam Toon Chew ("Toon Chew"). In 2004, a fourth sibling, Ms Chiam Ai Huem ("Ai Huem") was made a director of CHLR, though not of SCH. These four persons are still the directors of CHLR and they were named as the prospective defendants to the action which the plaintiffs sought leave to begin.

8 Mdm Lim passed away in 1990. HL Chiam continued to take an active part in running the companies. He died in 2008 at the age of 94.

The application

9 Prayer 1 of the originating summons ("OS") herein prayed that the plaintiffs be granted leave to bring an action in the name and on behalf of CHLR against Toon Tau, Ai Huem, Ai Thong and Toon Chew (referred to collectively as the "Directors") for breaches of directors' duties to CHLR in the manner described in Appendix 1 of the OS. Appendix 1 stated that the breaches of duty related to:

(a) unaccounted/unexplained/undisclosed transactions between CHLR and SCH in relation to the Balmoral Property that were *prima facie* not in the interests of CHLR, or were breaches of the Directors' duties to exercise skill, care and diligence in the exercise of their powers;

(b) unaccounted/unexplained interest-free and unsecured loans extended to the Directors during Financial Year ("FY") 2010 in the amount of $222,731;

(c) unaccounted/unexplained failures to account for rental received and/or to achieve optimal rental yield in respect of two office units at the Shanghai Bund International Tower, 99 Huangpu Road, Rooms 701 and 705, Shanghai 200080, People's Republic of China ("the Shanghai Properties");

(d) unaccounted/unexplained failures to account for rental received and to achieve optimal rental yields in respect of the properties in Johor, Malaysia owned by CHLR, including two two-

storey shop houses (95 & 95A and 97 & 97A Jalan Perisai) and two three-storey shop houses (31 and 33 Jalan Dedap) (collectively, "the Malaysian Properties");

(e) unaccounted/unexplained failures to achieve optimal rental yield in respect of the two-storey shop-house at 65 and 65A Serangoon Gardens Way ("the Serangoon Gardens Property") owned by CHLR; and

(f) unaccounted/unexplained/undisclosed payments made by CHLR in respect of renovation expenses purportedly incurred by SCH in or around 1977, 1981 and 1993, despite the lack of any agreement or document to evidence any contract between CHLR and SCH pursuant to which the payments were made.

10 Although there were some further details of the alleged breaches in Appendix 1 which I have not reproduced here, I found the allegations to be, on the whole, rather vague. In the course of the proceedings, therefore, I asked Mr Gregory Vijayendran, counsel for the plaintiffs, to provide me with a proposed statement of claim. He duly submitted a document entitled "Points of Claim" containing details of the action which the plaintiffs proposed that CHLR should bring against the Directors. I will refer to the Points of Claim in the course of these grounds because I was guided by it in ascertaining the exact nature of the plaintiffs' complaints and whether the same amounted to legitimate and arguable causes of action against the Directors.

11 Before I discuss the law and the Points of Claim in further detail, I will set out the plaintiffs' general complaint and the Directors' general response. This will, I hope, aid understanding of the parties' conflicting perspectives and the reasons for my decision.

The parties' perspectives

The plaintiffs' perspective

12 The affidavits for the plaintiffs were all made by the first plaintiff. The second plaintiff holds her shares by virtue of a gift from her husband, the first plaintiff, and she did not contribute independently to the proceedings. The matters stated below are taken from the first plaintiff's first affidavit.

13 The first plaintiff stated that when HL Chiam started his hotel business in 1962, it was run as a partnership between his parents, his sister, Ms Chiam Mui Eng, and himself. After the companies were incorporated, it was agreed and intended that they would be run as family businesses. At all material times from incorporation until HL Chiam's death, the business was primarily run by HL Chiam and Mdm Lim. The first plaintiff assisted them from 1955 until about 1972. Subsequently, his parents were assisted by his younger siblings.

14 The first plaintiff asserted that during the approximately 37 years from the incorporation of CHLR until the death of HL Chiam in 2008, only three annual general meetings ("AGM") of CHLR were held. After 2008, the Directors failed or refused to provide the plaintiffs with notice of any AGMs of CHLR until 2010. In addition, they failed to cause CHLR to lay the audited accounts for the financial years until 2009 before the members at an AGM. From the mid-1980s until 8 September 2009, the Directors failed to provide the plaintiffs with the company's audited accounts.

15 From the mid-1970s, the first plaintiff occasionally asked Ai Thong for CHLR's accounts but he did not receive them. From 1997, he also asked Toon Chew for these accounts but was equally unsuccessful until 2009. On 8 September 2009, Toon Chew provided the plaintiffs with a set of

accounts for the financial years 1976, 1979, 1981 and 1983 to 1997. He also gave them a set of the accounts for FY 2009 about half an hour before the 2010 AGM held on 7 June 2010 started. These accounts were unaudited. At the 2010 AGM, the plaintiffs asked for minutes of the meeting. These were not given to them voluntarily and they subsequently had to purchase the same. The plaintiffs subsequently asked for minutes of the 2011 AGM as well but did not receive them until 1 August 2012. The plaintiffs complained that all the minutes supplied were inaccurate in that they omitted any mention of the numerous legitimate enquiries raised by the plaintiffs and one of the other Chiam siblings during the meeting.

16 The plaintiffs complained that the Directors had systematically and deliberately withheld information regarding CHLR, its finances and/or its affairs from the plaintiffs, and had consistently failed or refused to provide them with such information despite numerous requests from the plaintiffs for the same. The first plaintiff believed that the failure on the part of the Directors to be forthcoming with information was motivated by a desire to hide the various breaches/infringements of duty that they had committed.

