Tan Choon Yong v Goh Jon Keat and Others and Other Suits
[2009] SGHC 106

Case Number : