IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 46

Civil Appeal No 71 of 2019

Between

Suying Design Pte Ltd

… *Appellant*

And

Ng Kian Huan, Edmund

… *Respondent*

Civil Appeal No 72 of 2019

Between

Tan Teow Feng Patty

… *Appellant*

And

Ng Kian Huan, Edmund

… *Respondent*

Civil Appeal No 73 of 2019

Between

Ng Kian Huan, Edmund

… *Appellant*

And

(1) Suying Design Pte Ltd
(2) Tan Teow Feng Patty

… *Respondents*

In the matter of Suit No 867 of 2015

Between

Ng Kian Huan, Edmund

… *Plaintiff*

And

(1) Suying Metropolitan Studio Pte Ltd
(2) Suying Design Pte Ltd
(3) Tan Teow Feng Patty

… *Defendants*

And

(1) Tan Teow Feng Patty
(2) Suying Metropolitan Studio Pte Ltd

… *Plaintiffs in Counterclaim*

And

(1) Ng Kian Huan, Edmund
(2) Metropolitan Office Experimental Pte Ltd
(3) Chong Chin Fong

… *Defendants in Counterclaim*

JUDGMENT

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25 November 2019

13 May 2020 Judgment reserved.

Belinda Ang Saw Ean J (delivering the judgment of the court):

Introduction

1 These appeals arise out of the decision of the High Court Judge ("the Judge") in HC/S 867/2015 ("Suit 867"). They revolve around the Judge's finding that a claim of oppression under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) had been made out. The appeals turn, on the one hand, on detailed factual issues, and on the other hand, on the propriety of the claim under s 216.

2 The parties in Suit 867 were all involved in the interior design business. The plaintiff in Suit 867 was Mr Ng Kian Huan, Edmund ("Mr Ng"). He was the sole shareholder and director of Metropolitan Office Experimental Pte Ltd ("MOX"). The third defendant in Suit 867 was Ms Tan Teow Feng Patty ("Ms Tan"). She has run Suying Design Pte Ltd ("SDPL"), the second defendant in Suit 867, since its incorporation in 1999. The first defendant in Suit 867 was

Suying Metropolitan Studio Pte Ltd ("SMSPL"), a company incorporated on 20 February 2012 by, *inter alia*, Ms Tan and Mr Ng, who were made directors of SMSPL. At its incorporation, SMSPL's shareholders were:

(a) Ms Tan, who held 40% of SMSPL's shares;

(b) Mr Ng, who held 35%;

(c) Ms Anita Chiu ("Ms Chiu"), who held 20%; and

(d) Mr Lim Chai Boon ("Mr Lim"), who held 5%.

Mr Lim's 5% shareholding underwent a series of transfers, and was eventually transferred to Ms Martinez Gejane Siman ("Ms Martinez"). The remainder of SMSPL's shares have not changed hands since its incorporation.

3 In Suit 867, Mr Ng claimed that Ms Tan acted in an oppressive manner by, *inter alia*, misappropriating SMSPL's funds and transferring them to herself and SDPL, withholding payments he was entitled to, and demanding that he return dividends and director's fees previously paid to him. In his decision in [2019] SGHC 56 ("the Judgment"), the Judge allowed a number of these claims, and found that a case of oppression had been made out against Ms Tan. He ordered SMSPL to be wound up, and SDPL and Ms Tan to repay various sums of money to SMSPL. In CA/CA 71 and 72/2019 ("CA 71" and "CA 72" respectively), SDPL and Ms Tan respectively appeal against the Judge's findings against them. In CA/CA 73/2019 ("CA 73"), Mr Ng cross-appeals against the Judge's rejection of some of his claims. The central issue in these appeals is whether the Judge's finding of oppression under s 216 of the Companies Act was correct.

4 Ms Tan and SMSPL also brought numerous counterclaims against Mr Ng, MOX, and Mr Ng's wife, Ms Chong Chin Fong ("Ms Chong", also known as Jazz), in Suit 867. In the Judgment, the Judge found Mr Ng liable for a number of these counterclaims based on various causes of action, including negligence and diversion of corporate opportunities. However, there is no appeal in respect of any of the counterclaims. Therefore, although our decision in the present appeals has a bearing on one of the counterclaims (see [99] below), there is no basis for us to disturb the Judge's rulings in the counterclaims.

Events leading to the commencement of Suit 867

5 It is common ground between Mr Ng and Ms Tan that the two of them, together with Ms Chiu and Mr Lim, decided to set up a new company. Consequently, SMSPL was incorporated on 20 February 2012. It is also not disputed that with the incorporation of SMSPL, all new business from the date of SMSPL's incorporation, whether emanating from Ms Tan or Mr Ng, would be routed to SMSPL as the contracting and performing party. Existing staff of SDPL and MOX would effectively join SMSPL.

6 In March 2015, Ms Tan informed Mr Ng that she would retire in June 2015, and that SMSPL would be left to Mr Ng and Ms Martinez to run (see the Judgment at [12]). Ms Tan's retirement was not new; it was an event envisaged prior to the incorporation of SMSPL. However, on 13 July 2015, Mr Ng informed Ms Tan and Ms Chiu that he intended to leave SMSPL. According to Mr Ng, he did so for three reasons: (i) he realised that Ms Tan had no genuine intention of leaving SMSPL; (ii) there was a "rift" between himself and Ms Tan due to their different working styles; and (iii) he wanted more time for personal commitments. Later that day, Mr Ng, Ms Tan and Ms Martinez met and agreed

to close down the company; they agreed to meet again in October 2015 for this purpose (see the Judgment at [13]).

7 On 15 July 2015, Ms Tan withdrew a total of $1,164,580 from SMSPL's bank account using 23 cheques for $50,000 each and one cheque for $14,580 (see the Judgment at [14]). According to Ms Tan, this was her gratuity and adjusted pay for January to June 2015 ("the Gratuity Payments"). She signed these cheques herself as only sums above $50,000 required two signatures. Ms Tan returned an amount of $492,580 on 27 July 2015, which she claimed was an accidental excess payment. The Gratuity Payments therefore ultimately totalled $672,000.

8 After Mr Ng had been removed as a signatory of SMSPL's bank account on 29 July 2015, Ms Tan signed off on nine debit notes from SDPL to SMSPL ("the Debit Notes") (see the Judgment at [16]–[17]). Ms Tan determined that the net amount due from SMSPL to SDPL under these Debit Notes was $1,642,510.99, and effected payment of this amount. According to Ms Tan, these were repayments of loans made by SDPL to SMSPL. Mr Ng disputed the propriety of all the above payments in Suit 867.

9 Next, there were a number of events relating to the corporate affairs of SMSPL that took place after Mr Ng announced his decision to resign. On 12 August 2015, SMSPL issued notice of an extraordinary general meeting ("EGM") for the ratification of the amounts under the Debit Notes as consultancy fees (see the Judgment at [18]).

10 Mr Ng commenced Suit 867 on 27 August 2015, accompanied by a summons for an injunction to restrain SMSPL from holding this EGM

(HC/SUM 4106/2015). A consent order was eventually recorded for the withdrawal of the EGM.

11 We digress for a moment to explain the parties' disagreement over the treatment of invoices issued by SDPL and MOX after 20 February 2012 ("the post-incorporation invoices") that eventually became a focus of Mr Ng's complaint of oppression at trial below. With the differing versions of what Mr Ng and Ms Tan had orally agreed to on the treatment of the post-incorporation invoices in the trial below, the parties, for brevity and simplicity, called this particular dispute the "Oral Agreement". Thus, all references to the Oral Agreement in the parties' respective written submissions have to be understood in the context described here. Specifically, their disagreement lies in how sums paid pursuant to the post-incorporation invoices for SDPL and MOX's projects which were in existence prior to this date (*ie*, pre-incorporation) were to be dealt with. However, Ms Tan's treatment of post-incorporation invoices was not specifically raised as one of Mr Ng's complaints of oppression at the time Suit 867 was commenced, as we will discuss in the next paragraph.

12 Based on Mr Ng's case at trial, his version of the Oral Agreement ("Mr Ng's Version") is that all receivables were to be transferred to SMSPL after deducting expenses incurred by MOX and SDPL for their respective projects (see the Judgment at [9]). The version of the Oral Agreement maintained by Ms Tan ("Ms Tan's Version") is that MOX and SDPL would retain their receivables but would reimburse SMSPL for the use of SMSPL's resources in completing these projects. To be clear, Mr Ng did not specifically raise his version of the Oral Agreement and Ms Tan's non-observance of the same as constituting oppressive conduct before he sued. Instead, it was pleaded for the first time in the Statement of Claim filed on 9 September 2015.

Events post Writ of Summons

13 On 9 October 2015, Mr Ng filed an application in HC/OS 921/2015 ("OS 921") to inspect the accounts and records of SMSPL in his capacity as a director of the company. A directors' meeting was held on 17 December 2015 in Mr Ng's absence and an EGM was fixed on 8 January 2016 to remove Mr Ng as director. Mr Ng obtained an interim injunction before the EGM to preserve his capacity as a director to proceed with OS 921. Mr Ng's application in OS 921 was subsequently granted on 25 January 2016.

14 Mr Ng's last day of work at SMSPL was 12 October 2015, and he indicated then that he would transfer a number of SMSPL's projects to MOX. This was possible as SMSPL was by then in the process of ceasing operations. SMSPL ceased operations in April 2016. Mr Ng remained a director of SMSPL until 5 April 2017.

The proceedings and the decision below

Mr Ng's case at the trial

15 As Mr Ng's counsel made clear at the trial, it was *not* Mr Ng's case that he resigned from SMSPL because of any oppression. Instead, Mr Ng's case was that *after* he resigned, Ms Tan decided to siphon money away from SMSPL and to obstruct Mr Ng in various other ways. The siphoning of money was alleged to have taken the form of the Debit Notes and the Gratuity Payments. Although Mr Ng therefore accepts that he resigned from SMSPL for personal reasons and not because of oppression, his case is that he discovered after his resignation that, all along, there had been oppressive acts by Ms Tan in the form of Ms Tan failing to transfer receivables that were due from SDPL to SMSPL. These

receivables were the subject of Annexes A, B, C1 and C2 of the Statement of Claim.

16 In short, Mr Ng's primary case is that his resignation from SMSPL prompted Ms Tan to engage in a series of oppressive acts in order to prevent him from realising the fair value of his stake in SMSPL. Mr Ng's further case is that he has unknowingly been the subject of oppression throughout his tenure in SMSPL, as Ms Tan had been violating the Oral Agreement all along.

Derivative action under s 216A Companies Act

17 In his Statement of Claim, one of the reliefs pleaded by Mr Ng was for an order to allow him to commence a derivative action against Ms Tan and SDPL in SMSPL's name under s 216A of the Companies Act. On the second day of the trial, 21 March 2018, counsel for Mr Ng, Mr Tan Chee Meng SC ("Mr Tan"), informed the Judge that Mr Ng intended to seek leave to commence a distinct derivative action against Ms Tan and SDPL. The Judge informed Mr Tan that while Mr Ng was free to commence the procedure under s 216A as he saw fit, the Judge would only deal with the issue at the end of the trial.

18 Fifteen days into the trial, on 17 April 2018, Mr Ng filed HC/OS 441/2018 ("OS 441") for leave to commence a derivative action, and to consolidate the new action with Suit 867. The pleadings in Suit 867 were adopted for the purposes of OS 441. The Judge said that it would not be practical to make the orders sought given the advanced stage of proceedings in Suit 867. He thus adjourned further consideration of OS 441 until after his decision in Suit 867 was given.

The Judge's decision

19 First, the Judge found in favour of Mr Ng's Version of the Oral Agreement on the totality of the evidence. We set out the limbs of the Judge's reasoning in brief here, and discuss them in fuller detail at [45]–[98] below.

(a) The Judge considered Ms Tan's Version to be unbelievable in the light of the absence of any tracking by SMSPL of its resources used by SDPL and MOX, which absence made it impossible for SMSPL to keep track of the reimbursements due to it (the Judgment at [27]–[31]).

(b) The Judge further found it telling that although Ms Tan had sent Mr Ng an email on 8 August 2015 after Mr Ng's resignation, setting out other aspects of the SMSPL's incorporation at length, she had not mentioned her version of the Oral Agreement (the Judgment at [73]–[74]).

(c) The Judge found Mr Ng's Version plausible despite the fact that SDPL's unbilled fees were much greater than MOX's, by virtue of the fact that Ms Tan wanted to retire and wanted someone to take over the "Suying" name from SDPL (the Judgment at [71]). The Judge also preferred the evidence of Mr Ng and his former associate, Mr Seah Chin Kwang ("Mr Seah"), in favour of Mr Ng's Version, over that of Ms Tan and that of Ms Chiu and Mr Lim, who supported Ms Tan's Version (the Judgment at [75]).

(d) The Judge found that the transfers to SMSPL between 2012 and 2015 on balance supported Mr Ng's Version. The Judge's findings on the individual sets of transfers are as follows:

(i) It was undisputed that SMSPL had repaid $203,430.71 to SDPL in April 2012 ("the $203k") in respect of payments SDPL had made on its behalf in February and March 2012 (see the Judgment at [46]). These payments were made by SDPL because SMSPL did not have a bank account at the time (see the Judgment at [125(d)]).

(ii) Transfers of $600,000 from SDPL to SMSPL in August and September 2012 ("the $600k") were loans from SDPL, and not transfers of receivables pursuant to Mr Ng's Version (the Judgment at [50]–[55]).

(iii) The purpose of the transfer of $100,000 from MOX to SMSPL in October 2012 ("the $100k") could not be determined (the Judgment at [36]).

(iv) A transfer of $162,193.93 from Ode to Art in February 2013, which was Ms Chong's business, to SMSPL ("the $162k") was effectively a loan from SDPL to SMSPL, and not a transfer of receivables pursuant to Mr Ng's Version (the Judgment at [70]).

(v) Transfers of $719,652.02 from SDPL to SMSPL from April 2013 to December 2014 ("the $719k") were transfers of receivables pursuant to Mr Ng's Version, and not, as Ms Tan claimed, "project-linked loans" (the Judgment at [61]–[66]).