The Directors' perspective

17 On 15 October 2012, Ai Thong and Toon Tau applied to intervene in this OS and to be able to file affidavits and be heard via counsel in relation to this OS. This application was granted on 20 November 2012. In an affidavit made on 14 November 2012, on behalf of herself and Toon Tau, Ai Thong gave their perspective. I shall refer to Ai Thong and Toon Tau collectively as "the interveners" when referring to their actions in relation to this OS.

18 The interveners believed that the plaintiffs' allegations/claims were entirely motivated by their personal vendetta against Ai Thong and Toon Tau and other members of the Chiam family and were driven by personal considerations and were not in the interests of CHLR. The plaintiffs were abusing the process of court by attempting to utilise the company's funds in order to further their own personal feud against the Directors.

19 It was asserted that CHLR and SCH were always intended to be run as a family business and were, for all intents and purposes, treated as a single entity by HL Chiam. HL Chiam as the patriarch of the Chiam family was fully in charge of the companies and their management. All acts and decisions carried out by the companies were in accordance with HL Chiam's instructions. There was never any question about this whether from the plaintiffs, the interveners, or any of the other directors and/or shareholders of the companies. Apart from HL Chiam and Mdm Lim, none of the other shareholders of the companies had contributed any money to the same. They had been given their shares by their parents.

20 When the Directors were appointed as directors of the companies, these appointments were made solely on HL Chiam's instructions. By the time of the first appointment in 1988, CHLR had been operating for close to 17 years under HL Chiam's direction and many of its business practices were, to the newly appointed directors, set in stone. In any event, these practices were carried out in the commercial interests of the companies. Apart from acting as directors of the CHLR and SCH, the Directors and a number of their siblings had also assisted in the day-to-day running of the companies and the various properties they owned.

21 After Mdm Lim's death, HL Chiam continued to run the companies assisted by the Directors. All key management decisions continued to be made by HL Chiam. All of the business practices undertaken by the companies during this period were instituted by him as well. After his death in 2008, the Directors saw no reason to make any material changes in the manner in which the

companies had been run.

22 Neither of the plaintiffs had been ever appointed a director of either CHLR or SCH. However, they were at all times aware of the manner in which the companies were operated and run. While HL Chiam was alive, the first plaintiff would occasionally give suggestions as to how to run the business but these were always rebuffed by his father. Following HL Chiam's death, the first plaintiff begun alleging that there were issues with the manner in which the companies were run. This was despite knowing that prior to 2008 all practices/decisions were those of HL Chiam and that after 2008, the Directors continued to run the companies in the same manner as they had been run by their parents. The business practices that the plaintiffs complained of in these proceedings were the same ones that their parents had followed. There was no question that these practices had always been in the commercial interests of CHLR and SCH.

23 In relation to the allegations that CHLR had hardly given notice of its AGMs until the first plaintiff complained to the Accounting and Corporate Regulatory Authority ("ACRA") in 2009, the interveners considered the same to be unmeritorious. CHLR was always intended to be a family business, as the plaintiffs were well aware. Hence, its company meetings had been held on an informal basis. Notices for these meetings were given on an informal basis as well by telephone calls or emails. This practice had been followed for more than 40 years. Secondly, it was not true that CHLR had only held three AGMs from 1971 to 2009. It had consistently held AGMs since 1977 and the first plaintiff himself had attended its AGMs in 1974, 1975, 1977, 1981, 1987, 1991, 1996, 2010 and 2011. It should be noted that the first plaintiff denied having attended all these meetings, alleging that in some instances his signature on attendance slips had been forged. In relation to some AGMs, however, he said he had signed the attendance slips at the direction of his father.

24 After the first plaintiff had complained to ACRA about the company's failure to give proper notice, various shareholders had explained to ACRA that CHLR had been run informally and that the meetings had also been informal. On 28 October 2009, ACRA informed the company that it had not complied with the Companies Act (Cap 50, 1999 Rev Ed) ("the Act") in that it had failed to send out the requisite notice of AGM 14 days before the AGM was held. ACRA then advised CHLR to ensure that it complied with the relevant provisions of the Act in future. Since then, CHLR had taken steps to try and comply with ACRA's instructions. It was notable that CHLR had not been charged for any breach of the Act nor had it been issued any official warning.

25 The allegation that the Directors had intentionally refused to provide accounts to the plaintiffs was untrue. The plaintiffs had had access to CHLR's accounts at most times at its office. They had also had access to the detailed accounts even though they were not entitled to the same since they were simply shareholders of the company and not office bearers.

26 Ai Thong stated that the plaintiffs had for many years been feuding with other members of the Chiam family. The interveners considered that the plaintiffs were trying to force them and other members of the family to buy out the plaintiffs' shares and referred to an email from the first plaintiff dated 16 July 2009 in which the first plaintiff had, *inter alia*, asked his siblings to buy his shares.

27 While he did not apply to intervene, Toon Chew, one of the Directors, filed an affidavit in which he supported the position taken by Ai Thong.

28 I should also note that four other shareholders of CHLR, *viz*, Ms Chiam Mui Eng, Ms Chiam Ai Peng, Ms Chiam Ai Cheng and Mr Chiam Toon Hai filed affidavits in these proceedings. They supported the Directors in that they stated that they believed there was no basis for this application. They considered that it would not be in the interests of CHLR to bring any legal proceedings against its

directors and they believed that the plaintiffs had brought the OS to force the other siblings to give in to their demands that the plaintiffs be bought out of the company.

The Extraordinary General Meeting ("EOGM")

29 On 7 November 2012, a Notice of EOGM of CHLR was sent out to all its shareholders. The agenda for the meeting was to consider and pass, if thought fit, ordinary resolutions which would ratify the actions of the Directors and absolve them from any breaches of duty they had committed in relation to the subject matter of the plaintiffs' complaints. The EOGM was duly held on 22 November 2012 and was attended by all living shareholders, including the plaintiffs.

