Jayanti Nadarajoo *v* Bronwyn Helen Matthews and another
[2015] SGHC 222

Case Number	: Suit No 766 of 2012 (Summons No 5713 of 2014)
Decision Date	: 27 August 2015
Tribunal/Court	: High Court
Coram	: Vinodh Coomaraswamy J
Counsel Name(s)	: Lee Soo Chye and Subir Singh Grewal (Aequitas Law LLP) for the plaintiff; Christopher Anand Daniel and Ganga Avadiar (Advocatus Law LLP) for the first defendant; Nair Suresh Sukumaran and Tan Tse Hsien, Bryan (Straits Law Practice LLC) for the second defendant.
Parties	: JAYANTI NADARAJOO — BRONWYN HELEN MATTHEWS — AVONDALE GRAMMAR SCHOOL PTE. LTD.

Companies – Shares

Professions – Valuer

27 August 2015

Vinodh Coomaraswamy J:

Introduction

1 The second defendant, Avondale Grammar School Pte Ltd ("the Company"), applies pursuant to s 216(2)(*e*) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") for an order that it be allowed to reduce its share capital by cancelling all of the plaintiff's shares in the Company and returning to her $1,869,000 being that part of the Company's issued and paid-up capital which is represented by those shares. The plaintiff's main objection to the application is that she is not bound to accept this valuation of her shares because the independent valuer appointed jointly by the parties arrived at the valuation in breach of natural justice and subject to manifest error.

2 I have found no merit whatsoever in the plaintiff's objections. I have therefore granted an order allowing the Company to reduce its capital in the manner prayed. The plaintiff has appealed against my decision. I now set out the grounds for my decision.

Background facts

3 The Company is a private international school incorporated in 2005. It has an issued and paid up share capital of $576,516 divided into 576,516 shares of $1.00 each. The Company's only two shareholders are the plaintiff and the first defendant. The first defendant holds 330,471 shares in the Company, constituting 57.32% of its capital. The plaintiff holds 246,045 shares in the Company, constituting 42.68% of its shares. [note: 1]

This action

4 In this action, the plaintiff seeks relief against the defendants under s 216 of the Act for oppression. Her statement of claim alleges the following oppressive acts by the first defendant: (i)

removing the plaintiff as a director of the Company in breach of the plaintiff's legitimate expectation to be involved in the management of the Company; (ii) paying herself and the other executive directors excessive salaries, resulting in the Company suffering losses and depriving the plaintiff of dividends; and (iii) wrongfully diluting the plaintiff's shareholding from its original 45% to its current 42.68% as part of a plan further to dilute her stake to less than 30%. [note: 2]

5 One of the alternative heads of relief which the plaintiff claims for the first defendant's alleged oppression is an order under s 216(2)(*e*) of the Act that the Company be ordered to purchase the plaintiff's shares at a fair value.

6 The first defendant denies all of the plaintiff's allegations. Her case is that: (i) she did not remove the plaintiff as a director; instead it was the plaintiff who failed to offer herself for re-election; (ii) the increased salaries paid to herself and the other directors was justified and was accompanied by substantial increase in revenue and profitability of the Company; and (iii) there was no plan to dilute the plaintiff's stake in the Company and it was, in any event, always open to the plaintiff to prevent her stake from being diluted by keeping pace with the first defendant in subscribing for more shares in the Company.

7 The Company did not plead a substantive defence to the plaintiff's claim.

This action is settled

8 The plaintiff's claim did not proceed to trial. It was fully and finally settled when the plaintiff on 29 August 2013 accepted the Company's offer of settlement. [note: 3] The settlement provided for the Company to buy the plaintiff's shareholding at a fair value. The parties agreed that the fair value of the plaintiff's shares was to be assessed on the terms set out in a document attached to the plaintiff's solicitors' letter dated 14 February 2013, as clarified on 7 March 2013, known as the Parameters for Independent Valuer. [note: 4] The parameters were as follows. The valuer was to be an established and reputable accounting firm appointed either by the parties' agreement or by the Court. The value of the plaintiff's shares was to be assessed as at 31 December 2012 with no minority discount applied. The plaintiff's shareholding was to be treated as an undiluted 45% of the Company. The valuer was to act as an expert.

9 Although this is not a term of the settlement, the Company's agreement to purchase the plaintiff's shares could be effected only through a reduction in the Company's capital, with the Company releasing to the plaintiff her capital, as determined by the valuer, and cancelling her shares.

GTCF is appointed

10 The plaintiff and the Company each declined to accept the other's nominee as valuer. The Company objected to the plaintiff's nominee because its fee quote was higher than that of the Company's nominee. The plaintiff objected to the Company's nominee because the Company had had prior communications with it.

11 Pursuant to the terms of the settlement agreement, and by consent of all three parties, they attended before me for directions as to the valuer. In the course of the hearing for directions, the Company's counsel proposed that the court appoint a valuer with whom neither party had had any prior communications. He suggested Grant Thornton Corporate Finance Pte Ltd ("GTCF"). Given that each party maintained its objection to the other's nominee, I considered it to be invidious to choose between the two nominees, both of whom were reputable accounting firms. I therefore directed that

the parties were to meet GTCF with a view to securing its appointment as the valuer contemplated by the parties' settlement agreement.

12 The parties met GTCF as directed. Eventually, on 27 May 2014, they reached agreement with GTCF on the terms of its engagement.

GTCF's valuation

13 After conducting its valuation, GTCF released its final report on 8 October 2014. It valued the plaintiff's 45% stake as at 31 December 2012 at $1,869,000. [note: 5] All that remained to implement the parties' settlement was for the Company to pay $1,869,000 to the plaintiff and cancel all of her shares.

14 The Company therefore applied by way of Summons No 5713 of 2014 ("Summons 5713"), praying that it be allowed, under s 216(2)(*e*) of the Companies Act, to reduce its share capital from 576,516 ordinary shares to 330,471 ordinary shares by cancelling all 246,045 ordinary shares held by the plaintiff and by paying her $1,869,000.

15 The plaintiff opposes the Company's application on two main grounds. First, she argues that the defendants have failed to show to the satisfaction of the court that the Company will remain solvent after the capital reduction. Second, she argues that she is not bound by GTCF's valuation because GTCF arrived at its valuation in breach of natural justice or as a result of manifest error.

Three preliminary observations

16 Before considering the merits of the plaintiff's objections, I make three preliminary observations.

17 The first observation is on the question of jurisdiction. The Company invokes in this application my jurisdiction as a judge seised of proceedings brought under s 216 of the Companies Act to grant relief specifically provided for in s 216(2)(*e*) of the Act. Indeed, the order which the Company seeks in Summons 5713 is to give effect to one of the alternative remedies which the plaintiff specifically prayed for in this action. That is also the very remedy which she agreed, by assenting to the settlement agreement, to accept in full and final satisfaction of her claims comprised in this action.

18 The Company's application is not, either in form or in substance, an application for specific enforcement of the settlement agreement. Indeed, it could not be. Neither of the parties alleges that there has been any breach of the settlement agreement by the other party. It is common ground before me that the settlement agreement concluded on 29 August 2013 is binding and, once performed in full, suffices to dispose entirely of the plaintiff's claim against both defendants. I will return to this point when I deal with the costs of Summons 5713.

19 The second observation is that counsel for the plaintiff has confirmed that the plaintiff takes does not and will not take any procedural or technical point on the question of my jurisdiction to order a capital reduction on this application. [note: 6] In order words, the plaintiff does not submit that I have no power to make the orders prayed for.

20 The third and final observation is on a point of procedure. The substance of the plaintiff's objections to the Company's application has very little to do with the merits of the proposed capital reduction. Instead, her objections arise in substance from the manner in which GTCF conducted the valuation of the plaintiff's shares. At a hearing for directions on 25 November 2014, the plaintiff's solicitors gave an indication of the grounds on which the plaintiff was unhappy with GTCF's report. I

directed that she apply to set aside the report by 12 December 2014. She has made no such application. Instead, she raises those objections as grounds on which I should not grant an order in terms of the Company's application under s 216(2)(*e*) of the Act.

21 I have nevertheless dealt with the substance of the plaintiff's objections as though I had before me an application to set aside GTCF's report.

22 I now turn to deal with the plaintiff's submissions.

Evidence of continued solvency

23 The plaintiff's first ground of objection is that the Company's directors have not made a solvency statement within the meaning of s 7A read with s 78B of the Companies Act. Because there is no such solvency statement, she argues, the court cannot be sure that the Company's creditors will not be prejudiced and therefore should not allow the capital reduction.

24 I accept, of course, that a court which is asked to sanction a capital reduction involving the actual return of capital by a company to a shareholder ought to safeguard the position of the company's creditors by ensuring that the company will remain solvent after the capital reduction takes place. I accept also that the directors of a company which seeks to reduce its capital under either s 78B or s 78C of the Companies Act are obliged to make a solvency statement within the meaning of s 7A of the Companies Act. I do not, however, accept that a solvency statement within the meaning of s 7A of the Act is a statutory prerequisite to a capital reduction under s 216(2)(*e*). First, s 216(2)(*e*) plainly does not, by its terms, require a s 7A solvency statement as a prerequisite. Section 216(2)(*e*) merely provides as follows:

> (2) If on such application the Court is of the opinion that either of such grounds is established the Court may, with a view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and, without prejudice to the generality of the foregoing, the order may —
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> …
>
> (*e*) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital…

25 Second, and as a result, s 7A of the Companies Act does not refer to s 216(2)(*e*) when it defines a solvency statement. Instead, it refers only to a proposed redemption of preference shares under s 70, a proposed giving of financial assistance under s 76(9A) or (9B) and a proposed reduction of capital under s 78B or 78C. None of this is surprising. These specific provisions establish exceptions to the capital maintenance rule which a company can now take advantage of without a court order. The solvency statement under s 7A therefore takes the place of the evidence of solvency on affidavit that would otherwise be required to satisfy the court that an exception ought to be made to the capital maintenance rule. A reduction of capital under s 216(2)(*e*) can be made only by court order. That is why it does not require a s 7A solvency statement.

26 To satisfy me that the Company will continue to be solvent after the capital reduction, the Company relies on the affidavit of Susan Anderssen, one of its directors:

> At the date of this affidavit, I know of no person or entity who intends or contemplates taking any form of legal action against the Company. The directors of the Company are confident that

based on the Company's financial position after the reduction of the share capital, the Company will be able to meet its financial obligations as and when they fall due. …

27 Counsel for the plaintiff submits that this evidence of the Company's solvency is somehow of less weight than a s 7A solvency statement. I do not accept the submission. Ms Anderssen's statements are made on oath, under penalty of perjury, and are supported by the Company's latest available audited accounts. I am satisfied by her evidence that the Company's assets will exceed its liabilities and that it will continue to be capable of paying its debts as they fall due even after the reduction in capital.

The plaintiff's substantive objections

28 The plaintiff's substantive objections to the application are as set out in paragraph 3 of its written submissions: [note: 7]

3. It is humbly submitted that no orders should be made on the Application at this stage as:

a. First, in conducting the valuation exercise to determine the fair value of Plaintiff's 45% shareholding in the 2nd Defendant, [GTCF] did not afford an equal chance for the Plaintiff to respond to the 1st Defendant before the valuation was determined and signed off by them. In this regard, GTCF was acting in a quasi-arbitral role and was in breach of the 2 fundamental rules of natural justice – *nemo judex in causa sua* and *audi alteram partem*;

b. Alternatively, if it is found that GTCF did not act in a quasi-arbitral role, but instead was merely making an expert determination, then it is submitted that the valuation exercise conducted by GTCF to ascertain the value of the Plaintiff's 45% equity interest in the 2nd Defendant was tainted with bias; and

c. Finally, the valuation by GTCF was marred by a patent error in the assumptions made by GTCF, and therefore the value derived as a result of this error is manifestly erroneous.

29 Before I consider these submissions, the preliminary issue to be considered is whether GTCF was acting as an expert or, as the plaintiff submits, in a quasi-arbitral role. If GTCF was acting as an expert, it was not subject to the fair hearing branch of the rules of natural justice.

GTCF was acting as an expert

30 Clause 4 of the Parameters for Independent Valuer expressly provides that GTCF, as the valuer appointed pursuant to those parameters, is to be a "valuer acting as an expert". [note: 8] If that is the correct position, GTCF's report can be attacked only on grounds of fraud or partiality but not by reason of a breach of the fair hearing rule. In *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR(R) 634 ("*Evergreat*"), V K Rajah J (as he then was) said:

34 Both arbitration and expert awards, however, have the same fundamental and common foundation – contract law. The law upholds and recognises such agreements and the consequential awards because of the sanctity it accords to contractual arrangements. I can do no better than to echo the observations of Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 353:

[T]hose who make agreements for the resolution of disputes must show good reasons for departing from them, …

> An expert's decision can be set aside on the basis of fraud or partiality. Beyond that it is probably correct to say that only a breach of an expert's terms of appointment would suffice to set aside his decision. Errors of fact or law will not vitiate an award if the expert acts within his contractual mandate. In contrast, there is a statutory mechanism albeit a very limited one for the review of both domestic and international arbitration awards.

31 Rajah J further explained in *Evergreat* that the distinction between an expert and an arbitrator is not a question of form or of terminology but a question of substance governed by the parties' contractual arrangements. The critical distinction is that the terms of an arbitrator's appointment oblige him to act solely on the material which the parties place before him and to so in accordance with strict rules of procedure. The expert is not bound by the fair hearing branch of the rules of natural justice:

> 35 At the end of the day, the modern distinction between an expert and arbitrator does not lie purely in whether the office holder is performing a judicial, quasi-judicial or purely discretionary function. The essential difference is in the duties and/or functions the terms of appointment impose on an appointee. The labelling of an appointment as "arbitrator" or "expert" is not in itself always conclusive. It is the precise contractual arrangement and the ensuing obligations of the office holder that is, in the final analysis, paramount. Is he obliged to act solely on the evidence before him and the submissions made to him or does he have a discretion to adopt an inquisitorial function? Does he have complete discretion over the applicable rules of procedure? If he has the sole discretion to arrive at his determination without being hamstrung by procedural and evidential intricacies or niceties, it is most unlikely that the court will view the proceedings to be arbitration proceedings. An expert is permitted to inject into the process his personal expertise and to make his own inquiries without any obligation to seek the parties' views or consult them. An expert is also not obliged to make a decision on the basis of the evidence presented to him. He can act on his subjective opinion; that is the acid test.
>
> 36 There are two fundamental aspects or facets of natural justice that generally apply to dispute resolution. The first is that a decision maker should be disinterested in the outcome. The second is due process; both parties have the right to be heard on all the issues that are to be determined. This second facet of natural justice does not apply to an expert's determination. This is the single most significant distinction between expert determination and litigation/arbitration.

Rajah J reiterated these points in *Geowin Construction Pte Ltd (in liquidation) v Management Corporation Strata Title Plan No 1256* [2007] 1 SLR(R) 1004 ("*Geowin*") (at [7]).

32 The plaintiff relies on *Evergreat* to argue that, notwithstanding the express provision in the Parameters for Independent Valuer, the substance of GTCF's contractual duties mean that it was valuing the plaintiff's shares in a quasi-arbitral function. The plaintiff points to cl 5 of GTCF's letter of engagement which it argues sets out procedural duties which GTCF was obliged to follow in the valuation process. Thus, the plaintiff argues, GTCF did not have complete discretion over the rules of procedure as an expert ordinarily would.

33 It is true that cl 5 of GTCF's letter of engagement makes provision for each party to make written representations and comments to GTCF: (i) on the parties' own initiative; (ii) in response to queries from GTCF; and (iii) on the other parties' representations and comments. But cl 5 does not establish that GTCF was performing a quasi-arbitral function. I say that for two reasons.

34 First, the Parameters for Independent Valuer are incorporated contractually into the four-way agreement between the three parties and GTCF. GTCF's agreement with the parties is set out in its

letter of engagement dated 27 May 2014. [note: 9] Clause 2.2 of the letter of engagement expressly provides that GTCF's "valuation exercise will be based on the Parameters for Independent Valuer (enclosed) to determine the fair value of a 45% equity interest in the Company". The characterisation of GTCF as an expert is therefore not merely one between the parties but one between GTCF and the parties. The terms of the letter of engagement must be construed in the light of this.

35 Second, construed in this context, the purpose of cl 5 is not to stipulate strict rules of procedure which GTCF was bound to follow. Instead, its purpose was to set out a tentative timetable reflecting the steps GTCF would take in order to receive information and representations from both parties and produce its report within the agreed eight week timeline. I do not accept the plaintiff's argument that cl 5 of GTCF's letter of engagement deprived GTCF of discretion over its procedure and rendered its role into a quasi-arbitral one.

36 This conclusion is further strengthened by considering the other sub-clauses of cl 5. They read as follows:

> 5.4 In the event that we require additional time to complete the Valuation, [GTCF] will be at liberty to make reasonable extension to the indicative timing set out above and the Parties will not object to any reasonable request for extension of time that is deemed necessary to complete the Valuation.
>
> 5.5 During the course of this engagement, [GTCF] may at our discretion request for meetings with the management of the Company and the Parties, jointly to hold discussions, gather information, and seek clarification on any matters as and when we deem fit. In addition, we will seek representation letters on the factual accuracy of the information made available to us before issuing our Report.

This shows that the intention of the parties was for GTCF to perform an inquisitorial role in which it had absolute discretion to gather information on its own initiative from any of the parties. I therefore find that GTCF was acting as an expert and not performing a quasi-arbitral role.

Breach of the rules of natural justice

37 The plaintiff's first objection is that GTCF acted in breach of natural justice in arriving at its valuation of her shares at $1,869,000. The result, according to the plaintiff, is that she is not bound by GTCF's valuation. In order to understand the plaintiff's submissions, it is necessary briefly to describe how GTCF's report came to be issued.

Factual background

38 All three parties jointly appointed GTCF on or about 27 May 2014. [note: 10] The plaintiff and the first defendant agreed to bear GTCF's fees equally. GTCF received several rounds of written representations from each party. It also held a meeting with the parties on 25 August 2014 to hear arguments. Each side also provided GTCF a report which it had commissioned from its own valuer. [note: 11]

39 On 8 September 2014, GTCF circulated a draft of its report to the parties. [note: 12] In this draft, GTCF valued the plaintiff's 45% shareholding at $2,096,000. This figure was based on an assumption that the Company had a 30% probability of being a going concern after 2017. Four days later, on 12 September 2014, GTCF circulated a revised draft of its report. In this revised draft, GTCF

valued the plaintiff's shares at $2,034,000 on the same assumption.

40 One week later, on 19 September 2014, the plaintiff's solicitors wrote to GTCF taking objection to both of GTCF's drafts. [note: 13] The plaintiff's main objections were as follows:

(a) GTCF failed to address or deal with information and evidence submitted by the plaintiff in determining whether the Company would be a going concern after 2017.

(b) GTCF was guilty of numerous inconsistencies and logical leaps in arriving at the probability of the Company remaining a going concern after 2017.

(c) The plaintiff was prepared to accept GTCF's valuation in its initial draft of 8 September 2014 that, if there was a 100% probability that the Company would remain a going concern after 2017, the Company as a whole would be worth $8,288,030. It was not prepared to accept GTCF's lower figure of $7,718,779 for this assumption in its revised draft of 12 September 2014.

41 On 23 September 2014, solicitors for the Company took issue with the rate of increase of property expenses which GTCF had applied in its drafts. Also on 23 September 2014, solicitors for the first defendant sent GTCF their comments and written representations on the draft reports. [note: 14] The written representations were six pages long and asked for the sources which GTCF had used to derive its figures. The written representations also raised technical objections to GTCF's valuation methodology.

42 On 24 September 2014, GTCF wrote to all three parties to inform them that it had received each party's representations on the draft report of 8 September 2014 and that it anticipated issuing its final report after taking two weeks to consider the parties' input.

43 On 30 September 2014, the plaintiff's solicitors wrote to GTCF taking strong objection to the first defendant's written representations of 23 September 2014. Their position was that those representations purported to direct GTCF on the appropriate valuation methodology. This, they argued, was inappropriate because the parties had already given GTCF their detailed representations and expert reports. The plaintiff's solicitors then asked GTCF to confirm that they would not take into account the first defendant's further technical representations. They also repeated the allegation that GTCF had failed to address or deal with the plaintiff's information and evidence in determining whether the Company would be a going concern after 2017. They said that GTCF's failure to do so could be regarded as an abdication of its role as an independent valuer and would be seen as GTCF acting in favour of the defendants and against the plaintiff. The plaintiff's solicitors suggested that another meeting between GTCF and the parties' solicitors be held to resolve the outstanding issues. [note: 15]

44 GTCF initially agreed that it may be helpful to have another meeting to resolve the issues raised by the parties on the draft reports. [note: 16] The plaintiff's solicitors and GTCF exchanged emails on 1 and 2 October 2014 on the date and time for the meeting. On 7 October 2014 at 3.15 pm, the first defendant's solicitors wrote to all parties to say that a further meeting was not necessary or useful and to insist, with respect, that GTCF issue its final report by 8 October 2014, after taking into account the parties' comments as at 24 September 2014. On the same day, at 3.53 pm, GTCF agreed to issue its final report upon payment of its fees in full.

45 On 8 October 2014, the Company's solicitors wrote to agree with the first defendant's position taken in the 7 October 2014 email. The Company's solicitors also informed GTCF that the Company's

payment towards GTCF's fees had been processed and that GTCF would receive the money shortly.

46 That very night, GTCF released its final report. GTCF valued the plaintiff's shareholding in the Company at $1,869,000. This was lower than the value set out in the revised draft reports of 8 September 2014 and 12 September 2014.

47 The plaintiff submits that GTCF carried out its valuation in breach of natural justice. GTCF, it is said, displayed actual and apparent bias towards the plaintiff and breached the fair hearing rule.

Actual bias

48 An expert determination can be set aside on grounds of partiality (see *Evergreat* at [34]). To make good its submission of actual bias, the plaintiff points to three primary facts. First, it argues that GTCF failed to confirm that it was going to take the first defendant's representations of 23 September 2014 into account in its final report and thereby deprived the plaintiff of a chance to submit her own technical and detailed comments in response to those representations.

49 Second, the plaintiff argues that further evidence of bias can be found in GTCF's sudden reversal of its initial decision to hold a second meeting. GTCF changed its mind as soon as the first defendant's solicitors opined forcefully that a further meeting was not necessary or useful.

50 Third, the plaintiff argues that GTCF's substantive findings in the final report are evidence of bias. Not only did GTCF fail to provide the plaintiff an opportunity to submit her own detailed comments on the first defendant's representations of 23 September 2014 but it took those representations into account in making its final report. The result is that GTCF reduced its valuation of the Company, if it were certain to remain a going concern after 2017, from $8,288,030 to $5,817,093 for no apparent reason. And this came after the plaintiff had intimated that it was prepared to accept the former valuation. Moreover, GTCF took certain representations of the first defendant in relation to the projected teaching expenses into account in its final report. According to the plaintiff, all of this is clear evidence of actual bias.

51 I do not think that any of the facts relied on by the plaintiff are sufficient to establish actual bias on the part of GTCF. Indeed, I consider that the evidence of actual bias to be so weak that an allegation of actual bias ought never to have been made.

52 First, a failure to respond to the plaintiff's email cannot in itself be evidence of actual bias. An expert can fail to respond to an email for any number of reasons. It could be that GTCF overlooked responding to the plaintiff's email. It could be that GTCF considered the plaintiff's email and concluded that no response was required because it had made its position clear on 24 September 2014. To go beyond showing merely that GTCF failed to respond and make out actual bias, the plaintiff must advance some basis for saying that GTCF deliberately and wilfully refused to respond in order to prejudice the plaintiff or to assist the defendants. There was absolutely no such basis.

53 The plaintiff submits that GTCF's failure to reply to her solicitors' email denied her an opportunity to respond to the first defendant's representations of 23 September 2014. This is in substance an allegation that the plaintiff was denied a fair hearing. I deal with this aspect of the plaintiff's submissions below. At this juncture, I assume without deciding that GTCF denied the plaintiff a fair hearing. A denial of a fair hearing cannot, in itself, be evidence of actual bias. Otherwise, every finding of a breach of the fair hearing rule would amount also to a finding of actual bias. To go beyond establishing a denial of a fair hearing and show actual bias, the plaintiff must advance some basis for saying that GTCF had an improper motive or reason for denying her a fair

hearing. There was absolutely no such basis.

54 The second ground the plaintiff relies on does not, again, even begin to show actual bias. The plaintiff is correct that GTCF initially agreed with the plaintiff's suggestion of having another meeting to resolve the outstanding issues as at 30 September 2014. It is also correct that GTCF reversed its position within 38 minutes of the first defendant's solicitors' forceful email asserting that no meeting was necessary and insisting that GTCF issue its final report. Thereafter, the Company confirmed that GTCF's payment had been processed. After this, GTCF released its final report. Again, there is absolutely no basis for suggesting that GTCF decided not to hold a further meeting and to issue its report because it was motivated by actual bias. It was open to GTCF to agree with the first defendant that no meeting was necessary just as it was open to GTCF to agree with the plaintiff that a meeting was necessary. The fact that GTCF reversed its position within 38 minutes of the first defendant's solicitors' email is too slender a basis for the plaintiff to allege actual bias. Further, no suggestion was made that GTCF was beholden or partial towards the Company because the Company was paying GTCF's fees. The second ground raised by the plaintiff is wholly inadequate to establish actual bias.

55 As for the third ground, the mere fact that a substantive decision goes against a party cannot, in itself, be evidence of actual bias. GTCF was perfectly entitled to take into account all representations made to it in order to arrive at its decision. This included the first defendant's representations of 23 September 2014. In fact, GTCF's final report shows that it rejected the part of the first defendant's representations of 23 September 2014 relating to the probability of the Company being a going concern after 2017. In its draft reports, GTCF assumed that there was a 30% probability that the Company would remain a going concern after 2017. The first defendant claimed that the probability should be 20%. The plaintiff had previously taken the position that GTCF had attached too low a probability to the Company being a going concern after 2017. GTCF appears to have accepted the plaintiff's representation because, in its final report, it increased the probability of the Company remaining a going concern after 2017 from 30% to 50%. This operated in favour of the plaintiff. There is no basis in this third ground to allege that GTCF was guilty of actual bias against the plaintiff.

56 None of the factors which the plaintiff relies on to submit that GTCF was guilty of actual bias is sufficient, whether taken alone or taken together, to show actual bias. The submission ought never to have been made.

Apparent bias

57 The plaintiff next argues that even if actual bias is not made out, the facts relied on to show actual bias are sufficient to show apparent bias. For this alternative reason, she says, the report should not bind her.

58 Whether an expert determination can be set aside on the ground of apparent bias is not clear. In *Poh Cheng Chew v K P Koh & Partners Pte Ltd and another* [2014] 2 SLR 573 ("*Poh Cheng Chew*") Lionel Yee JC set aside an expert's decision because he found actual bias on the part of the expert and opined that it was not clear whether apparent bias would have sufficed:

> 58 Since one of the grounds of challenge raised by the Defendants is that of bias and partiality, I should say a few words about the applicable test for partiality in the context of an expert determination. In England, the test is one of actual bias and not apparent bias: see *Macro v Thompson* (No 3) [1997] 2 BCLC 36 ("*Macro v Thompson*") at 65; *Bernhard Schulte GmbH & Co KG v Nile Holdings Ltd* [2004] EWHC 977 (Comm) at [98]; John Kendall, Clive Freedman & James

Farrell, Expert Determination (Sweet & Maxwell, 4th Ed, 2008) ("Expert Determination") at para 14.11.4. The rationale for this rule was articulated by Robert Walker J in *Macro v Thompson* at 65 as follows:

> … [W]hen the court is considering a decision reached by an expert valuer who is not an arbitrator performing a quasi-judicial function, *it is actual partiality, rather than the appearance of partiality that is the crucial test*. Otherwise auditors (like architects and actuaries) who have a long standing professional relationship with one party (or persons associated with one party) to a contract might be unduly inhibited in continuing to discharge their professional duty to their client, by too high an insistence on avoiding even an impression of partiality. … [emphasis added]

59 In Singapore, however, it appears that this point is not yet settled. In *HSBC v Toshin* ([34] supra), which concerned allegations of bias against licensed valuers appointed pursuant to the lease agreement between the landlord appellant and the tenant respondent, the respondent argued before the Court of Appeal that at law, actual bias (and not apparent bias) was required to challenge an expert's appointment (at [28]). The Court of Appeal did not express a final view on this question as it decided that the issue of bias (whether actual or apparent) did not even arise in that case (*HSBC v Toshin* at [58]). It is similarly not necessary for me to decide this question since the parties did not raise it and in any event, the Defendants seemed to have proceeded on the basis of actual bias rather than apparent bias. This issue therefore remains to be decided in a future case with the benefit of submissions from counsel.

59 In this particular case, it is similarly not necessary for me to take a position on whether apparent bias is a ground for setting aside an expert determination. Even on the assumption that apparent bias is a ground, I find that the plaintiff has failed to establish apparent bias.

60 Counsel for the plaintiff, in oral submissions, cites *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 for the test of apparent bias. The test favoured in that case was the reasonable suspicion test, *ie*, whether a reasonable member of the public could harbour a reasonable suspicion of bias. I make a further assumption that that is the appropriate test for apparent bias to be applied to an expert determination. I have already explained why all of the grounds set forth by the plaintiff are insufficient to establish actual bias (see [48]–[56]). For much the same reasons, I find that none of the facts on which the plaintiff relies would lead a reasonable person to harbour a reasonable suspicion of bias.

61 I have explained that GTCF's failure to reply to the plaintiff's email of 30 September 2014 asking GTCF to confirm that it would not take into account the first defendant's representations of 23 September 2014 could amount to evidence of actual bias only if there were some basis on which to say that the refusal was deliberate or wilful, intended to prejudice the plaintiff or assist the defendants. There is absolutely no basis on which a reasonable member of the public could harbour a reasonable suspicion that that was the case.

62 Similarly, I find it impossible to say that the mere fact that GTCF did not, in its valuation, accept the plaintiff's representations or arrive at a figure in line with her subjective expectation gives rise to a suspicion of bias, let alone a suspicion that can be said to be reasonable. In fact, GTCF's decision to increase the probability of the Company remaining a going concern after 2017 from 30% to 50% allays any suspicion of bias.

63 The only basis on which the plaintiff's second ground may give rise to a suspicion of bias is the fact that only 38 minutes elapsed between the first defendant's solicitors' email to GTCF on 7 October

2014 rejecting any further meeting and insisting that GTCF issue its report by 8 October 2014 and GTCF's decision not to hold a further meeting and to issue its report. Once again, however, there is no basis in the facts that could give rise to any suspicion of bias, let alone a reasonable suspicion. GTCF had already stated in its email of 24 September 2014 that it anticipated taking two weeks to issue its final report after considering all of the parties' comments. The first defendant's email simply indicated to GTCF that the first defendant intended to hold GTCF to that indication.

64 There being no basis for asserting that there was any reasonable suspicion of bias, I reject the plaintiff's submission that GTCF acted in a manner which displayed apparent bias.

Fair hearing

65 My finding that GTCF acted as an expert means it was not bound to observe the second pillar of natural justice: the obligation to give the parties a fair opportunity to be heard. This alone is sufficient to dispose of the plaintiff's submissions that GTCF breached this rule when it failed to reply to the plaintiff's email asking if the first defendant's representation of 23 September 2014 would be taken into account. Nevertheless, for completeness, I find that even if GTCF was bound by the fair hearing rule of natural justice, GTCF did not act in a manner that breached this rule.