(vi) Transfers of $148,500[1] from MOX to SMSPL from August 2013 to July 2014 ("the $148k") were transfers of receivables pursuant to Mr Ng's Version and not reimbursements pursuant to Ms Tan's Version (the Judgment at [37]–[40]).

20 Mr Ng alleged that various wrongs were committed against him, and these formed the basis of his claim in minority oppression. Here, we set out the Judge's decision on the alleged wrongs. We discuss them in fuller detail at [104]–[139] below.

(a) Mr Ng was wrongfully prevented from accessing SMSPL's financial documents (the Judgment at [100]–[105]).

(b) Ms Tan had wrongly characterised the $200,000 SMSPL paid to Mr Ng in 2012 as a loan, when it was in fact a director's fee, and therefore had no basis to demand that he repay it (the Judgment at [112]–[119]).

(c) Mr Ng was entitled to $265,000 from SMSPL as the balance of his director's fee for 2013, and Ms Tan had no basis to cause SMSPL to refuse to pay it (the Judgment at [120]–[122]).

(d) Ms Tan did not act in good faith when she demanded that Mr Ng return dividends paid to him by SMSPL in 2012 and 2013, as the grounds for her view that there were insufficient profits for these dividends were not justified (the Judgment at [126]–[136]).

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[1] The Judgment at [37] mistakenly refers to this sum as $148,000. The correct sum of $148,500 is reflected in the Judgment at [32(b)].

(e) SMSPL had no basis to withhold Mr Ng's pro-rated salary for October 2015 up to his last day of work at SMSPL, *ie*, 12 October 2015 (the Judgment at [140]).

(f) Ms Tan had wrongfully excluded Mr Ng from decision-making in relation to SMSPL's affairs after he ceased to be an employee in October 2015 (the Judgment at [142]–[146]).

(g) The Gratuity Payments were wrongful as the alleged gratuity and pay adjustment were never agreed upon (the Judgment at [83]–[88]).

(h) Since Mr Ng's Version of the Oral Agreement was found to be true, a total of $1,320,586.67 under Annex A of the Statement of Claim (fees from SDPL's pre-incorporation projects) and a total of $1,582,176.89 under Annex B of the Statement of Claim (fees from SDPL's post-incorporation projects) should have been paid to SMSPL (see the Judgment at [203(h)]–[203(i)]).

(i) The Debit Notes included repayments of the $600k and the $162k, which the Judge had found were justified as these were loans from SDPL. The remainder of the sum reflected in the Debit Notes accounted for receivables transferred to SMSPL by SDPL under the Oral Agreement, including the $719k, and their repayment to SDPL was therefore wrongful (the Judgment at [93]–[98]).

(j) Since Mr Ng's Version was accepted, the Judge also rejected Ms Tan's assertion that there were "project-linked loans". Ms Tan had therefore wrongfully caused SMSPL to write off $194,290.08 which was owed to it by SDPL in purported repayment of the "project-linked loans" (the Judgment at [192]).

(k) Sums of $1,388 and $48,333.72 were inadvertently mistakenly billed to SMSPL, and should be repaid by SDPL (the Judgment at [186], [189]). Another sum of $39,276 was accrued to Ms Tan's director's account with SMSPL by mistake (the Judgment at [188]).

(l) SMSPL paid $169,507.67 for SDPL's income tax and GST with Mr Ng's approval. This was therefore not wrongful, but must nevertheless be repaid by SDPL (the Judgment at [191]).

(m) The Judge rejected the remainder of the alleged wrongs, and there is no appeal in relation to them.

21 The Judge divided the wrongs he found to have been established into two categories: first, (a)–(f) above were personal wrongs against Mr Ng ("the personal wrongs"), and second, (g)–(j) above were claims with overlapping features of corporate and personal wrongs ("the overlap claims") (see the Judgment at [212]–[213]). Items (k) and (l) above were not found by the Judge to be wrongful, although the sums in question had to be repaid.

22 The Judge held that on the basis of the Court of Appeal's reasoning in *Ho Yew Kong v Sakae Holdings Ltd and another appeal and other matters* [2018] SLR 333 ("*Sakae Holdings*"), Mr Ng's reliance on the overlap claims with features of corporate wrongs was not an abuse of process (see the Judgment at [214]–[215]). The Judge reasoned that the injury Mr Ng sought to vindicate was that to his investment in SMSPL. The overlap claims concerned Ms Tan's misappropriation of moneys belonging to SMSPL, which were transferred either to herself or to SDPL. These were breaches of Mr Ng's legitimate expectation as a shareholder of SMSPL, that funds would not be siphoned away, and had a direct impact on his interests.

23 The Judge found Ms Tan liable in respect of the overlap claims as they were breaches of her duties as a director of SMSPL (the Judgment at [213]). He also found SDPL to be in knowing receipt of any sums it received in relation to those overlap claims. The Judge found Ms Tan's actions in relation to the personal wrongs and the overlap claims to be commercially unfair to Mr Ng, and therefore allowed his claim for minority oppression (the Judgment at [217]–[218]). The Judge held that the essential remedy Mr Ng sought was to exit SMSPL, and that restitutionary orders against Ms Tan and SDPL for the moneys they had wrongfully received in relation to these overlap claims were necessary to ensure a fair value exit for Mr Ng (the Judgment at [214(b)]). The Judge ordered SMSPL to be wound up (the Judgment at [218]), made restitutionary orders against Ms Tan and SDPL in relation to the overlap claims which were found to be established (the Judgment at [219]–[232]), and ordered SMSPL to pay Mr Ng the sums found to have been wrongly withheld from him in relation to the personal claims (the Judgment at [248]).

The issues in these appeals

24 In CA 71, SDPL primarily challenges the Judge's findings on the correct version of the Oral Agreement, including the nature of the transfers of $719k and $100k. The challenge to the Oral Agreement by implication also challenges the Judge's findings on the overlap claims, with the exception of the Gratuity Payments. Meanwhile, Ms Tan's appeal in CA 72 is focused on challenging the Judge's findings in relation to the personal wrongs she had committed against Mr Ng, as well as the Gratuity Payments. However, Ms Tan and SDPL's positions in the appeals are fully aligned. As such, when we refer to Ms Tan's position, this will generally also reflect the position of SDPL. They also challenge certain of the Judge's specific orders which they say involved double-counting or other inadvertent errors. Finally, they submit that the overlap claims

are in fact corporate wrongs that are not actionable in a claim for minority oppression, and that Mr Ng had no *locus standi* to obtain the restitutionary orders against SDPL. SMSPL was not before us in these appeals, although we note that its position was similarly aligned with Ms Tan's and SDPL's before the Judge.

25 As we indicated above, the central question to be determined in these appeals is whether Mr Ng has established his case of minority oppression. We will examine the personal and overlapping wrongs by first considering the alleged wrongs which occurred prior to 13 July 2015, and then those which occurred post-13 July 2015. The date 13 July 2015 is when Mr Ng announced his resignation from SMSPL and asked Ms Tan to buy his shares. As we explain at [42] below, the parties agreed later that day to cease business and dissolve the company (*ie*, wind up the company).

26 The following questions therefore arise for determination:

(a) in respect of conduct before 13 July 2015, what the Oral Agreement was between the parties;

(b) in respect of conduct after 13 July 2015, whether the wrongs alleged by Mr Ng have been established; and

(c) whether the wrongs (pre- and post-13 July 2015) which are established were oppressive under s 216 of the Companies Act.

27 Apart from the questions above, there is the anterior question of whether s 216 extends to affording Mr Ng an opportunity to sell his shares for an undiscounted price when Mr Ng's decision to exit from SMSPL was made entirely for his own personal reasons. This was not a case where he felt driven

to exit because of the actions of his co-director and majority shareholder. However, in practice, the only means by which he could obtain a buy-out order in the present case was through a s 216 action. There was no shareholders' agreement and SMSPL's Articles of Association did not provide Mr Ng with an exit mechanism. We examine this in more detail below.

The law on oppression

28 We will begin by first reviewing the relevant principles on oppression, which formed the basis for substantially the entirety of Mr Ng's claims in Suit 867 (see [3] above).

29 In our recent judgment in *Ascend Field Pte Ltd and others v Tee Wee Sien and another appeal* [2020] SGCA 14 ("*Ascend Field*"), we set out the legal principles which apply to a claim made under s 216 of the Companies Act:

> 27 Section 216 of the Companies Act allows a shareholder to bring an action for relief where:
>
> > (a) the company's affairs or the directors' powers are being exercised in a manner oppressive to one or more shareholders, or in disregard of one or more shareholders' interests; or
> >
> > (b) some act of the company has been done or threatened or a members' resolution is passed or proposed which unfairly discriminates against or is otherwise prejudicial to one or more shareholders.
>
> 28 The legal principles which apply to a s 216 action are well established and we therefore only set them out briefly. As this Court held in [*Sakae Holdings* ([22] *supra*)] at [81], s 216 encapsulates four limbs: (a) oppression; (b) disregard of a shareholder's interests; (c) unfair discrimination; and (d) prejudice. The common element supporting these four limbs is commercial unfairness, which is found where there has been "a visible departure from the standards of fair dealing … which a shareholder is entitled to expect": *Over & Over Ltd v Bonvests Holdings Ltd and another* [2010] 2 SLR 776 ("*Over & Over*") at [77].

> 29 In assessing commercial unfairness, the court should bear in mind that the essence of a claim for relief under s 216 lies in upholding the commercial agreement between the shareholders of the company, irrespective of whether the agreement is found in the formal constitutional documents of the company, in less formal shareholders' agreements or, in the case of quasi-partnerships, in the legitimate expectations of the shareholders: *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 at [88]. This point was also emphasised in *Sakae Holdings* at [172], where this Court emphasised that it is the understanding between the shareholders of a company, whether contained in a formal agreement or in an informal understanding, that generally will form the backdrop against which the court determines whether there has been commercial unfairness.

30 It is well-established that s 216 of the Companies Act should not be used to vindicate wrongs which are in substance wrongs committed against a company, and which are thus corporate rather than personal in nature. This is essential in preventing improper circumvention of the proper plaintiff rule in *Foss v Harbottle* (1843) 2 Hare 461. The proper plaintiff rule provides that the proper plaintiff to seek redress for a wrong done to a company is *prima facie* the company itself. The corollary of this is the no reflective loss principle. Where the minority shareholder's loss is merely a reflection of the loss suffered by the company which would be made good if the company were able to and did enforce its rights, the proper party to recover that loss is the company and not the shareholder (*Sakae Holdings* at [85], [86] and [91]–[93], citing *Ng Kek Wee v Sim City Technology Ltd* [2014] 4 SLR 723 ("*Ng Kek Wee*") at [61] and [70]). The nature of the loss relied on is of vital importance since it would follow as a matter of logical argument that most corporate wrongs would have some ill-effects on the interests of the shareholders of the company and its creditors (see *Ng Kek Wee* at [65]). To elaborate, the damage that the wrongdoer inflicts on a company may affect its ability to pay dividends to its members or return their capital in winding up, or its ability to pay its employees and other creditors, and perhaps diminish the price at which members can sell their shares.

Ordinarily, these ill-effects are put right when the company recovers what is due to it from the wrongdoer. It is thus not sufficient to simply claim, for example, that the misappropriation of the company's assets has resulted in a decrease in the value of the shares held by a minority shareholder. Misappropriation of the company's assets is by its very nature unlawful and would reduce the assets of the company. Unless there is evidence to the contrary, the "injury" to the minority shareholder in that situation is merely a reflection of the loss to the company. A similar point is alluded to in Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 3rd Ed, 2017) ("Margaret Chew") at paras 4.119 and 4.120:

> Perhaps the most singularly censurable form of oppressive conduct occurs where the controllers of a company have been able to use their power and position, whether as directors or majority shareholders, to cause the company's assets or opportunities to be diverted for self-serving purposes. … Such conduct on the part of controllers disregards the common interests of the corporate participants and offends the basic expectation of the corporate participants to share in the assets and profits of the enterprise. Traditionally, such conduct on the part of the controllers would have to be impugned as breaches of their common law, fiduciary and statutory duties as directors, if they were directors, whether formally appointed or *de facto*.
>
> *Ironically, where there could be the clearest manifestation of oppressive or commercially unfair conduct – for who amongst reasonable men of business would agree and expect to be outrightly defrauded – in the form of indisputable breaches of director's duty in stripping the company of its assets and opportunities, section 216 of the Companies Act may have its limitations.* In [*Ng Kek Wee*], the Court of Appeal had indicated, albeit obiter, that section 216 should not be used to 'vindicate essentially corporate wrongs.' … The paradox, therefore, is that where the breach is palpably impugnable under traditional law as a corporate wrong, section 216 might not be available. Recourse would then have to be sought pursuant to section 216A. …
>
> [emphasis added]

31 Generally speaking, a director's breach of his fiduciary duties is a corporate wrong done to the company, and the proper plaintiff in such cases would *prima facie* be the company itself: *Ascend Field* at [35]. Not only does the no reflective loss principle ensure that the wrongdoer can only be sued once for the same loss, in the context of s 216, the proper plaintiff rule is critical for one further reason. Even if the remedies can be crafted such that there is no double recovery and the plaintiff shareholder does not recover at the expense of the company, its creditors or its other shareholders, it remains that the legislative scheme in the Companies Act makes clear that s 216 and s 216A are ultimately intended to have distinct spheres of application, with different substantive and procedural requirements. Accordingly, this court remarked in *Ng Kek Wee* at [65] that it would be an abuse of process to allow an essentially corporate wrong to be pursued under s 216.

32 That said, this court has also held that there can be cases where what appears to be a corporate wrong can plausibly also be a personal wrong. This court acknowledged in *Ng Kek Wee* at [62] and [66] that there may be grey areas in which the distinction between personal complaints of oppression and complaints of wrongs against a company may be unclear (see also *Sakae Holdings* at [86]). Ultimately, how the wrong is to be categorised depends on the facts of each case. As the nature of the complaint and the appropriate relief are different in the two statutory regimes, the central inquiry for the court hearing a s 216 claim is whether the plaintiff shareholder is relying on unlawful conduct and conduct that constitutes commercial unfairness to found his claim of oppression. Even where the very same facts may found a derivative action or an action from oppression, the evidence will be examined critically to ensure that there is no blurring of the two different statutory regimes. In this regard, the *obiter* remarks of this court in *Ng Kek Wee* at [69] are a helpful guide:

> … an action for s 216 [of the Companies Act] is appropriately brought where the complainant is relying on the unlawfulness of the wrongdoer's conduct as *evidence* of the manner in which the wrongdoer had conducted the company's affairs in disregard of the complainant's interest as a minority shareholder and where the complaint cannot be adequately addressed by the remedy provided by law for that wrong. …
>
> [emphasis in original]

33 Recently, in *Sakae Holdings* at [116], we set out an analytical framework to ascertain whether it is an abuse of process for a particular claim to be brought under s 216, as follows (see *Ascend Field* at [38]):

> (a) Injury
>
> (i) What is the real injury that the plaintiff seeks to vindicate?
>
> (ii) Is that injury distinct from the injury to the company and does it amount to commercial unfairness against the plaintiff?
>
> (b) Remedy
>
> (i) What is the essential remedy that is being sought and is it a remedy that meaningfully vindicates the real injury that the plaintiff has suffered?
>
> (ii) Is it a remedy that can only be obtained under s 216 (*eg*, a winding-up order or a share buyout order) and not under s 216A?

34 It is clear that the framework we set out in *Sakae Holdings* did not in any way limit or diminish the importance of the proper plaintiff rule. Rather, it remains a prerequisite, even where "overlapping" wrongs are concerned, that a *distinct injury* must be suffered by the shareholder. The injury to the minority shareholder thus cannot merely reflect the injury suffered by the company. It must further be shown that the distinct injury amounts to commercial unfairness against the plaintiff as a member of the company. Commercial unfairness should be assessed against the behaviour the shareholder is entitled to expect or rely on, whether this expectation arises from a formal document or an informal

understanding, such as the alleged Oral Agreement in the present case: see *Ascend Field* at [29]; Hans Tjio, Pearlie Koh and Lee Pey Woon, *Corporate Law* (Academy Publishing, 2015) ("Hans Tjio") at para 11.052. The Judge had regard to the framework in *Sakae Holdings* in concluding that it was *not* an abuse of process for Mr Ng to pursue his claims, including the overlap claims, under s 216. As we explain below from [108], with respect, we disagree.

35 The cases decided under s 216 do not support the proposition that shareholders have a general right of unilateral withdrawal from the company. In short, s 216 cannot be invoked in a "no-fault" corporate divorce situation. As such, s 216 cannot generally be used where a minority shareholder seeks to withdraw his investment for personal reasons and is not driven to do so because of the actions of his co-directors and controlling shareholders. This sort of case is different from the situation where the minority shareholder seeks relief such as a buy-out or winding up order pursuant to s 216 because of, for example, exclusion from the management of the business *contrary to* the legitimate expectations of the minority. In all cases, what is essential is a fact-sensitive analysis of whether there has been commercial unfairness. We emphasise, in this regard, that the purpose and policy behind s 216 of the Companies Act is to *grant relief from oppressive behaviour* to shareholders who would otherwise be unable to stop that abuse: see *Ng Kek Wee* at [42].

36 It is well-established that recourse to s 216 is not available where a minority shareholder simply wishes to leave and take his investment in the company with him; he is not entitled to start an action under s 216 for the purpose of enabling him to sell his shares without a discount to reflect his minority holding. However, if the minority shareholder is nonetheless able to establish some conduct on which an oppression action may be grounded, and so long as he retains his shareholding, as matter of principle, he should be entitled

to rely on s 216, which is designed for the protection of members of companies. It is in that capacity that members of companies seek its protection, not as directors or employees. At the same time, the fact that the minority shareholder seeks to withdraw from the company for reasons *other than* oppression remains a useful cross-check, given its significant probative value. It may, for example, show that the alleged oppression was not as systemic or wide-ranging, or even that the minority shareholder has brought the s 216 claim for ancillary purposes. As in all cases, the court should ask whether there is evidence of commercially unfair conduct affecting the minority shareholder's interests as a shareholder that would serve to ground an action under s 216.

Whether minority oppression can be established

Preliminary points

37 By the time of the trial in 2018, it was common ground that SMSPL should be wound up. While the primary relief sought by Mr Ng had initially been an order that Ms Tan buy his shares in SMSPL at a fair value, this shift was unsurprising since SMSPL had ceased business in April 2016. As regards Mr Ng's various claims, both on behalf of SMSPL and in his own personal capacity, as well as whether oppression had been established, these matters continued to be disputed.

38 We note at the outset that the Judge's finding of oppression was critical for at least two reasons. First, if oppression had not been established, Mr Ng would not have standing to bring claims which rightly belonged to SMSPL without recourse to some other cause of action – such as s 216A of the Companies Act.

39 Second and more fundamentally, where there is no finding of minority oppression, Mr Ng's only means of withdrawing his investment in SMSPL, short of a voluntary agreement to buy-out his shares, would have been to wind up the company. Mr Ng's decision to exit SMSPL ended the underlying purpose of their collaboration. Closing down SMSPL was a course of action which he and Ms Tan had agreed to take back in July 2015. We will now elaborate.

40 In private companies, disputes amongst shareholders are common. A disenchanted shareholder who wishes to unlock the monetary value of his shareholding has three options, as we explained in *Liew Kit Fah and others v Koh Keng Chew and others* [2020] 1 SLR 275 ("*Liew Kit Fah*") at [58]. We observed in *Liew Kit Fah* at [60] that:

> … When a minority shareholder is dissatisfied with the manner in which the company is managed by the majority, he essentially has three options: (a) accept the status quo and remain in the company; (b) invoke the articles of the company and offer to sell out; and (c) commence a minority oppression action under s 216(2) to secure a court-ordered buyout. Clearly, the third option is the most difficult to establish but it typically comes with certain benefits such as the non-application of minority discounts in order not to confer any windfall on the delinquent majority shareholder. …

41 In the present case, Mr Ng wanted to exit the company with his investment but the articles of the company did not cater for a sale of his shares to the other shareholders. As such, he took the third option and sought a buy-out or, in the alternative, a winding up order under s 216(2) of the Companies Act.

Mr Ng's announcement of his intention to leave SMSPL

42 Mr Ng's evidence was that he had, at around 1 pm on 13 July 2015, informed Ms Tan and Ms Chiu that he intended to leave SMSPL and that he

was prepared to give them three months' notice in order to ensure any outstanding matters could be attended to. Mr Ng had apparently decided to do this because he realised Ms Tan had no genuine intention to leave SMSPL, because differences in their working styles had resulted in a "rift" between them, and because he wanted more time for his personal commitments (see [6] above). No decision was reached then and the issue of Mr Ng's departure was revisited that evening. According to Mr Ng, he again informed Ms Tan that he wanted to leave SMSPL, and also that he wanted to sell his shares back to the company or the other shareholders. Ms Tan was allegedly outraged that Mr Ng wanted to "wash [his] hands of the partnership"; she responded by saying that she would never purchase Mr Ng's shares, and that they were worth nothing as she was able to make them "worth only 20 cents". Ms Tan disputed this account and stated in her Affidavit of Evidence-in-Chief ("AEIC") that there was no discussion of any intention to sell SMSPL's shares, and the agreement had instead been to wind up the company. However, what is material for present purposes is that it appears that on his own case, Mr Ng had preferred a buy-out order, at least initially. This is corroborated by the fact that in his pleadings, Mr Ng sought a buy-out order, or, *in the alternative*, an order that SMSPL be wound up. Mr Ng's counsel had also said in his opening statement that the "ultimate question" was the value of Mr Ng's shares.

43 While the minority in a small private company might be more susceptible to exploitative conduct by the majority because there are no obvious legal remedies spelt out in the memorandum and articles of association and the shares may be difficult to dispose of (see *Over & Over* ([29] *supra*) at [83]), it is evident that this alone would not suffice for a s 216 action. In the present case, as stated, Mr Ng had *no* means of exiting the company under its articles of association. While he might have been able to sell his shares to a third party,

Article 20 of SMSPL's Articles of Association imposes a restriction on such transfers. Article 20 states that "no transfer of shares is to be made except to a person approved by the directors of the company." Any attempt to sell his shares would therefore have been subject to the directors' approval. Even so, s 216 is not satisfied merely or primarily because a minority shareholder wishes, for his own personal reasons, to leave the company but has no other means to do so. The lynchpin of a s 216 claim is still a finding of oppression.

44 It is therefore vital for us to consider whether the wrongs alleged by Mr Ng provide a sufficient basis (both legal and factual) on which to find minority oppression. Put another way, having regard to Mr Ng's unilateral withdrawal from the company, Mr Ng as a minority shareholder must show *something more* than the unlawfulness of Ms Tan's conduct in the conduct of the corporate affairs of SMSPL. Mr Ng must also show that there has been injury to his interests as a shareholder which does not merely reflect that suffered by the company, SMSPL.

Pre-13 July 2015 conduct

45 We begin by examining the Oral Agreement as explained at [11] above. The alleged breaches of the Oral Agreement are a central aspect of the alleged wrongs that form the basis of the oppression claim at the heart of Suit 867. Bearing in mind the principle that a member of a company will not ordinarily be entitled to complain of oppression unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted, as we mentioned at [33] above, the Oral Agreement, if established, would be a critical yardstick against which commercial unfairness could be measured. Indeed, all of the overlap claims, other than the Gratuity Payments, turn on

whether there was an Oral Agreement at all and which version of the Oral Agreement is to be accepted.

46 Unfortunately, there is no direct documentary evidence of the Oral Agreement. As we will see, the lack of reliable documentary evidence is a problem that bedevils these proceedings. As such, resort has been had to two kinds of considerations in determining the true Oral Agreement. First, there are arguments about the likelihood or truthfulness of Mr Ng or Ms Tan's Versions as a whole – for example, which version makes more commercial sense. Second, there are the specific transfers made to SMSPL. The question is whether each set of transfers is more consistent with Mr Ng's Version or Ms Tan's Version. On the other hand, a decision on the true Oral Agreement would also in turn colour the analysis of the individual sets of transfers, since those transfers would have been made in the light of the true Oral Agreement. We bear this interconnectedness in mind when analysing the Oral Agreement.

47 The parties do not offer any third possibility – on their cases, it is either Mr Ng's Version or Ms Tan's Version that governs the business relationship between the parties. However, given the considerable difficulties with the evidence in the present case, and despite the Judge's conclusion, we ultimately find it impossible to exclude the possibility that the truth is neither that presented by Mr Ng nor by Ms Tan. We return to this issue at [93]–[97] below.

The consistency of Mr Ng's case

48 We start with a point which SDPL complains was not addressed by the Judge. SDPL submits that Mr Ng's case underwent two significant and unexplained shifts: first, there was a shift from his pleaded case, that the Oral Agreement envisaged the transfer of *all* receivables, to his case at trial, that it

entailed the transfer of *net* receivables (which is the version of the Oral Agreement we have termed "Mr Ng's Version": see [12] above) ("the first shift"); second, while Mr Ng's pleaded case was that *all* post-incorporation invoices constituted receivables transferrable under the Oral Agreement, during the trial Mr Ng arbitrarily withdrew from the ambit of his action those SDPL invoices that were paid *shortly after* SMSPL's incorporation (on 20 February 2012) on the basis that such invoices were likely for work done pre-incorporation ("the second shift"). SDPL's submission is that these shifts undermined the credibility of Mr Ng's Version.

49 Mr Ng submits that the first shift did not take place; his case all along entailed a transfer of net receivables. In our view, this is simply an implausible reading of Mr Ng's pleadings, which asserted that the Oral Agreement envisaged that:

> *All receivables* collected by [SDPL] and MOX pursuant to invoices dated on or after the date of incorporation of [SMSPL] were to be transferred to [SMSPL]. [emphasis added]

Mr Ng also brought claims against SDPL for furniture, fitting and equipment ("FF&E") expenses incurred by SMSPL on SDPL's behalf. These claims were enumerated in his Statement of Claim at Annexes E, H1 and H2. The Statement of Claim therefore implied that SDPL should have borne its own FF&E expenses even while transferring all its receivables to SMSPL. This was clearly an unsustainable arrangement from SDPL's perspective, since it would be left with no revenue with which to fund its expenses, and would eventually become insolvent. Mr Ng's Version in its eventual form, entailing the transfer of *net* receivables, only emerged on the first day of trial, during his cross-examination. Further, it was only on the 15th day of trial that Mr Tan confirmed that Annex E was simply Mr Ng's "alternative case" in case he did not succeed on the Oral

Agreement. That there was a shift in Mr Ng's case in relation to the Oral Agreement from his pleadings to the trial cannot be denied. This goes to the credibility and hence veracity of Mr Ng's Version.

50 Mr Ng's explanation for this apparent shift was evidently that after SMSPL's incorporation, it "paid for everything" and the costs borne by MOX and SDPL would be "very small", and mainly entailed consultants' fees or other similar fees. The implication was that there was little distinction between the transfer of all receivables or net receivables as far as Mr Ng saw it. Against this, SDPL contended that *it* incurred considerable costs of its own even after SMSPL's incorporation. However, whilst SDPL has not shown that Mr Ng would have known this, and its situation therefore did not necessarily cast doubt on Mr Ng's explanation, there was still no good reason for Mr Ng to have inaccurately pleaded that the Oral Agreement involved the transfer of all receivables if it in fact involved the transfer of net receivables. The difference in monetary terms between transfers of *all* receivables and *net* receivables is significant bearing in mind that the volumes and values of SDPL's projects far exceeded those of MOX's projects (see [54] below). That Mr Ng saw little distinction between the transfer of all receivables or net receivables is an unsatisfactory explanation.