30 The resolutions put before the meeting dealt with whether it would be in the interests of CHLR for the company to bring an action against the Directors for the matters alleged in Appendix 1 of the OS. The motions were debated and generally the plaintiffs were the only shareholders who spoke out against the same. The resolutions to the effect that it would not be in CHLR's interest to take such action were then passed by a majority vote of 78.36% representing nine shareholders in all including the Directors. The plaintiffs and their daughter (a voting block of 16.37%) voted against all the resolutions and in some of the nay votes they were supported by Ms Chiam Ai Fong who held 5.26% of the shares. Details of the resolutions tabled and passed at the EOGM can be found in Appendix 1 to these grounds of decision (the appendix is taken from the submissions made on behalf of the interveners).

31 The 2012 AGM for CHLR was held on 12 December 2012. A further resolution relating to the OS was tabled at this AGM. It read:

> That it be resolved that the shareholders of [CHLR] waive and/or ratify any and all alleged breaches of directors' duties by the Directors of [CHLR] and/or release the Directors of [CHLR] from any liability arising from any or all alleged breaches of directors' duties as alleged at paragraphs (a) to (f) of Appendix 1 of Originating Summons No. 933 of 2012/N.

The above resolution was passed at the meeting. The plaintiffs and their daughter voted against it and Ms Chiam Ai Fong abstained but all other shareholders present at the meeting (including the Directors) voted in favour of the resolution.

The law

32 The plaintiffs' application was made under the provisions of s 216A of the Act. This section has been considered in many local cases and I do not think it is necessary at this stage for me to give a long account of the law. Suffice it to say that, in order to obtain permission to commence a statutory derivative action, a complainant must establish the following:

> (a) that he has given 14 days' notice to the directors of the company of his intention to apply to the court under s 216A(2) of the Act for leave to bring an action in the name and on behalf of the company;
>
> (b) that he is acting in good faith; and
>
> (c) that it appears to be *prima facie* in the interests of the company that the action be brought.

It was common ground that the plaintiffs had complied with condition (a) above. It was the other two

conditions that were in dispute.

33 In considering whether the complainant has satisfied the conditions above, the following principles apply:

(a) The complainant has the two-fold burden of proving that: (i) there is a reasonable basis for his complaint and a legitimate or arguable action against the proposed defendants; and (ii) it is in the interests of the company for the proposed action to be pursued.

(b) This is not an easy burden for the complainant to fulfil. The court will be slow in granting leave when there is any doubt that the complainant has satisfied his initial burden.

(c) Even where the complainant has satisfied this burden, he must show that his action is brought in good faith. It is his burden to do so. The proposed action will still be rejected if the complainant does not seek to commence the action in good faith.

34 The principles set out above are elaborated in the following authorities:

(a) *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd and another* [2011] 3 SLR 980;

(b) *Walter Woon on Company Law* (Sweet & Maxwell, Rev 3rd Ed, 2009) at paras 9.79 and 9.80; and

(c) *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340.

35 The Directors also sought to rely on some related principles. First, the courts do not grant leave for a derivative action to be brought if the directors and/or shareholders of the company in question, having considered the matter, honestly decide that it would not be in the company's interests to commence or defend the proposed action. This principle was followed by the Singapore High Court in *Panweld Trading Pte Ltd v Yong Kheng Leong and others (Loh Yong Lim, third party)* [2012] 2 SLR 672, where the court stated that shareholders may either prospectively or retrospectively pass a resolution to release a director from his fiduciary duty or exonerate him from the consequences of a breach he had committed (at [40]).

The complaints

The Balmoral Property

36 In the Points of Claim it was stated that, in respect of the Balmoral Property, the Directors had breached their duty to act honestly and their duty of diligence in that:

(a) from or around 1988, the Directors had caused CHLR to lease the Balmoral Property to SCH at an annual rental which was substantially below market rate and by reason of the said breach, CHLR had suffered loss;

(b) the Directors caused CHLR to fail to collect rental and property tax payable by SCH for ten years; and

(c) the Directors had caused CHLR to fail to collect either rental or property tax payable by SCH for a further 14 years.

37 The plaintiffs' case in relation to these breaches was that CHLR had rented out the Balmoral

Property to SCH at a rate that was far below the optimal achievable market rate and had also been subsidising the property tax paid by SCH for the hotel. The plaintiffs said they only became aware of this rental arrangement in September 2009 when they received some of CHLR's accounts.

38 The plaintiffs said that the annual rental currently payable by SCH is $15,912 excluding property tax which has also to be paid by SCH. The plaintiffs submitted that the rent was extremely low because:

(a) the Balmoral Property comprises 31,745 sq ft of land located in a prime district;

(b) the annual valuation of Balmoral Property by the Inland Revenue Authority of Singapore ("IRAS") is $336,000; and

(c) CB Richard Ellis (Pte) Ltd estimated, in an email dated 25 August 2010, that the achievable market rental for the property would be $50,000 to $60,000 per month and this estimate did not take into account the large restaurant and private car park on the property.

39 The plaintiffs noted that the annual rent was settled in 1971 and had remained stagnant thereafter notwithstanding the rising value of property in Singapore, general inflation and increase in the built-up area in the vicinity of the Balmoral Property since 1971. If the annual valuations of the property by IRAS between 1988 and 2010 were added together, the amount obtained would be $5,221,000. The total amount of rent and property tax payable by SCH to CHLR for the same period amounted, however, to only $1,016,406. As such, the plaintiffs contended that the difference between the optimal achievable rent and the amount actually paid was at least $4,204,594.