66 The plaintiff's argument is that GTCF did not give the plaintiff a chance to deliver a cogent rebuttal to the first defendant's representations of 23 September 2014. GTCF denied the plaintiff that opportunity by failing to reply to her solicitors' email of 30 September 2014 asking GTCF to confirm by 5.00 pm on 2 October 2014 that GTCF would disregard the technical aspects of the first defendant's comments. The plaintiff points out further that she put GTCF on notice in this email that it would be procedurally improper for GTCF to take into account the first defendant's representations of 23 September 2014 without affording the plaintiff a chance to respond. Thus, according to the plaintiff, a breach of the fair hearing rule has been established. I disagree.

67 In *Evergreat*, Rajah J described the fair hearing rule as a rule of due process. According to him, "both parties have the right to be heard on all the issues that are to be determined" (at [36]). GTCF did not deny the plaintiff an opportunity to be heard. Before GTCF issued the draft report, all parties put in full representations and even addressed GTCF orally on 25 August 2014. There was clear due process in this.

68 It is an important point that, before the plaintiff's solicitors' email of 30 September 2014, GTCF had already informed the parties on 24 September 2014 that it would take into account all comments received as at that date and anticipated issuing its final report in two weeks, ie on 8 October 2014. The plaintiff was therefore on notice from 24 September 2014 that GTCF would take into consideration the first defendant's representations of 23 September 2014. It should therefore have been obvious to the plaintiff that if GTCF did not reply to the plaintiff's email of 30 September 2014 within the stipulated deadline, GTCF's position remained as set out in its email of 24 September 2014. The plaintiff made no effort to submit any further representations to GTCF. She was not denied an opportunity to be heard.

69 It appears to me that GTCF conducted the entire process with fundamental fairness to all parties. I find that there was no breach of the fair hearing rule, even assuming it applied to GTCF.

Manifest error

70 The plaintiff's final objection to the report was that it is marred by manifest error. The plaintiff relies on the case of *Tan Yeow Khoon and another v Tan Yeow Tat and others* [2003] 3 SLR(R) 486

(at [12]) (affirmed in *Quek Kwee Kee Victoria (in her personal capacity and as executor of the estate of Quek Kiat Siong, deceased) and another v Quek Khuay* Chuah [2014] 4 SLR 1 ("*Victoria Quek*") at [33]) as authority for the proposition that an expert's decision will be set aside if there is manifest error.

71 In *Geowin*, Rajah J explained that the phrase manifest error is "no more than a convenient shorthand reference to a patent error on the 'face' of the award or decision" (at [16]; see also *Victoria Quek* at [33]). Rajah J said (at [19]):

> I respectfully concur with Lord Denning MR's view in *Campbell v Edwards* ([16] supra) that the only errors that can be corrected by the court are those that appear on the "*face*" of the award or report (see at [17] above). In the context of a speaking award, the court should not stray beyond the actual report or award in considering how or why the decision was reached. The underlying evidence ought not to be re-examined or referred to as this would be tantamount to an appellate hearing and to that extent contrary to what the parties had solemnly agreed to. The right of review should be confined to correcting apparent mistakes that appear on the face of the report or award (eg apparent mathematical miscalculations) and to determining whether the expert has complied with his terms of appointment. If an expert answers the right question in the wrong way his decision will nevertheless be binding.

72 In *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2009] 2 SLR 385, Chan Seng Onn J took a less strict approach to manifest error, opining that there was no absolute rule precluding reference to matters beyond the face of the award or decision to establish manifest error. Chan J said:

> 88 On the facts of this case, fortunately the IA gave a reasoned determination and even included the relevant important documentary evidence as part of his written determination which then enabled me to see more clearly and better understand, both from the IA's reasoned determination and the attached documentary evidence forming part of his written determination, as to where and how the manifest errors as contended by OIC could have arisen.
>
> 89 What if the manifest error is not detectable unless the underlying evidence is referred to? What if the parties themselves put forward the underlying evidence before the court for consideration? Should the court completely ignore such underlying evidence? Is such evidence also not a part of the "record" simply because they are not attached to the expert determination? Must the court confine itself only to the four corners of the written expert determination when reviewing that determination on the question of a manifest error? In this case, I had no alternative but to depart respectfully from what Rajah J had said in relation to not examining the underlying evidence at all, as I would not have been able to understand fully how the IA had determined the case and follow his reasoning if I could not examine the insurance policies, the provisions in the Scheme documents and various other exhibits in the affidavits filed in support of the case, which included many of the documents/letters constituting the underlying evidence that were earlier placed before the IA.
>
> 90 At [33], the court in *Veba Oil* ([57] *supra*) considered what else could constitute "manifest errors":
>
> > … I would extend the 'definition' of manifest errors as follows: 'oversights and blunders so obvious *and obviously capable of affecting the determination as to admit of no difference of opinion*'. [emphasis added; emphasis in original omitted]

> Hence, manifest errors include errors which are "obviously capable of affecting the outcome of the determination" and "admit of no difference of opinion". Usual errors that qualify as manifest errors are mathematical miscalculations in the determination, *eg*, 2 + 2 = 5.

73 Even on Chan J's approach, it is clear that not all error is manifest error. Only error which is capable of affecting the outcome of the determination and *admits no difference of opinion* amounts to manifest error. The example provided is a clear arithmetical error. In that case, Chan J found manifest error in the determination of the period of interest because of a technical arithmetical error in the expert's discount calculations. The comprehensive explanation of the error can be found at [153]–[167] of Chan J's decision.

74 On the facts of the present case, I do not have to choose between Rajah J's strict or Chan J's less strict approach. Even on the less strict approach, I find that GTCF made no manifest error.