51 There is another nuance to the framing of Mr Ng's pleaded case. His Statement of Claim asserts that the Oral Agreement was "[e]ssentially" to "*combine* both companies, namely MOX and [SDPL], *into one*, i.e. [SMSPL]" [emphasis added]. Although Ms Tan and SDPL deny that there was any plan to merge the businesses, former SMSPL employees Mr Cabigas Joseph Francis Perez and Mr Seah gave evidence that no practical distinction was drawn between MOX, SDPL and SMSPL after the latter's incorporation. This evidence was not challenged in cross-examination. In fact, when Mr Seah

tendered his letter of resignation, long before any dispute had broken out, he made reference to "the merger" of MOX and SDPL. The practical treatment of MOX, SDPL and SMSPL as a combined business is potentially significant because, as Mr Owen Hawkes, Mr Ng's accounting expert, suggested, it was possible that the parties paid attention only to the revenue aspect of their business arrangements, without giving much thought to the expenses. It was inevitable that the expenses of such a business would have to be settled on the basis of some informal understanding or *ad hoc* arrangement, or MOX and SDPL would become insolvent. On the other hand, there is some force in the argument advanced by counsel for SDPL, Mr William Ong ("Mr Ong"), that SDPL has other shareholders whose interests have to be borne in mind when evaluating the veracity of Mr Ng's Version. Indeed, Ms Tan's shareholding in SDPL is only 30%, with the remaining shares held by Ms Tan's son, sister, and brother-in-law. Mr Ong's contention is part and parcel of the argument that Mr Ng's Version made no commercial sense.

52 Although we accept SDPL's contention that the first shift did take place, that alone does not conclusively debunk Mr Ng's Version, though it casts some doubt on its credibility.

53 As for the alleged second shift, the Judge gave this complaint short shrift during the trial. The Judge said that it was Mr Ng's prerogative to maintain his pleaded case while also withdrawing certain claims which were close to the date of SMSPL's incorporation. Further, the Judge accepted Mr Ng's explanation that there had been no conscious consideration of how such borderline invoices would be treated (see the Judgment at [26]). Thus, the second shift was not a real change in Mr Ng's case. Nevertheless, we find some force in SDPL's argument that such a strict and potentially arbitrary line based on the date of the

invoice makes Mr Ng's Version inherently less plausible. We go on to discuss this issue of plausibility next.

The plausibility of the two versions

54 We first consider the plausibility of Mr Ng's Version. SDPL strenuously contended that Mr Ng's Version made no commercial sense for Ms Tan. The evidence was that over a period of about six months in 2012, SDPL had revenues of about $2.82m, while over a similar period of about eight months in 2012, MOX had revenues of about $451,000. SDPL argued that such a large disparity in MOX and SDPL's revenues made it implausible that Ms Tan would have agreed to share these revenues in the proportion of the parties' shareholdings in SMSPL. That Mr Ng's Version lacked commercial sense is also borne out by the fact that no due diligence on the finances of MOX or SDPL was done prior to incorporation.

55 SDPL's submission in relation to the alleged second shift in Mr Ng's case is related to this point. As SDPL's counsel submitted at the hearing before us, Mr Ng's Version generates unfairness because an invoice could be issued post-incorporation even though almost all the work could have been done pre-incorporation. This would disadvantage Ms Tan and SDPL, given the much larger amount of revenue SDPL was generating. We agree that this unduly advantaged Mr Ng.

56 Although the Judge found that Ms Tan knew "that SDPL's unbilled fees exceeded MOX's" (the Judgment at [72]), this hardly speaks to the magnitude of the difference between the degrees of success of the two companies. Ms Tan's own evidence was that prior to SMSPL's incorporation, all that she knew was that Mr Ng had told her MOX's annual revenue ranged between $550,000 and

$750,000, against overheads of about $420,000 to $456,000. These relatively broad estimates, in the absence of supporting documentation, did not paint a clear picture of MOX's likely prospects or profitability. As such, accepting Mr Ng's Version would mean that Ms Tan agreed to give up a significant proportion of SDPL's future income without knowing how much income from MOX she would have the benefit of in return.

57 On the other hand, the Judge was of the view that Ms Tan would be willing to agree to Mr Ng's Version because she "was planning her retirement and intended that [Mr Ng] would take over the running of SMSPL and preserve the 'Suying' name" (the Judgment at [71]). Ms Tan's evidence was also that she hoped to "enjoy future passive income" from SMSPL even after she retired. Mr Ng further submitted that Ms Tan went into business with him in the hopes of starting an interior design practice that could hold itself out as having architectural expertise or as having the services of an architect. For the purposes of an article in "Cubes" magazine which described SMSPL as "blur[ring] the boundaries between architecture and interior design", Ms Tan had sent an email in which she said that SDPL and MOX did complementary work, and they therefore agreed without any hesitation to a collaboration. We accept that these were amongst the reasons for Ms Tan's decision to start SMSPL with Mr Ng. But these attractions alone are not sufficient. The likely magnitude of the monetary benefit to Mr Ng arising from the transfer of post-incorporation invoiced receivables compared to that to Ms Tan, and the lack of due diligence, give us pause.

58 Ms Tan's Version of the Oral Agreement, which we turn to next, is equally not without significant difficulties.

59 In finding against Ms Tan's Version, the Judge placed significant weight on the fact that SMSPL did not track the use of its manpower by SDPL and MOX (see the Judgment at [27]–[30]). SDPL submits that this was because the parties operated on an "honour system" for reimbursements. Her evidence is that SDPL made "project-linked loans" to SMSPL consisting of the entirety of the receivables earned under certain invoices for SDPL projects which used SMSPL's resources; the reimbursements for the use of these resources would be effected by a deduction of the relevant sums when these loans were repaid to SDPL (see the Judgment at [58]). If this were true, the serious difficulty with this testimony is that Ms Tan actively *delayed* the process of making these reimbursements. According to Ms Tan, after Mr Ng's resignation, she caused SMSPL to repay the loans given by SDPL via the Debit Notes, but only after deducting $230,000 to account for SDPL's use of SMSPL's manpower (see the Judgment at [89], [91]). The Judge assessed Ms Tan's best efforts at estimating the amount owed to SMSPL for use of its manpower as having "bordered on being arbitrary" (the Judgment at [30]). In short, Ms Tan could not abide by her version of the Oral Agreement even if she wanted to, because she delayed the making of reimbursements for years even while keeping no records that could shed light on how much these reimbursements ought to be. Ms Tan's difficulty lies in the absence of proper records to effect accurate reimbursements. Indeed, it has not been suggested that there existed any proper formula by which such reimbursements were to be made to SMSPL. This implies either that the parties never discussed the issue of reimbursements, or that they were prepared to accept an arbitrary approach.

60 Further, Mr Ng estimated that SMSPL's non-manpower overheads accounted for between 40% and 60% of all its expenses. Ms Tan appeared to accept as much in cross-examination. However, Ms Tan's case is that

reimbursements were made only for use of SMSPL's manpower (see the Judgment at [31]). As Mr Ng submits, it is unclear why the parties would have agreed to reimburse SMSPL for the use of its resources, and yet omit to take into account approximately half of these resources, by failing to include the use of non-manpower resources in the Oral Agreement. However, this is the effect of Ms Tan's Version.

61 In our judgment, there are gaps in either party's case. Considerations of plausibility therefore cannot determine which version of the Oral Agreement is true.

Other considerations

62 We now turn to address the other factors pertaining to the Oral Agreement as a whole. First, after Mr Ng resigned, Ms Tan sent him what the Judge described as a "confrontational email" on 8 August 2015 (see the Judgment at [73]). This lengthy email started with a description of the agreement between SMSPL's shareholders as to its paid-up capital and their expectations on the turnover Mr Ng was to bring into the company, and ended with a section titled "Company Accounts", which stated, *inter alia*, that SDPL had provided SMSPL with approximately $800,000 to $1,000,000 in loans to date, which had now been repaid. The Judge placed weight on Ms Tan's failure to refer to her version of the Oral Agreement and the reimbursements for the use of SMSPL's resources thereunder in this email (the Judgment at [74]). In our judgment, these omissions are not probative of the veracity of Ms Ng's Version. This email is stated to be Ms Tan's response to Mr Ng's email dated 28 July 2015, in which Mr Ng raised the issue of handover arrangements and sought SMSPL's accounts. Moreover, as we have observed at [12] above, up to that point Mr Ng had not specifically raised the Oral Agreement or any issue

arising therefrom. Thus, there was nothing that compelled Ms Tan to set out her version of the Oral Agreement in her 8 August 2015 reply.

63 As for the purported $800,000 to $1,000,000 in loans, we observe that the amount Ms Tan withdrew by way of the Debit Notes shortly before sending this email was more than $1.6m (see [8] above). Ms Tan's email therefore appears to significantly understate the amount of the loans compared to her case at the trial, which was that the Debit Notes constituted repayments of loans. We will return to this point starting from [66] below.

64 Second, SDPL submits that the Judge failed to consider Mr Ng's proposal to Ms Tan for her to buy 40% of MOX's shares for $240,000 after SMSPL's incorporation. SDPL argues that if Mr Ng's Version were true, and MOX had to transfer all its receivables to SMSPL post-incorporation, its shares would have no value, and there would be no reason for Mr Ng to make this proposal. Mr Ng, on the other hand, submits, rhetorically in our view, that this proposal was part of a larger plan for a share swap between himself and Ms Tan, which was meant to be a symbolic transaction reflecting the merger of SDPL and SMSPL. We do not find Mr Ng's share proposal to be of much help to either party, not least because the stance seems to us to be purely argumentative rather than constituting objective evidence in support of either version. Ultimately, no sale or swap of the shares took place.

65 Third, SDPL submits that Ms Tan's Version should be preferred because it was corroborated by Ms Chiu and Mr Lim, who were the only other persons who would have been present when the Oral Agreement was reached. On the other hand, the only witness to corroborate Mr Ng's Version was Mr Seah, a former associate of Mr Ng who had no first-hand knowledge of the Oral Agreement. Ultimately, the Judge placed very little weight on the credibility of

the witnesses. Instead, all he said was that the conflicting evidence of all the witnesses, including Mr Ng and Ms Tan, had to be considered against the totality of the evidence (the Judgment at [75]). We do not see any reason to place greater reliance on the conflicting oral testimony of those witnesses than the Judge did, especially considering that he had the benefit of seeing the witnesses testify. Instead, we turn to the specific transfers between MOX and SDPL on the one hand and SMSPL on the other, and consider whether the circumstances of each transfer support either version of the Oral Agreement.

The transfers to SMSPL

66 The parties each argue that the transfers to SMSPL were made for purposes consistent with their version of the Oral Agreement. We summarise the transfers, which we have set out at [19(d)] above, in the following table:

	From	**Date**	**Mr Ng's Case**	**Ms Tan's Case**	**Judge's Finding**
The $203k	SDPL	Feb – Mar 2012	*Undisputed to be a loan*		
The $600k	SDPL	Aug – Sep 2012	Receivable	Loan	*Loan*
The $100k	MOX	Oct 2012	Receivable	Reimburse-ment	*Unable to determine*
The $162k	Ode to Art	Feb 2013	Receivable	Loan	*Loan*
The $719k	SDPL	Jul 2013 – Dec 2014	Receivable	Loan	*Receivable*
The $148k	MOX	Aug 2013 – Jul 2014	Receivable	Reimburse-ment	*Receivable*

(1) The $203k

67 The $203k, which was undisputedly in the nature of advances made because SMSPL had no bank account at the time, illustrates a central point in the present case. To obtain repayment of these advances, SDPL issued two invoices to SMSPL both for "Administrative Fee[s]", even though that was not what they were. These invoices included GST, even though GST need not be paid on such transactions. This shows the poor grasp SMSPL and SDPL's staff had of their accounts, and their adoption of incorrect practices and inaccurate documentation surrounding transfers of money. As the Judge found, SMSPL's accounts "were in a state of mess" (the Judgment at [50]), and its bookkeeper was "somewhat muddleheaded" (the Judgment at [182]). SDPL also had the same bookkeeper. The fact that the documentary evidence is so unsatisfactory and unreliable in the present case poses a significant problem in establishing the truth behind the numerous disputed facts.

(2) The $600k

68 These were sums of $176,000 and $424,000 transferred from SDPL to SMSPL in August and September 2012 respectively, which the Judge found to be loans (see the Judgment at [45]–[55]). Mr Ng contends, however, that these were transfers of receivables.

69 In our view, the most compelling piece of evidence in support of these sums being loans is the WhatsApp messages between Mr Ng and Ms Tan before 13 July 2015. It is common ground that there was a meeting on 8 June 2015 at which Mr Ng and Ms Tan had discussed the issue of loans from SDPL to SMSPL, and that the outstanding loans were estimated at $800,000. According to Ms Tan, this referred to the outstanding loans from 2012 only. On 1 July 2015, Ms Tan sent a WhatsApp message to Mr Ng and Ms Martinez stating the

"[g]ood news" that the relevant amount owed was only about $600,000. To this, Mr Ng replied "[t]hank you so much" (see the Judgment at [53]). Mr Ng's only explanation of this message is that it was an expression of gratitude to Ms Tan for taking the time to check, and not an acknowledgement of the loans. Like the Judge, we find his explanation unpersuasive. Since Mr Ng's position all along has been that SMSPL had never needed loans, there is no reason for Mr Ng to have simply accepted the figure of $600,000 without protest. This strongly indicates that Mr Ng accepted that SMSPL took such loans from SDPL.

70 We are also unable to agree with Mr Ng's submission that Ms Tan had no basis to think that SMSPL was short of funds and required the $600k in loans. According to Ms Tan, she paid close attention to SMSPL's cash flow (see [80] below); in August and September 2012, when the $600k was transferred, SMSPL's net cash flow had been significantly negative for every single preceding month since its incorporation. It would therefore have been obvious to Ms Tan that SMSPL needed funds. Indeed, Mr Ng himself accepted that Ms Tan had told him in August 2012 that SMSPL's bank balance was low (see the Judgment at [54]).

71 The conclusion that the $600k were loans is further supported by SDPL's list of expenses for August and September 2012, which recorded the $600k as "payout[s] to Suying Metropolitan *to cover expenses*" [emphasis added] (see the Judgment at [51]). This is language clearly suggestive of the payments being loans. The Judge also relied on a number of handwritten notes to the same effect (see the Judgment at [49] and [51]). Mr Ng contends that these were fabrications. We do not think any reliance needs to be placed on these handwritten notes, given the other evidence we have outlined above. We therefore uphold the Judge's findings that the $600k were loans from SDPL to SMSPL.

(3) The $100k

72 This is a single transfer from MOX to SMSPL in October 2012 pursuant to an SMSPL invoice describing the amount as a "Design Consultancy Fee". The Judge was unable to determine the purpose of this transfer (see the Judgment at [36]). Mr Ng contends that this $100k was a transfer of receivables, while Ms Tan contends that it was a reimbursement for the use of SMSPL's resources, in the form of MOX's former employees who were on SMSPL's payroll, but were still working on MOX projects.

73 In our view, the evidence clearly points towards the $100k being a reimbursement from MOX to SMSPL. This is shown, first of all, by an email from Twopoint, MOX's bookkeeper, to Mr Ng on 21 August 2012. The email stated that Twopoint would advise Mr Ng "on the amount owing to [SMSPL] for expenses (i.e. salaries) paid on behalf". The only reasonable reading of this sentence is that Twopoint believed that MOX owed SMSPL money for salaries SMSPL paid on MOX's behalf. If this impression was wrong, Mr Ng did not correct it.

74 We also accept the explanation given by SDPL's counsel of the treatment of the $100k in MOX's accounts. It is clear to us from MOX's general ledger that the $100k was paid in satisfaction of debts recorded in the general ledger as being owed to SMSPL for various *salaries* in 2012, totalling $104,535.11. After the payment of the $100k, the remaining balance of $4,535.11 was transferred to Mr Ng's director's account in the general ledger. In the absence of any credible explanation, these records reflect that the $100k was a reimbursement to SMSPL for salaries paid by SMSPL. Although Mr Ng was in sole control of MOX's accounts, Mr Tan conceded that Mr Ng had no explanation for these records.

75 On the other hand, the only positive evidence that this $100k could have been a transfer of receivables is the fact that on SMSPL's list of incoming funds, this transfer was linked to the names of two of MOX's pre-incorporation projects (see the Judgment at [33]). However, Mr Ng concedes that the sum of $100k did not correspond to any fees received on the invoices for these projects, nor was there any other evidence linking the $100k to these projects. In the circumstances, the weight of the evidence shows that the $100k was a reimbursement from MOX to SMSPL for salaries paid by SMSPL for MOX's former employees who had moved over to SMSPL. The one-off nature of this transfer accords with Ms Tan's case that it was made only because she had complained to Mr Ng that "most, if not all" of these employees' time was spent on MOX projects alone. We therefore overturn the Judge's finding on the $100k, and find that it was a reimbursement from MOX to SMSPL.

(4) The $162k

76 This is a transfer of $162,193.93 from Ode to Art (the business run by Ms Chong, Mr Ng's wife) to SMSPL in February 2013, which the Judge found to be a loan from SDPL to SMSPL (see the Judgment at [70]).

77 This amount reflected, in Singapore dollars, a sum SDPL's branch in Shanghai ("SD (Shanghai)") had paid in Chinese yuan to various artists in China on Ode to Art's behalf (see the Judgment at [68]). The Judge accepted Ms Tan's account that she had arranged for Ode to Art to repay this sum in Singapore dollars to SMSPL instead, because SMSPL was in need of funds (see the Judgment at [69]). Mr Ng contends, on the other hand, that this sum was paid to SMSPL as a means of effecting the payment of receivables collected by SD (Shanghai) pursuant to his version of the Oral Agreement. We agree with the Judge that Mr Ng has failed to discharge his burden of proof, as he is ultimately

unable to draw any link between income from specific SD (Shanghai) projects and this $162k. In the absence of any proof to the contrary, the natural inference to draw when Ode to Art made repayment to *SMSPL* for a loan which Ode to Art owed to *SDPL* was that this transfer amounted to a loan from SDPL to SMSPL. We therefore affirm the Judge's finding that the $162k was effectively a loan from SDPL to SMSPL.

(5) The $719k

78 These are sums totalling $719,652.02 which SDPL transferred SMSPL in April, July and September 2013 and December 2014 (see the Judgment at [56]–[57]). They were paid pursuant to ten invoices relating to a number of SDPL's pre-incorporation projects, which described the sums as "consultancy fee[s]". The Judge found the $719k to be transfers of receivables from SDPL to SMSPL pursuant to Mr Ng's Version (see the Judgment at [67]).

79 SDPL contends, however, that the $719k were "project-linked loans". According to Ms Tan, these loans were made in order to ensure that SMSPL maintained a cash buffer of three times its monthly operational expenses, as well as any additional cash needed to fund FF&E purchases for its projects (see the Judgment at [58]). As alluded to at [59] above, the "project-linked loans" were transfers of the entirety of the receivables earned under certain invoices.

80 We begin with Ms Tan's explanation that she maintained a cash buffer for SMSPL. Such a suggestion is plausible since a cash buffer is intended to take care of cash flow problems and emergency expenses, and is a part and parcel of good business management. However, Ms Tan's evidence on her implementation of this cash buffer raises some doubts as to whether the practice of a cash buffer existed in SMSPL or, if it did, whether it was arbitrary. In her

AEIC, Ms Tan stated that she maintained the cash buffer by deducting cash set aside for FF&E expenses from SMSPL's bank balance. This was no longer Ms Tan's position when she took the stand at the trial: she then claimed that she never looked at SMSPL's bank statements or its general ledger; instead, she only managed its cash buffer by looking at its incoming cheque listing and its list of expenses. Ms Tan's accounts in her AEIC and at trial are clearly contradictory. On appeal, SDPL has adopted Ms Tan's account at trial. These variations undermine Ms Tan's claim to having maintained a cash buffer.

81 It was Ms Tan's case at the trial and SDPL's case on appeal that the transfers of the $719k occurred on the basis of Ms Tan's assessment of *when* SMSPL was short of cash. However, the Judge observed that these transfers were made on a "back-to-back" basis – *ie*, their timing was determined by when SDPL received payment on the relevant invoices (see the Judgment at [62]). This naturally pointed towards them being a simple transfer of receivables; if they were in fact "project-linked loans" made pursuant to close attention to SMSPL's cash buffer, this would require there to be an interesting coincidence between SMSPL's need for funds and SDPL receiving payment on invoices.

82 On the other hand, we note that SMSPL's financial records suggested that it had a negative cash flow in the majority of the months for which it was in operation, if the transfers from SDPL and MOX are excluded. This suggests that it was not implausible for someone monitoring SMSPL's cash flow to come to the conclusion that SMSPL needed cash most of the time. Elsewhere in Ms Tan's AEIC, she also suggested that the transfers of the $719k were made so as to be *punctual* in paying SMSPL what it was due (*ie*, the reimbursements for the use of its resources); these "project-linked loans", according to this evidence from Ms Tan, were a way of complying with her version of the Oral Agreement *and* maintaining SMSPL's cash buffer at the same time. This would go some

way towards explaining the timing of these "project-linked loans". However, this was again a slightly different account from the cash buffer as initially described in the very same AEIC (see [80] above), since Ms Tan now seemed to be suggesting that "project-linked loans" were not transferred *in response to* the fluctuations in the cash buffer, but merely in view of the general need to maintain SMSPL's cash flow.

83 The waters are further muddied by the evidence of Ms Tan's accounting expert, Mr Abdul Gafoor ("Mr Gafoor"). Mr Gafoor had assumed in his analysis that SMSPL operated on a three-month cash buffer *and* a two-month buffer for FF&E expenses. As the Judge pointed out (see the Judgment at [63]), it is not clear where the two-month FF&E buffer came from. Although Ms Tan made reference to the need to set cash aside for FF&E expenses in her evidence, she did not state that she worked on the basis of a two-month FF&E buffer. There was therefore a mismatch between the basis on which Mr Gafoor analysed whether SMSPL had sufficient cash or needed loans, and what Ms Tan would actually have had in mind when undertaking this exercise based on her own evidence. This limited the helpfulness of Mr Gafoor's analysis. Instead, it became yet another variation of Ms Tan's purported cash buffer, on top of the slightly different accounts given by Ms Tan at various points in her affidavit evidence and at the trial.

84 The Judge further found that there were various other sources of funding for SMSPL, which Ms Tan could easily have tapped on instead of making loans to SMSPL (see the Judgment at [64]–[65]). With respect, we consider the availability of these other sources of funding to have been overstated.

(a) First, we disagree with the Judge that SMSPL had a ready source of funding available from the amounts due to it from SD (Shanghai). Ms

Tan's evidence was that the balance of funds in SD (Shanghai)'s account might be needed for SD (Shanghai)'s future expenses. This would have provided a valid reason for SD (Shanghai) not to remit them to SMSPL.

(b) Second, the Judge relied upon the availability of $1,066,087.13 collected by SDPL in its capacity as "contract administrator" for SMSPL's projects. However, nothing near this sum would have been available at the material times. Instead, the vast majority of this approximately $1.07m was collected by SDPL only *after* most of the $719k had been transferred to SMSPL. On the other hand, even if only a much smaller sum had been collected by SDPL at the material times when Ms Tan made "project-linked loans" to SMSPL, the question nevertheless arises as to why Ms Tan did not transfer that smaller sum to SMSPL instead. As Ms Tan herself points out, $61,632 had been received by SDPL in its capacity as contract administrator in August 2013. This was just before SDPL made a purported "project-linked loan" of $49,980 to SMSPL in September 2013. Ms Tan conceded that she could not explain why a supposed loan of $49,980 was made to SMSPL instead of simply transferring SMSPL the $61,632 in SDPL's possession at the time that rightfully belonged to SMSPL.

(c) Third, we do not agree with the Judge that SMSPL had no cash flow difficulties at the time of the transfers of the $719k simply because it had made certain other payments: in particular, the Judge relied on the fact that SMSPL had paid $154,707.65 towards SDPL's income tax in November 2013 and $14,800.02 towards SDPL's GST liabilities in January 2014, and loaned Ms Tan $70,433.55 towards a purchase of property in May 2013 (see the Judgment at [66]). SMSPL's income tax and GST payments were not strong pieces of evidence, since none of the

> transfers within the $719k were made close to the time of these payments. They do not therefore suggest that there was no need for the "project-linked loans" at the time they were actually made. As for the loan to Ms Tan, she explained that she was out of cheques at the time and repaid the loan just over a week later, once she received a new chequebook. This is likewise not a significant piece of evidence to show that SMSPL did not require the $719k to aid its cash flow.

85 We turn to SDPL's submission that the $719k could not have been transfers of receivables because they amounted to the gross receivables received, without deducting SDPL's expenses. This can be illustrated with reference to two of the transfers amongst the $719k: a total of $170,130 transferred to SMSPL in July 2013 in relation to SDPL's Riversails project (see the Judgment at [56]). This represented the entire sums received by SDPL under two of the invoices for the Riversails project. SDPL points out that it bore FF&E expenses of at least $570,000 for the Riversails project, out of a total contract value of $1.03m. The transfer of the $170,130, being gross receivables, therefore did not conform to Mr Ng's Version, which was for the transfer of net receivables. However, this is again an inconclusive piece of evidence. Since the rest of the receivables for the Riversails project were evidently never transferred to SMSPL, it is impossible to say whether this transfer of $170,130 was a back-to-back "project-linked loan" as Ms Tan contends, or partial compliance with Mr Ng's Version, taking into account the fact that other receivables from the project had not been transferred.

86 Finally, we return to our observation at [62]–[63] above that in Ms Tan's email sent to Mr Ng on 8 August 2015, she stated that SDPL's "unwavering support" to SMSPL in the form of loans "to date amounted to approximately between S$800,000.00 to S$1,000,000.00", but that these loans had now been

repaid. This is a surprising assertion, considering that the Debit Notes had just been issued on 29 July 2015 for an amount of $1,642,510.99 – reflecting a total payment of $1,535,057 plus GST. According to Ms Tan, the entirety of this payment constituted the repayment of loans, although she later discovered that $243,212 had been included by mistake (see the Judgment at [91] and [97]). If this were true, it is not clear why she would send an email a week later asserting that SDPL had only loaned SMSPL between $800,000 and $1,000,000 *in all*. The $600k, which we have found to be loans (see [71] above), would already account for the majority of this sum. The Debit Notes further reflect the repayment of the $162k, which we have found to be effectively a loan from SDPL to SMSPL (see [77] above). Beyond the Debit Notes, there were also the undisputed loans of $203k, which had been repaid much earlier (see [67] above). In short, Ms Tan's email strongly suggests that the balance of the Debit Notes, including the majority or entirety of the $719k, did not reflect loans, and were not loan repayments.

87 Given our analysis of Ms Tan's email and our other observations above as to the difficulties with Ms Tan's evidence on the cash buffer, we do not think the $719k were loans. However, this does not mean that they were transfers of receivables. As is evident from the foregoing analyses, the evidence surrounding the $719k is a microcosm of the extensive difficulties in determining the true state of facts in the present case. Ultimately, we do not find any conclusive evidence arising from the circumstances surrounding the transfers of the $719k to determine the true purpose for which they were made. We therefore defer our decision as to the correctness of the Judge's finding that the $719k were transfers of receivables until our final analysis on the Oral Agreement. As we alluded to at [46] above, the transfer would take on a different colour depending on our finding on the Oral Agreement.

(6) The $148k

88 This comprises four transfers from MOX to SMSPL: $16,250 and $81,250 in 2013, and $21,000 and $30,000 in 2014. Each of these transfers was linked through documentation, such as invoices, to specific pre-incorporation MOX projects (see the Judgment at [37]). The Judge found these to be transfers of receivables (see the Judgment at [41]).

89 SDPL contends that the $148k mostly comprised "lump sum" reimbursements (see the Judgment at [40]). In respect of the $16,250, $21,000 and $30,000, the sum total of SDPL's arguments is that Mr Ng "must have" paid these sums as reimbursements for use of SMSPL's resources, because Ms Tan would have known about the use of SMSPL's manpower on these projects. As for the $81,250, SDPL's submission is that this comprised reimbursements by MOX to SMSPL for the fees of two contractors SMSPL had engaged on MOX's behalf for the project in question. According to SMSPL, it incurred fees of $50,111.99 for these two contractors. SDPL asserted that the difference of $31,138.01 amounted to miscellaneous reimbursements for the use of SMSPL's resources. Although SDPL's case in relation to the $148k is certainly not implausible, the evidence adduced in support of it is, with respect, little more than bare conjecture.