40 Further, out of the 26 financial years between 1983 and 1996 and between 1999 and 2010 in respect of which the plaintiffs had data:

(a) for 13 years and the financial period ending 31 December 2003, property tax was paid but insufficient rent was paid by SCH;

(b) for 11 years insufficient property tax was paid and no rental was paid by SCH;

(c) for one year both property tax and rental were fully paid by SCH; and

(d) for one year a surplus was paid by SCH.

Thus, there were major discrepancies between the amount payable and the total amount actually paid by SCH to CHLR and these discrepancies indicated that CHLR had been heavily subsidising the rent and the property tax payable by SCH. The plaintiffs complained that they had raised these discrepancies and had sought explanations for the various transactions from the Directors but the latter had failed or refused to provide information. At the 2010 AGM, the first plaintiff brought up his concern that the rental was only $15,912 per annum. It was clear from Toon Tau's response to this that he would not agree to rent out or sell the Balmoral Property to any other party whatever the market price unless all the company's members agreed to it. Thus, it was apparent that the Directors intended to run CHLR for an indefinite period without any change in the rental.

41 The response of the interveners on behalf of the Directors was that since incorporation, CHLR and SCH had been treated as a single entity and were intended to be run as a single family business. Prior to the incorporation of the companies, HL Chiam and his wife owned the Balmoral Property and managed the hotel in a partnership together with their daughter, Ms Chiam Mui Eng. Incorporating the

companies merely separated the two assets in name. In substance, after incorporation, HL Chiam and Mdm Lim continued to wholly own the Balmoral Property and the hotel. The renting of the Balmoral Property to SCH by CHLR was merely a technical arrangement and since the companies were treated as a single family entity, it would not make any sense for CHLR and would be wholly against the shared interests of the two companies for CHLR to charge SCH a high rental rate. It would also not make sense for CHLR to seek a higher "optimal rental rate" from SCH. That would force SCH either to pay a much higher sum as rent or to vacate the premises. Such an approach would be senseless. The rental rate was set by HL Chiam and since CHLR and SCH were in essence the same entity, there was no reason for CHLR to insist on a high rent from SCH.

42 The interveners informed the court that the specific amount of rent paid by SCH was pegged at a rate that would cover the annual property tax payable by CHLR in respect of the Balmoral Property. The rent was supposed to meet the property tax and nothing else. This was explained to the plaintiffs during the 2010 AGM. At that meeting, Ai Thong also told them that HL Chiam and Mdm Lim had previously decided that it did not make sense for SCH to pay more than the property tax as rental as any excess would be taxed by IRAS as income in the hands of CHLR. At the time this decision was made, income tax was fixed at a flat 40% of chargeable income. As for the alleged major discrepancies between the amount that SCH allegedly should have paid to CHLR and the amount of rent actually paid, the plaintiffs' calculations were without any basis.

43 I accepted the interveners' arguments. Their account of the setting up of SCH and CHLR, the intentions of HL Chiam and Mdm Lim and the way in which both companies had been managed by the founders for decades had, largely, been corroborated by the first plaintiff's account of his parents' intentions and acceptance that both companies were part of a family business. It appeared to me that the founders, and in particular HL Chiam, had never been bothered by the legal niceties of separate corporate personality and instead had treated CHLR and SCH as two fingers of the same hand. This situation did not change when some shares were divested by the founders in favour of their children. Even now the shareholders of both companies are the same save that in CHLR the second plaintiff and the plaintiffs' daughter are also shareholders because, in 2000, the first plaintiff divided his shares amongst them.

44 The law is clear that the courts will be slow to intervene in commercial decisions made by the company's board of directors. Management decisions are within the directors' responsibility and it is wrong to question such decisions if they had been arrived at on a *bona fide* basis (see for example *Re Winpac Paper Products Pte Ltd* [2000] 1 SLR(R) 415 at [9]–[10]). It is also established law that the court does not require the same standard of corporate formality from family-owned companies as it requires from other companies. Family-owned companies are allowed more laxity in their dealings with other members of the family and amongst themselves.

45 In this case, CHLR and SCH were running essentially what was regarded as one business which was owned by the same people. It made commercial sense to the directors for the rental of the Balmoral Property to be fixed at the property tax payable by CHLR. I accept that this was a *bona fide* decision made in the interests of both companies. Further, the evidence was clear that this method of determining rent had been in force since 1971 or, at least, the very early days of the companies' existence. It was not a rental rate initiated by the Directors. They were made directors by their father and, as was clear from Ai Thong's explanation during the 2010 AGM, he informed them of the commercial rationale for the rental and they accepted it. Further, on the basis that HL Chiam continued to be the ultimate decision maker after the Directors were appointed, it struck me as unfair for the plaintiffs to seek to direct CHLR to hold them responsible for concurring with HL Chiam's strategy for the companies. Whilst HL Chiam was alive, the plaintiffs themselves did not complain about the rental. Their reason is that they did not have the accounts of CHLR and therefore did not

realise what it was. That, however, was not a very good excuse in my opinion because the plaintiffs, or at least the first plaintiff, could have insisted on getting the accounts much earlier. Whilst his father was alive, however, it appeared that he was not willing to take the aggressive action that would have been available to him to obtain the accounts even if he was being stonewalled by the directors of the company.

46 I took the view that CHLR had no legitimate and arguable case against the Directors in relation to the rental for the reasons given above. Further, it was clear that while HL Chiam was alive the plaintiffs had been content to take a back seat while he and the Directors ran the company. It was only after his death that the plaintiffs started questioning the practices of the business and trying to hold the Directors to a different standard. It must not be concluded from this that I condone any failure of CHLR to provide accounts to its shareholders and give notice of AGMs on a proper basis. However, as a result of the plaintiffs' complaints, the company has now regularised the situation. The Directors must recognise that with the passing of the patriarch of the family, their business practices may have to be put on a more formal basis and decisions made need to be explained and justified. On the other hand, it seemed to me that as far as this complaint was concerned, it was tenuous because it challenged a very fundamental principle on which SCH and CHLR had been run.

47 I was also influenced by the fact that at the EOGM the shareholders by a substantial majority passed a resolution authorising CHLR to rent out the Balmoral Property to SCH at the existing renting rate. Even if the affirmative votes of the Directors were to be disregarded, the resolution was still passed by the affirmative votes of all shareholders apart from the plaintiffs, their daughter and Ms Chiam Ai Fong (the four of whom had an equivalent of 13.04% of the total neutral shareholding of the company). The other shareholders, who had an equivalent of 86.95% of the total neutral shareholding (*ie*, excluding that of the plaintiffs and the Directors), voted in favour of the resolution. The evidence given by four of the Chiam siblings (not including the Directors) was that they had been involved in the family business for various periods of time and were fully supportive of the two companies being run as one business. I could not overlook this resolution and the support which the shareholders gave to the rental terms. It is not for the court to substitute its own decision for one made by shareholders in possession of the facts. The plaintiffs did contend that the shareholders did not know the whole truth but as far as this resolution was concerned, I was satisfied that they knew enough to make their decision an informed one. The shareholders of CHLR are also the shareholders of SCH and they must have been aware that any adjustment of the rent for the Balmoral Property would have a material impact on the profits of SCH. The shareholders were entitled to take their own interests in SCH into account when voting at the EOGM.

Unexplained interest-free and unsecured loans

48 In the Points of Claim, the plaintiffs alleged that the Directors had been in breach of their duty to act honestly and had also been in breach of fiduciary duty because in FY 2010, CHLR had extended loans to the Directors in the amount of $222,731. The plaintiffs considered that CHLR was entitled to the following reliefs:

(a) an account of all loans extended to the Directors;

(b) alternatively, payment of all loans to the company.

It should be noted that before the Points of Claim were provided to me, the plaintiffs had also made complaints about interest-free loans that apparently been made to the directors of CHLR in the financial years preceding 2001. However, this complaint was dropped from the Points of Claim and therefore I do not deal with it in these grounds of decision.

49 The plaintiffs' complaint was that during FY 2010, CHLR had extended loans to the Directors in the amount of $222,731 ("the Loans") and the same were expressed in the annual accounts to be "unsecured, interest free and repayable on demand". The plaintiffs were concerned because the Loans were equivalent to 76.8% of the company's profit for that financial year. In June 2011 and February 2012, the plaintiffs had sent notices to the board of directors expressing their concerns over the Loans. No response was received.

50 The plaintiffs further complained that after this action was filed, the Directors had alleged that the Loans were not actually loans although recorded as such but were rentals received from the Shanghai Properties. The explanation proffered was that CHLR had tried to open an account in Shanghai to hold the rental income from the Shanghai Properties but that it was unable to do so as CHLR was not registered in Shanghai. The plaintiffs considered this explanation to be an afterthought. The Loans had only been recorded in CHLR's account for FY 2011 after the plaintiffs had sought explanations for interest-free loans extended to the Directors by way of their notice in June 2011.

51 The plaintiffs also pointed out that the 2010 accounts showed that the rental income received in respect of the Shanghai Properties had already been included in the accounts under the heading "*Prior Year* [*sic*] *Income and Expenses*". This was a distinct account entry item from the Loans which were recorded under the heading "*Amount owing by directors*". Secondly, the net amount of income received from the Shanghai Properties did not tally with the sum of $222,731. The plaintiffs also complained that there were no documents supporting the explanations which the Directors had given for the various accounting entries.

52 The response of the interveners to this claim was that there were no Loans. The sum of $222,731 recorded as a "loan" was in fact the rental received from the Shanghai Properties. Due to the fact that CHLR could not open a bank account in Shanghai, Ai Huem, who was appointed to administer the Shanghai Properties, had banked the rental payments into her own personal bank account in Shanghai. Because the moneys were put into her account, the figures were incorrectly recorded in CHLR's accounts as a "loan". However, the Directors at all times understood and recognised that these funds belonged to CHLR. Ai Huem herself had confirmed on affidavit that there was no question that the sum of money belonged to CHLR and that she was holding it for the company and would remit it upon request. She further confirmed that that was always the understanding and arrangement between her and the other Directors.

53 I did not give the plaintiffs leave to start a derivative action in respect of the "Loans". Whilst the company's accounts were in somewhat of a mess and should have been better kept and there may have been some discrepancies in the figures, I was not satisfied that all this amounted to even an arguable breach of the duty of honesty or a legitimate claim for CHLR to bring against Ai Huem and the other Directors. Ai Huem had recognised that she held this money for CHLR and was obliged to pay it to CHLR on demand. It would not be in the company's interest to start a law suit against her unless she refused to pay. Up to the date of the proceedings, no such demand had been made and it appeared that the Directors were, for the time being, content to leave the money in Ai Huem's hands as she also had the responsibility of looking after the Shanghai Properties and these funds were to be used for this purpose if necessary. There did not appear to me to be any compelling reason for the Directors to demand the immediate return of the money. Nor did the plaintiffs suggest such a reason.

54 I was also surprised that the plaintiffs had not accepted the explanation given by the interveners. It appeared that this explanation had been given to them prior to the commencement of the action, to wit, at the 2010 AGM. The first plaintiff himself noted that at the AGM, Ai Huem had admitted that she had been holding all the rental income derived from the Shanghai Properties. Thus, the "Loans" had been acknowledged and liability for their return accepted. Yet, the plaintiffs had

decided to ignore that explanation and instead had chosen to allege impropriety on the part of the Directors. The only basis for the plaintiffs' allegation seemed to me to be the contrast between the accounting entry which described the money as a "loan" and the explanation which indicated that it was rental. Even if the money was to be regarded as a loan in accounting terms because it was in an account in the personal name of the director concerned and not in the company's bank account, the fact that CHLR had made a loan to a director would not in itself constitute a breach of directors' duties. Private companies are entitled to lend money to their directors as long as they do so *bona fide* and in accordance with the constitutional documents of the company. The plaintiffs seemed determined to see the transaction in the worst possible light.

The Shanghai Properties

55 In the Points of Claim, the allegation was that the Directors were in breach of their duties to act honestly and diligently and in respect of their fiduciary duty because:

(a) for the period of seven and a half years from 30 June 2002 to FY 2009, the Directors left the Shanghai Properties vacant and thereby caused CHLR to incur expense while deriving no income, and CHLR was therefore entitled to damages or in the alternative, an account of the rental moneys received; and

(b) for the period from 1 July 2003 to 31 December 2010, Ai Huem had deposited rental income derived from the Shanghai Properties into her personal bank account and CHLR had thereby suffered loss.

56 I found no merit in the first allegation. There was no legitimate cause of action in this respect. In their own arguments, the plaintiffs admitted that in August 2011 they had been informed at the 2011 AGM that the Shanghai Properties had been rented out at various times during the period in question and that rent had been derived from such tenancies. The accounts lodged at that meeting had disclosed the rental income and expenses for prior years. The Directors had not reported the rental income and expenses of the Shanghai Properties every year in the accounts as required but had reported the same in two lump sums only in the accounts for FY 2010 which were presented at the 2011 AGM. This omission showed bad practice rather than a serious breach of duty meriting a law suit. The plaintiffs also sought to make some argument about the Shanghai Properties being rented out at less than optimal rents and not having been rented out continuously. They were not able to show, even arguably, that their figures were based on real conditions in Shanghai or that the Directors could have achieved continuous occupation of the Shanghai Properties during the periods in question. The plaintiffs' arguments were based on suspicion that the Directors did not take every conceivable reasonable step to rent out the Shanghai Properties at the best obtainable rents. Their suspicions had no reasonable foundation.

57 I was, however, more impressed with the plaintiffs' point regarding how the moneys of CHLR earned from the Shanghai Properties had been dealt with. All the moneys collected as rental were deposited into Ai Huem's personal bank account in Shanghai. The explanation for this was that CHLR could not open its own account there and therefore there was no choice but to put the money in Ai Huem's account. The expenses incurred in relation to the Shanghai Properties were also paid out of Ai Huem's account. In addition, according to Ai Huem's affidavit, HL Chiam had from time to time asked for money from the rental payments to be remitted elsewhere for various reasons and Ai Huem followed his instructions without question. Further, in January 2009, Ai Huem transferred RMB380,000 from this bank account to her personal fixed deposit account in the Industrial and Commercial Bank of China and another sum of $10,000 to her personal fixed deposit account in China. Ai Huem had stated that she did this on HL Chiam's instructions. However, as the plaintiffs noted, since the transactions

occurred after HL Chiam's death, the likelihood of his having instructed that they be made was remote. I also noted that Ai Huem had admitted that she did not make yearly reports to CHLR on the rent received from, and the expenses incurred for, the Shanghai Properties.

58 I considered that there was an arguable case that Ai Huem had failed to properly account for the income and expenses of the Shanghai Properties and that it was incorrect that she did not segregate those funds from her own in some way. I therefore gave the plaintiffs leave to bring an action in the name and on behalf of CHLR against Ai Huem for an account of all rental moneys received from 30 June 2002 to 31 December 2009 in respect of the Shanghai Properties. I noted that the shareholders at the 2012 EOGM had, by a majority, resolved that it would not be in the interests of the company to bring an action against Ai Huem for failure to report alleged rental income and expenses in respect of the Shanghai Properties. I was not, however, inclined to excuse the default on that basis since if the shareholders had no knowledge of exactly how much Ai Huem had received and exactly how much she had spent for CHLR and the Shanghai Properties, they would not have been able to make an informed decision as to what was in CHLR's best interests in this regard.

The Malaysian Properties

59 The allegation in the Points of Claim was that the Directors had failed to observed their duty to act honestly and with due diligence in that:

(a) they had caused CHLR to lease the Malaysian Properties at a rental rate which was substantially below market rate; and

(b) alternatively, they had failed to properly account for rental income received from the Malaysian Properties and to duly report the same in accordance with the law.

60 In their submissions, the plaintiffs claimed that based on rental figures provided verbally by Ai Huem, two of the Malaysian Properties, the two three-storey shop-houses, alone were able to generate $189,818 per annum in gross rental income. However, based on the company's account for FY 2010, the net increase for the year under the item "*Cash and Cash Equivalent in Malaysian Ringgit*" (which included rent, dividends and interest) was only $17,145. Further, the plaintiffs had been informed that Malaysian income had not been remitted to Singapore due to tax reasons and had been deposited instead into a Malaysian bank account. In the accounts presented at the 2011 AGM, CHLR's holdings of "*Cash and Cash Equivalents*" in Malaysian Ringgit amounted to $729,598 but at the same AGM, Ai Huem said that this amount should be more than $1m. There was, therefore, a discrepancy between the company's accounts and the information provided by Ai Huem. The plaintiffs argued that the discrepancies in the accounts and the Directors' failure to account for rental received and to achieve optimal rental in respect of the Malaysian Properties were *prima facie* not in the interests of the company and/or were breaches of the Directors' duties to exercise skill, care and diligence in the exercise of their powers.