75 The manifest error is said to be reflected in the following paragraph of GTCF's report:

> There are some uncertainties whether the Company can extend the lease at Phoenix Park beyond FY2016 or source a suitable site for its ongoing business operations in Singapore post 2017. We also noted from the respective [plaintiff's] and [the Company's] evidence that the probability of the Company having a finite life is 10% and 80%. Considering the above uncertainties and evidence, the valuation for the equity in [the Company] is derived on the basis of 50% probability of going concern and 50% probability of finite life.

76 The plaintiff submits that GTCF made a manifest error in considering that the Company might cease to be a going concern after 2017 because there was no evidence to suggest that the parties envisioned such a possibility on 31 December 2012, the agreed effective date of the valuation. By taking into account evidence which came after the effective date of the valuation, the plaintiff submits, GTCF valued the Company based on hindsight. Moreover, the plaintiff submits that GTCF reached this conclusion against the weight of the compelling evidence presented by the plaintiff that the Company would remain a going concern after 2017.

77 I do not find that this is manifest error for two reasons. First, the plaintiff's solicitors accepted in an email dated 15 May 2014, before GTCF's terms of engagement were agreed, that whether the Company was to be valued entirely as a going concern or as being subject to a finite life would be a matter left to GTCF. Second, the plaintiff's own expert, who also took 31 December 2012 as the valuation date, attached a non-zero probability – which it assessed to be 10% – to the Company ceasing to be a going concern after 2017. GTCF was therefore fully entitled to take this as a live issue between the parties and to factor it into its valuation.

78 As for the plaintiff's assertion that GTCF's valuation failed to take into account compelling evidence that the Company would continue as a going concern after 2017, that failure even if established would not be an error which admits no difference of opinion. Even the plaintiff's own expert formed an opinion that there was a 10% chance of the Company having a finite life. [note: 17]

79 There was no manifest error on any ground and on any approach.

Conclusion

80 In conclusion, I am satisfied that the Company will remain solvent after the capital reduction for which the Company prays. I am also satisfied that none of the grounds on which the plaintiff claims not to be bound by GTCF's report have any merit. There is no bias, actual or apparent, nor has there

been a failure to give the plaintiff a fair opportunity to be heard. Finally, there is no manifest error in the report.

81 Given these findings, I therefore granted the Company an order allowing it to reduce its share capital from 576,516 to 330,471 ordinary shares by cancelling all of the 246,045 ordinary shares held by the plaintiff and in exchange paying to the plaintiff $1,869,000.

82 There was a dispute as to who ought to bear the costs of the present proceedings. Even though the plaintiff did not succeed on any ground, she argues that the Company ought to bear costs of this action. First, the plaintiff submits that the present application was not necessitated by any conduct on her part, but would have been necessary in any event to complete the settlement agreement. Second, the plaintiff relies on cl 10 of the Parameters for Independent Valuer which provides that the Company will pay the plaintiff's costs in this action. It is thus part of the settlement agreement, she submits, that the Company will bear the costs of the present application.

83 I have explained earlier that my jurisdiction in making these orders stems, by consent of the parties, from s 216(2)(*e*) of the Companies Act (see [17] above). I am not acting on the parties' legal rights under the settlement agreement. I therefore disregard the parties' settlement agreement in making costs orders on Summons 5713. I award costs as a procedural matter pursuant to my ordinary discretion to award costs in civil proceedings.

84 I order that the plaintiff shall pay the costs of and incidental to Summons 5713 to the first defendant and to the Company. Such costs are to be fixed on the standard basis at $15,000 for each party (excluding reasonable disbursements). Such disbursements are to be taxed if parties are unable to agree. None of the costs orders I have made deal with costs of Suit 766 other than those incurred or arising out of Summons 5713. My order is quite separate from the parties' mutual obligations as to costs under the settlement agreement or any liability for breach of that agreement. Those are matters for the parties to take up at such juncture and by such means as they see fit.

[note: 1] Susan Anderssen's affidavit dated 13 November 2014 ("SA's 13 November Affidavit") at SA-1 (Business Profile of second defendant).

[note: 2] Statement of Claim filed on 3 October 2012.

[note: 3] SA's 13 November Affidavit at SA-4.

[note: 4] SA's 13 November Affidavit at page 55.

[note: 5] SA's 13 November Affidavit at SA-5.

[note: 6] Notes of Argument 8 January 2015 at page 3, Lines 16–18.

[note: 7] Plaintiff's written submissions dated 6 January 2015.

[note: 8] See Parameters for Independent Valuer cl 4 (Jayanti Nadarajoo affidavit of 12 December 2014 at Tab 3 page 54).

[note: 9] Jayanti Nadarajoo's affidavit of 12 December 2014 at page 63.

[note: 10] Jayanti Nadarajoo's affidavit 12 December 2014 at page 62.

[note: 11] Jayanti Nadarajoo's affidavit 12 December 2014 at paragraphs 40–44.

[note: 12] Jayanti Nadarajoo's affidavit 12 December 2014 at paragraph 48.

[note: 13] Jayanti Nadarajoo's affidavit 12 December 2014 at Tab 9.

[note: 14] Jayanti Nadarajoo's affidavit 12 December 2014 at Tab 11.

[note: 15] Jayanti Nadarajoo's affidavit 12 December 2014 at Tab 12.

[note: 16] Jayanti Nadarajoo's affidavit 12 December 2014 at Tab 13.

[note: 17] Jayanti Nadarajoo's affidavit 12 December 2014 at page 115.