90 Mr Ng's case in relation to the $148k was also mainly founded upon his own assertions. Mr Ng claimed that these sums were transfers of receivables, and it was simply owing to a mistake that MOX's remaining receivables were not transferred to SMSPL (see the Judgment at [39]). The person said to be responsible for this alleged mistake was Ms Barkath Nisha Mohamed Ibrahim ("Ms Nisha"), an SMSPL employee. Ms Nisha, on the other hand, denied having received any standing instructions to transfer MOX's receivables to

SMSPL. On Mr Ng's own case, however, the total amount of receivables that should have been transferred from MOX to SMSPL from 2012 to 2015 was some $615,157.72.[2] Of this sum, Mr Ng claimed to have actually transferred $248,500, comprising the $100k and the $148k. However, we have already found the $100k not to be a transfer of receivables but instead a reimbursement (see [75] above). Therefore, Mr Ng's compliance with his version of the Oral Agreement throughout its existence involved, at most, the transfer of the $148k. This means that even if we accept Mr Ng's case on the $148k, MOX effected the transfer of less than 25% of the total amount due to SMSPL between 2012 and 2015 as receivables. It would be surprising if the directors of SMSPL, including Ms Tan and Mr Ng himself, simply allowed this state of affairs to persist from 2012 to 2015. We therefore do not readily accept Mr Ng's claim that the isolated transfers of the $148k represented a mistaken failure to comply with his version of the Oral Agreement. In any event, this low level of compliance further undermines Mr Ng's Version of the Oral Agreement.

91 In our judgment, the evidence specific to the $148k cannot satisfactorily establish whether it was a transfer of receivables or a reimbursement for the use of SMSPL's resources. We again defer our decision as to the correctness of the Judge's finding that the $148k were transfers of receivables until our final determination on the Oral Agreement.

Our findings on the Oral Agreement

92 In summary, our conclusions on the evidence are as follows:

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2 JRA III:5:86–89 (Mr Tan's AEIC at paras 213–222 – reflecting $366,657.72 of untransferred receivables, compared with $248,500 of transferred receivables (see JRA III:5:197)).

(a) Mr Ng's pleaded case was not entirely consistent with his case at trial, and this tended to undermine the credibility and hence veracity of his version of the Oral Agreement (see [52] above).

(b) Mr Ng's Version makes little commercial sense for Ms Tan. However, it is not entirely implausible that she had reasons for allowing Mr Ng some degree of the advantages entailed by his version (see [54]–[57] above).

(c) Ms Tan's Version is commercially sensible, but her actions seem to be at odds with what was necessary if she were actually trying to implement her version (see [59]–[60] above).

(d) The $600k and the $162k were loans from SDPL to SMSPL (see [68]–[71], [76]–[77] above).

(e) The $100k was a reimbursement from MOX to SMSPL (see [72]–[75] above). We therefore disagree with the Judge's assessment of the $100k.

(f) Looking at the evidence and the parties' submissions in relation to the $148k and the $719k in isolation, we do not reach any definitive conclusion as to their purpose (see [78]–[91] above). We can only conclude that it is *unlikely* that the $719k were loans. Any further conclusion on the precise nature of the $148k and the $719k would have to rest on our overall determination of what Oral Agreement, if any, existed. We turn to this next.

93 It is clear to us that the evidence is more often than not sparse, contradictory, and unhelpful. Even the accounts and accompanying financial

documentation, which would usually be the first port of call in such a dispute, cannot be relied upon: see [67] above. Although we have found in favour of Ms Tan's case on the $162k, the $600k and the $100k, these findings do not strongly support Ms Tan's Version. The $162k and the $600k were loans, which fall outside the scope of either party's version of the Oral Agreement. As for the $100k, there is no conclusive evidence to support its being part of *systemic* reimbursements to SMSPL for MOX and SDPL's use of its resources. Instead, Ms Tan's own case appears to suggest that it might have been an *ad hoc* reimbursement (see [75] above). We have also found that the $719k was *unlikely* to have been "project-linked loans" pursuant to Ms Tan's Version. The facts as a whole are marked in their lack of clarity as to what Oral Agreement the parties actually acted in accordance with.

94 Such is the paucity of reliable evidence in the present case that we consider, with respect, that the Judge erred in preferring Mr Ng's Version over Ms Tan's Version. As this court stated in *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 ("*Rabobank*") at [35]:

> … [U]nder ss 3(3)–3(5) of the Evidence Act, there are three possible conclusions which a court assessing the evidence before it may make, *viz*, that a fact is proved, disproved, or not proved, respectively. Where the evidence suffices to satisfy the court that a fact exists, that fact will be held to have been proved. Conversely, where the evidence suffices to satisfy the court as to the *non-existence* of a particular fact, that fact will be held to have been disproved: *Loo Chay Sit v Estate of Loo Chay Loo, deceased* [2010] 1 SLR 286 at [22]. However, the court is not bound to make a choice between finding that a fact is either proved or disproved. ***It is open to the court to select a third option, ie, that a fact is not proved***. A statement that a fact is not proved simply means that the court is unable to state affirmatively the existence or non-existence of a particular fact given the state of the evidence: *Loo Chay Sit v Estate of Loo Chay Loo, deceased* at [20]. [emphasis in original in italics; emphasis added in bold italics]

In this regard, this court in *Rabobank* cited with approval a part of the following statement by Lord Brandon of Oakbrook in *Rhesa Shipping Co SA v Edmunds* [1985] 1 WLR 948 (also referred to as "*The Popi M*") at 955H–956A:

> … [T]he judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.

95 This is unfortunately squarely such a case. We find that neither Mr Ng nor Ms Tan has discharged their respective burdens of proving their version of the Oral Agreement. Since no version of the Oral Agreement has been proven, at least as to how MOX and SDPL's pre-incorporation projects were to be treated post-incorporation, that fact of an Oral Agreement has not been proven. As such, we hold that there was no Oral Agreement which any party could have been in breach of. Accordingly, it is not possible for an oppression claim to be founded on the Oral Agreement.

96 Mr Ng and Ms Tan understood that MOX and SDPL would join forces and effectively operate under one roof after the incorporation of SMSPL – this, after all, was the practical reality as appreciated by SMSPL's staff: see [51] above. This collaboration would be beneficial for business brought in to SMSPL. Its purpose was to reap the benefits of an established interior design business which could hold itself out as having architectural expertise: see [57] above. As we also explained there, the other key purpose was to allow Ms Tan to retire with a passive income and for Mr Ng to continue the business under the valuable "Suying" brand. In this regard, it is clear to us that in the early years of SMSPL, the common understanding must have been that Ms Tan would bring

in the bulk of the customers, while Mr Ng would gradually take over the management of the business (in this regard, see [6] above). This ought to have been clear to them even if Ms Tan only knew at a general level that SDPL had more business than MOX (see [56] above), particularly since it was *Ms Tan*'s brand name that the business was intended to preserve. We note that the evidence shows that Ms Tan fulfilled her end of this understanding by bringing in the vast majority of SMSPL's business.

97 However, it is also evident that Mr Ng and Ms Tan did not pay much attention to the precise financial implications of their collaboration in respect of projects that were started in their respective outfits, SDPL and MOX, and which were completed and invoiced after the incorporation of SMSPL. This is demonstrated by the casual manner by which significant transfers between the three companies were effected. The only matter on which there was any clarity, it appears, is the consensus that new business should be directed to SMSPL (see [5] above). We do not find it unbelievable that a relatively small-scale owner-run business could have operated under such ambiguity for a few years, especially while the relations between the owners were cordial.

98 In the light of our conclusions on the Oral Agreement, we do not consider it likely that the $719k were transfers of receivables from SDPL to SMSPL. In the absence of any Oral Agreement, it is unlikely that SDPL would make outright transfers of its receivables to SMSPL, since there would be no reason or commercial basis for doing so. The truth most likely lies somewhere in between – for example, the $719k could have included reimbursements made to SMSPL outside of any standing Oral Agreement, or a combination of other payments for various reasons. However, it is not necessary (nor, indeed, possible) for present purposes to decide the true purpose of the $719k definitively. The same is true of the transfers of the $148k from MOX to SMSPL

– we do not consider them likely to be transfers of receivables in the absence of an Oral Agreement, but we do not arrive at a definitive conclusion as to what their purpose was.

99 For completeness, we note that our conclusion means that the Judge's order for one of SMSPL's counterclaims, relating to the Kim Chuan Façade, should not have been made (see the Judgment at [272]). This was an order for Mr Ng to pay SMSPL $40,000 as receivables pursuant to his version of the Oral Agreement. Since we find that no Oral Agreement is proven, there is no reason for this transfer of receivables to be made. However, since there is no appeal against any of the Judge's findings or orders in relation to the counterclaims, there is no basis for us to disturb this order. Separately, we note that the Judge also dismissed SMSPL's counterclaim against MOX for reimbursement for its use of SMSPL's resources, as he had found in favour of Mr Ng's Version (the Judgment at [343]). Our finding that neither version of the Oral Agreement has been established does not affect this ruling. As stated, there is no appeal by SMSPL.

Post-13 July 2015 conduct

The loan repayments pursuant to the Debit Notes

100 The Debit Notes included sums reflecting the repayment of the $600k and the $162k, which the Judge found were rightfully repaid to SDPL as they were loans (the Judgment at [93]). Since we have upheld the Judge's findings on these sums, this conclusion remains.

101 The Debit Notes also included sums reflecting the repayment of the $719k and further sums of $40,000 for the "Chennai Villa project" (see the Judgment at [95]). The Judge found the repayment of these sums to be wrongful

as he had found these to have been receivables transferred by SDPL to SMSPL under Mr Ng's Version. Since Mr Ng is the party bringing allegations of wrongful conduct, the burden of proof falls on him to make good his allegations. As we have not found any Oral Agreement to have been established, it follows that Mr Ng has failed to show that these sums were wrongly paid to SDPL under the Debit Notes.

102 The balance of the sums paid under the Debit Notes were admitted by Ms Tan to have been included by mistake (see the Judgment at [97]). The parties do not submit on these sums in these appeals, and there is no basis for us to consider them to have been wrongfully, rather than mistakenly, transferred.

103 The result of our analysis in relation to the Oral Agreement is therefore that no wrongs have been established by Mr Ng in relation to the purported loan repayments under the Debit Notes.

The Gratuity Payments

104 Having rejected the Judge's conclusion on the Oral Agreement and addressed the claims in relation to the Debit Notes, the only overlap claim which remains to be considered is Ms Tan's alleged wrongful payment of $1,164,580 to herself and her subsequent retention of $672,000 from this sum (*ie*, the Gratuity Payments).

105 As we indicated at [7] above, Ms Tan paid herself the $1,164,580 using 23 cheques for $50,000 each, and one cheque for $14,580. Ms Tan had a single signatory limit of $50,000, and it was not disputed that she had asked an SMSPL employee, Ms Nisha, to issue multiple cheques so that her single signatory limit would not be exceeded. According to Ms Tan, $492,580 had been paid to her by mistake, and this sum was later returned. She claimed that $600,000 was a

one-off gratuity paid to her on the basis that it was 4% of the value of the projects she brought into SMSPL. $72,000 was meant to be a salary adjustment for January to June 2015. These payments were allegedly agreed upon by, *inter alia*, Ms Tan and Mr Ng on 8 and 22 June 2015: see the Judgment at [78]–[81].

106 In contrast, Mr Ng's position is that the withdrawal of $1,164,580 was unauthorised. He accepted in cross-examination that they had discussed paying Ms Tan a gratuity of $600,000, but said that this had been contingent on a review of SMSPL's accounts. This testimony was inconsistent with his position on affidavit, which was that the gratuity had not been discussed.

107 The Judge did not accept Ms Tan's account, and instead found that no agreement had been reached on the gratuity or the alleged pay adjustment. The Judge therefore held that Ms Tan was not entitled to retain the remaining $672,000 which had not been repaid to SMSPL: see the Judgment at [88]. In our view, having reviewed the evidence and the submissions made by the parties, the Judge's finding is clearly justifiable and not against the weight of the evidence. The more difficult question, as we signposted above, is whether this claim was properly brought under s 216.

108 As we highlighted above at [33], this court set out an analytical framework in *Sakae Holdings* ([22] *supra*) to be applied when ascertaining whether it is an abuse of process for a claim to be pursued under s 216. The Judge applied this framework and held that the injury Mr Ng sought to vindicate was the injury to his investment in SMSPL caused by Ms Tan's breaches. The overlap claim for the Gratuity Payments involved her misappropriating money belonging to SMSPL, in breach of Mr Ng's legitimate expectation as a shareholder that SMSPL's funds would not be siphoned away. The Judge held that this had a direct impact on Mr Ng's interests as a shareholder. Further, the

Judge found that the essential remedy sought by Mr Ng was to exit SMSPL through a winding up order, and the restitutionary orders sought in Suit 867 were necessary to ensure a fair value exit for Mr Ng. The moneys repaid to SMSPL would increase the value of all the shareholders' shares, including Mr Ng's. The benefit to SMSPL was characterised as being "purely incidental" to the essential remedy sought by Mr Ng (see the Judgment at [214]).

109 The Judge's reasoning appears, at least *prima facie*, to closely follow that employed in *Sakae Holdings*. In *Sakae Holdings*, the Court of Appeal held that the real injury sought to be vindicated by the minority shareholder, Sakae, was the injury to its investment in the joint venture and *the breach of its legitimate expectations* as to how the company's affairs and its financial investment was to be managed. Crucially, we noted that the High Court Judge in that case had carefully considered how Sakae was personally affected by each of the impugned transactions: with the exception of one, *the transactions had been carried out in breach of Sakae's rights which had been carefully negotiated* for in, *inter alia*, the joint venture agreement. Sham documents had also been created to conceal these transactions, and Sakae had let one Andy Ong manage the company's affairs because of the longstanding friendship between Andy Ong and the chairman of Sakae's board. This was the basis on which the Court of Appeal had gone on to hold that Sakae had a legitimate expectation that its funds would not be mismanaged, much less siphoned away in the manner they had been (*Sakae Holdings* at [125]–[127]).

110 To be clear, we do not think that the Court of Appeal's decision in *Sakae Holdings* should be read as suggesting that the mere fact that injury has been caused to a shareholder's investment would be sufficient to constitute a distinct personal wrong. As we emphasised above at [30], it is necessary to consider whether the injury to the minority shareholder is merely a *reflection* of that

caused to the company. Further, while we accept that there may be certain standards of fair dealing and fair play which a shareholder is entitled to expect (see *Over & Over* ([29] *supra*) at [77]), particularly where the majority shareholder and wrongdoer is also a director of the company, it does not necessarily follow that a breach of these standards necessarily forms a distinct personal wrong. *Sakae Holdings* does not suggest otherwise. As we emphasised above, the impugned transactions in *Sakae Holdings* were carried out in breach of the rights which had been carefully negotiated for, and which were recorded in the joint venture agreement and other documents executed at the inception of the joint venture (at [125]). *Sakae Holdings* was therefore an instance of a clear, egregious and fraudulent breach of an express understanding, and is distinguishable from the present case.

111 In our view, even if the Judge had been correct to find that Mr Ng could reasonably expect as a shareholder that SMSPL's funds would not be siphoned away, this would not, on the facts of this case, suffice for a finding that Mr Ng suffered a distinct injury.

112 The Judge appeared to find a legitimate expectation *solely* on the basis that Mr Ng was a shareholder of SMSPL (see the Judgment at [214(a)]. In this regard, we note that Mr Ng pleaded that the parties had entered into the joint venture on the understanding that the shareholders would conduct SMSPL's affairs in a manner which was fair to all of them. It is not clear what precisely this meant, and, further, unclear what the basis for this broad understanding was. Even if this could be read as a reference to the Oral Agreement, we have found that no Oral Agreement has been proven. While the evidence shows that there was some trust between Mr Ng and Ms Tan, because the latter was a good friend of Ms Chong (Mr Ng's wife), it is unclear whether this was the premise on which SMSPL had been incorporated, in particular because such trust would not

have extended to the other shareholders. In any event, by the time the Gratuity Payments were made to Ms Tan, the relationship had broken down and Mr Ng had indicated his desire to leave SMSPL. For these reasons, we do not think that Mr Ng had a basis for any expectations as to how SMSPL would be managed *apart* from the basic expectations a shareholder may legitimately hold.

113 In our judgment, these baseline expectations do not provide a sufficient basis on which to find that Mr Ng has suffered a distinct personal injury which would amount to commercial unfairness. To find otherwise would, in our view, suggest that *any* misappropriation of moneys by a director would constitute a distinct injury to a shareholder. This would be too broad a construction of the framework the Court of Appeal set out in *Sakae Holdings* and make impermissible inroads into the proper plaintiff rule. This simply cannot be the case. Further, the breach of this expectation would be remedied by the recovery of the misappropriated moneys by the company in a corporate action. The Companies Act provides s 216A for this purpose.

114 As such, in our judgment, while Mr Ng may have been entitled to expect that SMSPL's funds would not be siphoned away, the breach of this expectation did not in itself constitute a distinct injury under s 216 of the Companies Act. In any event, *even if* there was a distinct injury, it does not necessarily follow that it would be commercially unfair to Mr Ng if the breaches are not remedied. The claim in respect of the Gratuity Payment therefore should *not* have been brought under s 216. This is not to say that there was no wrongdoing, but rather, that any such wrong was one done to the company, and should therefore have been pursued under a different cause of action – such as a derivative action under s 216A. This appears to have been a difficulty the parties were alive to: as we highlighted above at [18], an application for leave was made on 17 April 2018, during the trial of Suit 867. With respect, the wrong course was taken in the

present case by continuing with Suit 867 as pleaded instead of dealing with the s 216A application.

Personal wrongs

115 Having concluded that the $1,164,580 paid to Ms Tan should not have formed the basis for a claim brought under s 216, we turn now to consider whether the remaining personal wrongs identified by the Judge are sufficient to establish oppression (see [20] and [21] above). The Judge found that:

(a) Ms Tan had denied/obstructed Mr Ng's access to SMSPL's financial documents;

(b) Ms Tan had excluded Mr Ng from decision-making in SMSPL;

(c) Ms Tan had asked Mr Ng to repay his director's fee for 2012 to SMSPL;

(d) Ms Tan had refused or caused SMSPL to refuse to pay Mr Ng the unpaid balance of his director's fee for 2013;

(e) Ms Tan had insisted on Mr Ng returning the dividends received by him for 2012 and 2013; and

(f) Ms Tan had caused SMSPL to deny Mr Ng his pro-rated salary for October 2015.

116 The Judge gave detailed reasons for his findings in the Judgment. Having reviewed the evidence and considered the parties' submissions, we do not think there is sufficient basis on which to conclude that the Judge's conclusions, as summarised above at [115], were against the weight of the evidence. We further accept that the acts in [115(c)]–[115(f)] had been done

without sufficient basis. However, we do not accept that these acts were *oppressive*.

117 In this regard, we note that this court held in *Over & Over* ([29] *supra*) at [74] that allegations of oppression appear to be best sustained where this manifests in a cumulative course of conduct over a period of time, straddling several different grounds or categories of oppressive conduct. However, it was also accepted that an isolated act may amount to oppression; for example, a singular dilution of the minority's shares by the majority contrary to an informal understanding, or a clear and egregious misappropriation of moneys contrary to an implied understanding. A past act, although remedied, may betoken a risk of future oppressive acts (*Over & Over* at [74], citing Margaret Chew at pp 228–229).

118 In assessing whether there has been commercial unfairness, the allegedly oppressive acts must be viewed in the light of the commercial relationship between the parties and the expectations they were entitled to hold at the material time. In our judgment, the alleged personal wrongs provide a thin basis on which to find oppression.

119 Mr Ng had decided to leave SMSPL for personal reasons and not because of any allegedly oppressive acts. Mr Ng's claim of oppression therefore rested on acts which had either been committed after 13 July 2015, or which he had *discovered* after that date (see [15] above). Having dismissed the claims Mr Ng made on the basis of the Oral Agreement, the remaining claims fall within the former category. Specifically, Ms Tan only asked Mr Ng to repay the $448,700.05 in director's fees and dividends when he notified her of his resignation on 13 July 2015: the Judgment at [109]. Mr Ng's claim for unpaid salary was for the month of October 2015, and, similarly, the acts which formed

the basis of his allegation that he was excluded from management were committed from October 2015: see the Judgment at [141]. Finally, Mr Ng pleaded that access to SMSPL's financial documents had been denied or restricted after 13 July 2015. These therefore appear to be relatively discrete instances which did not reflect a *wider* tendency to disregard Mr Ng's interests as a minority shareholder. Overall, Mr Ng's action smacks of an abuse of s 216 relief. This cannot be clearer than from his initial insistence on a buy-out of his minority holding in a company that he knew would cease business and be dissolved following his decision to exit the company. From August to October 2015, handover arrangements of SMSPL projects took place. Mr Ng himself stated on 12 October 2015 that MOX would take over four of his projects in SMSPL. We will elaborate on this below.

(1) Denial of access to financial documents

120 Mr Ng claimed that Ms Tan had repeatedly taken steps to deny or restrict his access to the books, ledgers, accounts, financial statements and other financial records of SMSPL. As indicated above at [13], an order was made on 25 January 2016 granting Mr Ng's application to inspect the accounts and records of SMSPL. Mr Ng contends that even after this order was made, certain documents, including SMSPL's general ledger and the accounts for financial year 2014 (as at 30 June 2015) were not produced. In contrast, Ms Tan's position was that Mr Ng was not accessing SMSPL's documents to perform his directorial duties, but rather to improve his claim against the defendants, which is impermissible.

121 While not expressly stated in these terms, it would seem that the Judge's finding that Mr Ng had been wrongfully denied access to SMSPL's financial documents related to *both* conduct pre- and post- 25 January 2016 (see the

Judgment at [100]–[106]). The Judge accepted that Mr Ng had been denied access to SMSPL's financial documents: Ms Tan did not welcome Mr Ng's requests for the accounts, Mr Ng had been asked to direct his requests for documents to Ms Tan's lawyers, and there had been an attempt to remove Mr Ng as a director before OS 921 could be heard. In particular, the Judge stated that it was "most disturbing" that SMSPL and Ms Tan did not disclose the finalised 2014 accounts, and that even the unaudited financial statements for 2014 and several accounting documents for 2014 were only produced during the course of the trial (the Judgment at [106]).

122 The weight of the evidence does in fact indicate that Ms Tan and SMSPL had denied Mr Ng access to the latter's financial documents. However, there are at least two difficulties with relying on this in support of Mr Ng's s 216 action.

123 First, it is pertinent to note that the financial documents were being sought by Mr Ng in his capacity as a *director* rather than as a *shareholder* of SMSPL. The orthodox position is that the conduct complained of under s 216 must affect the member in his capacity as member ("the *qua* member requirement") (see *Tan Choon Yong v Goh Jon Keat and others and other suits* [2009] 3 SLR(R) 840 at [34]). In this connection, we observe that, in the context of an unfair prejudice petition under s 459(1) of the Companies Act 1985, the House of Lords stated *obiter* in *O'Neill and another v Phillips and others* [1999] 1 WLR 1092 at 1105 that the requirement that the prejudice be suffered as a member should not be too narrowly or technically construed. We accept that a fact-sensitive approach should be taken in assessing whether the *qua* member requirement is fulfilled. This is both since it is common for members to stand in multiple relationships *vis-à-vis* the company, and because the scope of a member's interests would depend on the understanding between the parties on the terms upon which they agree to associate together in the company: see Hans

Tjio at para 11.069; Tan Cheng Han gen ed, *Walter Woon on Company Law* (Sweet & Maxwell, 3rd Ed, 2009) at paras 5.60 and 5.61. Therefore, if there is a clear understanding that the member will be entitled to participate in the management of the company, the removal of the member as a director, or exclusion of the member from such management may affect the member's rights *qua* shareholder: see *Kitnasamy s/o Marudapan v Nagatheran s/o Manogar and another* [2000] 1 SLR(R) 542 at [31] cited in Hans Tjio at para 11.072.

124 In the present case, it is clear that the right Mr Ng sought to exercise was squarely a *director's* right. Under the Companies Act, shareholders do not have a broad right to financial information of a company other than the audited financial statements pursuant to s 203 of the Companies Act (see *Ezion Holdings Ltd v Teras Cargo Transport Pte Ltd* [2016] 5 SLR 226). There is also no good basis to suggest that Mr Ng expected access to these documents purely by virtue of the fact that he was a shareholder of SMSPL. While access to the documents may have uncovered wrongdoing that affected his interests as a shareholder, this does not alter the *nature* of the right he was seeking to exercise. Further, *even if* Mr Ng had a legitimate expectation that he would be involved in the management of SMSPL, he had, by this point, communicated his decision to leave the company.

125 We note that Mr Tan said at the hearing before us that Mr Ng wanted access to the documents to obtain a valuation of his shares to facilitate a buy-out, and that *the denial of access despite Ms Tan's misappropriation of money was oppressive*. We make two observations. First, as the Court of Appeal held in *Mukherjee Amitava v DyStar Global Holdings (Singapore) Pte Ltd and others* [2018] 2 SLR 1054 at [25], it would be an abuse of process for the director to use the right to inspect for purposes which are largely unconnected to the discharge of the director's duties. The facilitation of a buy-out of a director's

shares is not a proper use of the director's right to inspect the company's financial documents: see also *Hau Tau Khang v Sanur Indonesian Restaurant Pte Ltd* [2011] 3 SLR 1128 at [41]. We also have our doubts as to whether it would have been appropriate to inspect the company's documents to bolster a claim brought in his capacity as a shareholder. Any failure to produce the relevant documents was therefore only wrongful in so far as it was a breach of the order made in OS 921. Second, while Ms Tan's misappropriation of money may have an ill-effect on Mr Ng's interests as a shareholder, as we have said above, the injury to Mr Ng was a mere reflection of the injury to SMSPL. Without more, this would not be a wrong which should be vindicated by a claim under s 216. For this reason, in our judgment, any denial of access to SMSPL's financial documents should not have been considered under s 216.

(2) Exclusion from decision-making

126 Mr Ng's assertion that he was excluded from decision-making in SMSPL from October 2015 rested on five allegations. In brief, these were that Mr Ng was excluded from a meeting held on 30 October 2015 to discuss SMSPL's outstanding projects and that decisions on SMSPL's accounts, cessation of operations and tax returns were made without consulting him. Additionally, Ms Tan and/or the other shareholders prevented SMSPL from providing Mr Ng with a fair view of the financial state of, and management decisions taken for, SMSPL, including by attempting to remove him as a director (see the Judgment at [141]).

127 Before the Judge, Ms Tan argued that Mr Ng had voluntarily removed himself from the decision-making process by resigning from the management of SMSPL. The Judge did not accept this submission and instead observed that Mr Ng remained a director and shareholder of SMSPL and was fully entitled to

attend the 30 October 2015 meeting like Ms Tan, Ms Chiu and Ms Martinez. Ms Tan and Ms Chiu had attended the 30 October 2015 meeting as "Director/Share Holder[s]" while Ms Martinez was said to be an "Employee/Share Holder". Ms Tan also argued that Mr Ng's exclusion from management was justified because of his misconduct. The Judge again did not accept this argument, in part because it had not been pleaded (the Judgment at [143]). The Judge also rejected the submission that the decisions to make adjustments to the accounts were management decisions, and found that Ms Tan had deliberately excluded Mr Ng's participation (the Judgment at [144] and [145]).

128 With respect, we do not agree with the Judge's views as outlined in [127] above. It is necessary to bear in mind the fact that, by this point, Mr Ng had resigned from SMSPL, even if he remained a director in name and shareholder. He remained a shareholder as he wanted, but was unable to obtain, a buy-out. Further, while he remained a director in law, by his resignation he severed his connection with the company and left the company, including the "active management" of SMSPL. In particular, while the other shareholders of SMSPL were present at the 30 October 2015 meeting, and the minute sheet recorded their designations as employee/director and shareholder, this does not necessarily mean that *all* directors or shareholders of SMSPL were entitled to attend the meeting. We observe that Mr Ng appeared to accept, at least at one point, that the meeting was not one for directors, and therefore that he should not have been there:

> COURT: Do you accept that this meeting that you complain about was not a directors' meeting?
>
> A. It's not a director meeting but it's a meeting to see how the projects are, status of the projects.

> COURT: Yes, but if it's not a directors' meeting then do you agree or disagree that there's really no reason for you to be there?
>
> A. If it's not a director meeting, yes, your Honour, I should not be there.

129 Indeed, by 30 October 2015, SMSPL was in the process of winding up its operations and Mr Ng had also resigned. In this regard, we find that the parties had agreed on 13 July 2015 that SMSPL would cease business and be dissolved (*ie*, be wound up), although the details of exactly when the winding up would take place had not been determined and would depend on how fast the outstanding projects in hand could be completed or novated. While the Judge observed in the Judgment that the parties had agreed to meet again in October 2015 to "put in place the closure of the company", the evidence shows that the parties had in fact agreed on 13 July 2015 to "close down" or wind up the company, and to work towards the cessation of the business. Mr Ng accepted as much in cross-examination, although he qualified this by saying that they had not yet decided on the *date* on which SMSPL would be wound up. The meetings held on 25 August 2015 (which Mr Ng attended) and 30 October 2015 were attempts to decide what would be done with SMSPL's outstanding projects, with a view to ceasing operations by end October 2015. This is evident from the minutes from these meetings, as well as the transcript of the 25 August 2015 meeting. In fact, the 30 October 2015 minutes also indicated that Mr Ng had, on 12 October 2015, indicated that he would be transferring four of his projects to MOX, which clearly evidences the plan to wind up SMSPL. We note also that the Joint Expert Statement dated 9 March 2018 concluded that there was no further intention to conduct SMSPL's business as a going concern – from 13 July 2015, SMSPL did not take on new projects and there was no significant cash flow expected after the completion of outstanding projects. The submissions filed on behalf of SDPL state that SMSPL is now in liquidation.

130 This is the context in which Mr Ng's purported exclusion from management should be analysed. As Mr Ng had left SMSPL's employment on 12 October 2015, we are unable to see how he could assert his right to be at the 30 October meeting. The agenda of that meeting indicated that it had been convened for purposes that were largely managerial and operational in nature. In particular, the meeting was convened in part to determine how to manage SMSPL's ongoing projects as SMSPL would be ceasing operation. The 25 August 2015 minutes also indicated that the parties had already decided, to a significant extent, what was to be done with each of SMSPL's projects. Mr Ng had been included in the 25 August 2015 meeting, while he remained an employee of SMSPL, and his views on each of the projects discussed then obtained. The decisions made at the 30 October 2015 meeting were similarly of a managerial nature. Further, Mr Ng's indication on 12 October 2015, that he would be transferring four of his projects to MOX, was yet another step taken to end his relationship with SMSPL. It was neither unreasonable nor oppressive for him to be excluded from this meeting after he had severed his relationship with the company. As such, we find that Mr Ng's exclusion from the 30 October 2015 meeting was neither wrongful nor oppressive.

131 In our view, the attempt to remove Mr Ng as a director in December 2015 similarly was not commercially unfair or oppressive. Ms Tan and SMSPL had been acting within their legal rights and, seen in the context of the prevailing circumstances, their conduct was neither unfair nor did it call for the court's intervention (*Over & Over* ([29] *supra*) at [85]). By then, Mr Ng was a director in name only. The attempt to formally remove him as a director was merely a step in effecting Mr Ng's express desire to sever his relationship with SMSPL, which, by this point, was well into the process of ceasing operations. In any event, we note that Mr Ng had obtained an injunction to restrain SMSPL and

Ms Tan from removing him as a director (see the Judgment at [104]). Thus, any oppressive effects from the failed attempt to remove him as a director would have been limited.

132 In a similar vein, we accept Ms Tan's submission that there was no reason for Mr Ng to remain a joint signatory to SMSPL's bank account after he had decided to quit. A consent order had also been made on 26 August 2015, before the Statement of Claim was filed, in which SMSPL undertook not to pay out any further moneys or other assets save where necessary for the purposes of paying SMSPL's ordinary operational expenses, which SMSPL was also obliged to inform Mr Ng of. Any oppressive effect in relation to this matter would therefore have abated well before the trial of Suit 867.

133 Mr Ng also relied on the fact that adjustments had been made to SMSPL's accounts, resulting in a need to request that the Annual Return lodged for 2014 to be expunged, without consulting him. This should again be analysed in context. As we explained above, we accept that there had been an agreement to wind up SMSPL by this point. In the ordinary course of winding up a company, a liquidator would be appointed and would then be obliged to, *inter alia*, investigate potential claims. Where Mr Ng's claims concerned *debts* owing from SMSPL to him, either as unpaid salary for October 2015 or unpaid director's fees for 2013, it would also have been open to Mr Ng to file a proof of debt in the liquidation. Similarly, we note that any wrongdoing in the manner in which the accounts had been adjusted by Ms Tan would be an issue in the liquidation. Any moneys misappropriated by Ms Tan would also have to be accounted for. In *Sakae Holdings* ([22] *supra*), the Court of Appeal held at [163] that the presence of and reliance upon any available alternative remedy is inextricably tied to the ultimate inquiry into the commercial fairness or otherwise of the defendant's conduct. While this was said in the context of

shareholder exit mechanisms, the same is true in the present case, where there was an agreement between the parties to close down SMSPL. In fact, the liquidation of SMSPL would seem not so much an *alternative remedy*, but rather an eventuality through which the various personal wrongs alleged would have been appropriately and adequately dealt with. This is not to suggest that the impending liquidation was a *bar* to the oppression claim (see also *Kumagai Gumi Co Ltd v Zenecon Pte Ltd and others and other appeals* [1995] 2 SLR(R) 304 at [72]–[74]), but merely that it is a relevant factor in considering whether oppression has been established, and, even if so, what the appropriate remedy would be.

134 As we have mentioned, we recognised in *Over & Over* at [74] that past oppressive acts can continue to have oppressive effects, and may further indicate a tendency or propensity to oppress the minority or disregard its interests (see above at [117]). Where there has been a genuine agreement to cease business and wind up the company, any such tendency or propensity would naturally be less significant. The majority in *Hendrick International Hotels & Resorts Pte Ltd v YTL Hotels & Properties Sdn Bhd & ors* [2003] 3 MLJ 742, cited to us by Ms Tan, accepted that the effects of an oppressive act cannot be said to continue to subsist upon the granting of a winding up order and the appointment of a liquidator. That proposition perhaps goes too far. Nevertheless, where the business is at an end and intended to be wound up, any propensity to disregard the minority's interests would naturally carry less weight since the interposing of a liquidator in the process would provide a check on the majority's conduct.

135 Finally, even if a decision was made as to when SMSPL would be wound up without consulting Mr Ng, we have found, above, that Mr Ng too had agreed that SMSPL should be wound up. He participated in the 25 August 2015

meeting, in which decisions were made to effect the cessation of business operations, and had subsequently decided to transfer some of his projects to MOX. It was therefore a given by this point that SMSPL would be wound up eventually. While we accept that Mr Ng's agreement on when SMSPL would be wound up should have been obtained, the *date* on which this would be done was therefore a mere technicality, and the failure to obtain Mr Ng's consent on the date would not be evidence of any commercial unfairness in the then existing context.

(3) Director's fees, dividends and salary

136 Ms Tan made various arguments challenging the findings in [115(c)]–[115(f)] above, for example, arguing that the various sums claimed by Mr Ng were not due and owing to him, or that the sums she had asked Mr Ng to repay were properly due to SMSPL. However, as we indicated above at [116], we are not persuaded, having reviewed the evidence and the parties' submissions, that there was any basis for appellate intervention.

137 For completeness, we note that Ms Tan's demand for Mr Ng to repay his SMSPL dividends for 2012 and 2013 were made on the basis of adjustments to SMSPL's accounts for 2012 and 2013. The Judge's findings that these adjustments were not justified turned in part on his acceptance of Mr Ng's Version of the Oral Agreement (see the Judgment at [124]–[136]). In particular, the following adjustments turned on the Oral Agreement:

(a) In relation to SMSPL's accounts for 2012:

(i) A sum of $315,118.54 was added to the revenue as charges to SDPL and MOX for the use of SMSPL's resources. The Judge held that this adjustment was not justified as he had

accepted Mr Ng's Version (the Judgment at [125(b)]). Given that we have not accepted either party's version of the Oral Agreement, we agree with the Judge this adjustment was not justified.

(b) In relation to SMSPL's accounts for 2013:

(i) A sum of $259,980 was reclassified from revenue to a liability. This formed part of the $719k we have discussed above. The Judge held that the adjustment was *not* justified as they were payment of fees collected from pre-incorporation projects and not loans (the Judgment at [134(a)]). Given that we have not been able to determine the nature of the $719k, we are likewise unable to conclude that this adjustment was justified.

(ii) A sum of $307,067.18 was added to the revenue as charges to SDPL and MOX for the use of SMSPL's resources. Given that we have not accepted either party's version of the Oral Agreement, we agree with the Judge this adjustment was not justified (the Judgment at [134(c)]).

Our findings on the Oral Agreement therefore do not change the Judge's findings that Ms Tan did not act in good faith when she insisted that Mr Ng return his dividends for 2012 and 2013.

138 In any event, we do not agree that Ms Tan's acts were oppressive. As we have said, in so far as the wrongs related to *debts* owing from SMSPL to Mr Ng, these would have been resolved in the process of winding up. Mr Ng in fact appeared to make a similar point when he argued that, if there had been an agreement to wind up SMSPL *and* Ms Tan's gratuity had been agreed to by the

directors, they would have been dealt with "as part of the process of shutting SMSPL down." This reasoning would equally have applied to any debts owed by SMSPL to Mr Ng. Again, this severely limited any oppressive effects there may have been on Mr Ng. Further, we note that while Ms Tan had *asked* Mr Ng to repay various sums, including his director's fee for 2012 to SMSPL and the dividends received by him for 2012 and 2013, it would seem that this demand was not complied with. Indeed, the relief sought in respect of this alleged wrong was a *declaration* that Mr Ng was entitled to retain $448,700.05 (comprising what he claimed to be director's fees and dividends for 2012 and 2013). It is difficult to see how a bare demand which was not complied with could be commercially unfair, particularly when seen in the context of the agreement to wind up, as explored above. The portion of Mr Ng's salary which the Judge found to have been withheld was also a relatively small sum of $4,063.35 and does not change our analysis.

139 It cannot be said that Ms Tan's demands constitute evidence of the manner in which she had conducted the affairs of the company for her benefit and in disregard of Mr Ng's interests as a minority shareholder. The better course of action for Mr Ng would have been to either sue SMSPL for the sums he claimed were owing to him, or to have his claims dealt with in the course of winding up in the usual manner.

Consequential orders

140 We have found that neither Mr Ng nor Ms Tan's Version of the Oral Agreement has been established on the evidence before us. We have also concluded that the remaining claims either should not have been brought under s 216, as in the case of the Gratuity Payments, or do not, considered cumulatively, establish oppression. The effect of our findings is that Mr Ng was

not the proper plaintiff to bring any of the claims against Ms Tan or SDPL, which were for loss caused to SMSPL, as opposed to the claims by Mr Ng against SMSPL, which were for loss caused directly to himself. For this reason, the Judge's orders in respect of those claims must be set aside. We therefore allow in part both the appeals in CA 71 and CA 72.

141 For the reasons indicated above, we dismiss Mr Ng's appeal in CA 73. To be clear, we do not think there is any basis to overturn the Judge's findings in relation to Annexes C1 and C2 of the Statement of Claim (the Judgment at [169] and [170]); in any event, there would be no basis to allow these claims given our rejection of the Oral Agreement and the oppression claim as a whole. On the other hand, the outcome of the appeals does not affect the following orders made by the Judge:

(a) SMSPL is to pay Mr Ng the sum of $4,063.45 as his outstanding salary for the period 1 to 12 October 2015 as SMSPL had no basis to withhold this (the Judgment at [140]);

(b) SMSPL is to pay Mr Ng the sum of $265,000, being the outstanding balance of his director's fee of 2013, as Ms Tan had no basis to cause SMSPL to refuse to pay it (the Judgment at [120]–[121]);

(c) the declaration that the sum of $200,000 paid to Mr Ng in 2012 was a director's fee and not a loan, and therefore need not be repaid to SMSPL (the Judgment at [112]–[119]);

142 These orders in [141(a)]–[141(c)] were orders the Judge made against SMSPL, which did not file an appeal. Further, these were claims that Mr Ng was entitled to bring apart from any alleged oppression under s 216. Indeed, the

orders in [141(a)] and [141(b)] were prayed for by Mr Ng against SMSPL directly.

143 As a consequence of the outcome of the appeals, we *set aside* all of the remainder of the Judge's orders in relation to Mr Ng's oppression claim (*viz*, the orders set out at [219]–[247] of the Judgment). This would include the order that SMSPL be wound up as that order was premised on the Judge's finding that oppression had been established under s 216. Since there is no longer any legal basis for the court to order a winding up in Suit 867 as pleaded, the winding up order cannot be sustained. In the circumstances, it is for the parties to determine how to proceed. In the event the parties continue with the liquidation on a proper legal footing, it may be appropriate for the liquidators to investigate and to determine whether to pursue any legal action on any sums which may have been misappropriated. We also leave it to the parties or the liquidators as the case may be, to make the necessary adjustments to the accounts that are necessary to reflect the conclusions we have reached, particularly to the extent these differ from the Judge's findings. It would then follow from this that the respective shareholders would have to return all or part of the dividends received by them, proportionally, if the profits were insufficient to support the dividends declared (as originally indicated at [128], [136] and [364] of the Judgment).

144 We will hear parties on the costs of these appeals and the proceedings below. Parties are to tender written submissions, limited to five pages, within 14 days from the date of this judgment.

Judith Prakash Judge of Appeal	Belinda Ang Saw Ean Judge	Quentin Loh Judge

Ong Boon Hwee William and Lee Bik Wei (Allen & Gledhill LLP) for the appellant in CA 71/2019 and the first respondent in CA 73/2019;
Khoo Boo Teck Randolph, Tan Huiru Sally and Vanessa Chiam Hui Ting (Drew & Napier LLC) for the appellant in CA 72/2019 and the second respondent in CA 73/2019;
Tan Chee Meng SC, Paul Loy Chi Syann and Hui Janie Anne (WongPartnership LLP) for the appellant in CA 73/2019 and the respondent in CA 71 & 72/2019.