61 I could see no basis whatsoever for the plaintiffs' assertion that the Directors had not achieved optimal rentals for the Malaysian Properties. This allegation seemed to have been spun out of thin air. No figures were given to me about the rentals achievable for any of the Malaysian Properties during any of the relevant financial years to justify the assertion that the actual rent earned was too low. It was not even clear exactly which financial years the plaintiffs were complaining about. The plaintiffs were upset that the extracts from the CHLR's accounts set out in Ai Thong's affidavit showed the rental income for the Malaysian Properties in 2009 and 2010 but did not also exhibit documentary evidence like bank statements and tenancy agreements. The plaintiffs inferred that because such documents were not exhibited, they did not exist. This was a far-fetched inference. It was further

evidence of the plaintiffs' tendency to be suspicious of anything they were told or shown by the Directors.

62 The plaintiffs' allegation about discrepancies also appeared unjustified. The interveners considered that the first plaintiff had misunderstood the explanations that they had given him for the apparent "discrepancies" in the figures relating to the Malaysian income. The estimated rental amount of "189,818 per annum" for the two three-storey shop-houses provided to the first plaintiff at the 2010 AGM was in Malaysian Ringgit not in Singapore dollars. It would not have been possible for these properties alone to have such a high rental yield (*ie*, S$189,818). Accounts annexed to Ai Thong's second affidavit showed that in 2009 a total of RM292,788 was achieved as gross annual rental for the Malaysian Properties, the commercial properties drawing RM16,800 and RM9,354 per month whilst the residential properties had rentals ranging between RM2,000 and RM400 per month. I should state here that there was nothing in the documents which could cast any doubt on those figures.

63 The plaintiffs had alleged that, based on a representation made to the first plaintiff, the income received from the rental of the Malaysian Properties over a period of 40 years was "more than one million", there was a "clear and sizeable discrepancy" in the accounts because the actual rental sum recorded in CHLR's 2010 accounts was only $729,598. The interveners maintained that this allegation was baseless because the figure of one million had referred to Malaysian Ringgit rather than to Singapore Dollars. The first plaintiff continued to insist that he had been told that the sum had been expressed to him in Singapore Dollars even after hearing the Directors' explanation that he had misunderstood the currency. He then did an about turn and claimed that even if the sum of one million was in Malaysian Ringgit that worked out to an amount of $405,921.15 and pointed to this as another "clear and sizeable discrepancy" in the exactly opposite direction. Further, the first plaintiff had ignored his own averment that he had been told that the rental sum received was "more than 1,000,000". I agreed with the interveners that the changes in the position taken by the first plaintiff showed that his allegations had no substance and that he was simply trying to find fault with the Directors.

The Serangoon Gardens Property

64 The allegation in the Points of Claim was that for more than ten years the Directors had caused the company to lease the Serangoon Gardens Property at a rental rate which was substantially below market rate. This was in breach of their duties to act honestly and with due diligence.

65 The Serangoon Gardens Property is a two-storey shop-house. In his affidavit, the first plaintiff noted that the annual valuation of one unit was $24,000 and the annual valuation of the other unit was $204,000. Therefore, together the units had a valuation of $228,000. However, CHLR had been renting out the property for what the plaintiffs described as a "paltry" amount of approximately $15,000 to $16,000 per month, well below the IRAS' valuation of $19,000 per month. In February 2012, the plaintiffs had sought an explanation from the Directors for the failure to achieve optimal rental yield in respect of the Serangoon Gardens Property but the Directors had failed to provide them with information.

66 I considered that there was no basis for this complaint. Apart from the annual valuation figures given by IRAS, the plaintiffs produced no evidence whatsoever that the Serangoon Gardens Property had been rented out at a rental rate which was "substantially below market value". They did not have any evidence from any estate agent as to what the other properties of similar size and location were achieving by way of rental.

67 The evidence of the Directors was that currently the Serangoon Gardens Property was rented

out for $22,000 a month which they asserted was a reasonable amount for that property. In any case, even if the rent was below $19,000 per month, I considered that that rate did not by itself mean that the Directors were in breach of their duty and had to be sued by the company. There was no reason to believe that the Directors had not done their best to rent out the Serangoon Gardens Property at the best achievable levels whenever the same was available for lease. The first plaintiff had in his affidavits pointed to a similar shop house nearby which was rented out to Citibank for more than $30,000 per month but that unit was a corner unit with a larger floor space and the fact that one unit could bring in more money than the Serangoon Gardens Property did not mean that the Serangoon Gardens Property was being let at a discount. It was also the Directors' evidence that the rental paid by the lessee of the unit that adjoined the Serangoon Gardens Property was itself lower than the rental paid by CHLR's lessee. I was satisfied that the plaintiffs had not been able to show that there was an arguable case that the Directors had not acted *bona fide* in the commercial interests of the company when they rented out the Serangoon Gardens Property.

Renovation expenses

68 The complaint here as contained in the Points of Claim was that the Directors had caused CHLR to unjustifiably incur and/or fail to properly account for substantial expenses on purported renovations executed for the benefit of SCH.

69 In their submissions, the plaintiffs noted that in 1977, the Building and Construction Authority had granted approval to CHLR as the legal owner of the Balmoral Property to undertake renovations at the hotel involving internal re-arrangements and the construction of two car porches. The accounts of CHLR for 1979 showed an increase of $207,613 spent by CHLR "*at cost Land and Buildings*". Further, SCH conducted additional renovations in or around 1981 at a cost of $34,000 and added a store in 1993 at a cost of $32,394. Both these sums, the plaintiffs said, were paid by CHLR. As such, CHLR had paid for $274,007 worth of renovations conducted by SCH and had not obtained or sought an increase in respect of SCH's rental.

70 In affidavits filed in these proceedings, the Directors explained these expenses as follows:

(a) the amount of $274,007 was actually used to purchase CHLR's properties at 95 & 95A and 97 & 97A Jalan Perisai in Johor, Malaysia;

(b) there had been no change in the amount of "*at cost Land and Buildings*" from 1978 to 1983;

(c) the amount of $32,394 was actually used to pay for renovation costs for CHLR's two three-storey shop houses on Jalan Dedap in Johor, Malaysia; and

(d) the first plaintiff was actually involved in the hotel renovations in 1977 and 1981 as CHLR's and SCH's representative.

71 The plaintiffs did not accept this explanation. They made various arguments about the lack of documentary evidence and about discrepancies between the figures in the accounts and the amounts spent on the renovations.

72 I was not impressed by the plaintiffs' arguments. I considered that there was no legitimate or arguable case against the Directors. First, the amount of $207,613 reflected in the 1979 accounts, whatever it was spent on, was expended in 1978 and 1979, a time when CHLR was controlled by HL Chiam and Mdm Lim. The same went for the expenditure of $34,000 in 1981. The Directors did not

become directors of CHLR until 1988. They could hardly be held accountable for things done when they were not in office. The plaintiffs alleged that Ai Huem was a "de facto" director before 1988, but even if that was so, it did not make her liable for the decisions which must have been taken by her parents. Second, as far as the sum of $32,394 was concerned, this was spent 20 years ago and I thought it was too late for any complaint to be made about it. In any case, there was no reason to doubt the Directors' explanation that it funded the renovation of the shop-houses in Johor. The Directors were obviously entitled to expend money to renovate these properties belonging to CHLR.

Would the proposed actions be in the interests of CHLR?

73 As stated above, the plaintiffs had the burden of establishing that the proposed actions would be in the interests of CHLR. For the reasons that I have given in relation to the individual complaints, I concluded that it would not be in CHLR's interests to pursue any claim against the Directors apart from the claim against Ai Huem for an account of her dealings with the rental earned from the Shanghai Properties.

Good faith

74 The plaintiffs had the burden of proving that they were acting in good faith. The interveners submitted that the plaintiffs' real motivation was to, first, ventilate their personal feud with the Directors and the other Chiam siblings and second, to force a buy-out of their shares in CHLR and SCH. They pointed out that other shareholders had stated in their affidavits, amongst other things, that:

(a) the first plaintiff was unhappy that he was not made a director of CHLR or SCH, and that he was not appointed as executor of either of their parents' wills;

(b) the first plaintiff had never been satisfied with what HL Chiam and Mdm Lim gave him. Further, he had always been suspicious of his siblings' properties and investments, despite the fact that these investments had been earned through their own work and not inherited from their parents;

(c) the first plaintiff had always been seen as a troublemaker, and he had constantly interfered with the business of the company and made many threats to sue the Directors; and

(d) the plaintiffs had previously asked for various properties in exchange for leaving the companies and "not creating any more trouble".

75 The plaintiffs on the other hand submitted that they had proven their good faith because they had an honest and reasonable belief that there were good causes of action against the Directors. They pointed out that they had not received CHLR's accounts for more than three decades and therefore did not know what was happening in the company. The breaches of the Directors only came to light after the plaintiffs were first given a set of accounts (albeit incomplete) by Toon Chew in or about 8 September 2009. The plaintiffs could not be faulted for not having brought up these issues earlier. They also pointed out that the cases demonstrated that an applicant acting out of self-interest was not necessarily acting in bad faith.

76 The plaintiffs said that they had no reasonable alternative but to file this application as the Directors had failed to provide any substantive response to their various notices and the correspondence sent thereafter with regard to the various breaches, nor was there any effort on CHLR's part to consider and investigate these matters. It was clear from the two resolutions passed

at the EOGM and the 2012 AGM that the company intended to "white wash" the breaches of the Directors. The plaintiffs were therefore genuinely aggrieved and had no reasonable alternative but to apply for the court's leave to take action on behalf of CHLR.

77 I accepted that the plaintiffs genuinely felt aggrieved. Unfortunately, it was clear from the form their complaints took that, in many cases, the plaintiffs had allowed their unhappiness with their siblings and with the way that CHLR was being run to overcome their objectivity. In my view, the plaintiffs had taken an unduly suspicious view of the actions of the Directors and of their motivations. The plaintiffs appeared to have combed through the accounts to look for faults and were not willing to accept the explanations of the Directors. To that extent I considered that the plaintiffs had not proven their good faith. It was only as regards the treatment of the income from the Shanghai Properties that the plaintiffs had been able to show that the company had a legitimate cause of action. The plaintiffs should have concentrated on this rather than have made specious arguments about the Directors having failed to rent out various properties at the proper rates. Too many of the plaintiffs' arguments were based on so called "discrepancies" in the accounts and on bad record keeping of the Directors.

78 The Directors were perhaps wrong in that after the death of HL Chiam they continued to run CHLR in the way that he had done. They should have realised that the patriarch and founder of the company would be treated with much more respect and deference and would not receive demands to account for his actions. The Directors are not in the same position and must be more proper in their record keeping and accounting. The action was taken partly because of their failure to regularly supply accounts to the plaintiffs and to ensure that the accounts correctly reflected the actual position. Whilst CHLR and SCH remain family companies, the passing of the founders means that the companies must be run in a more professional manner.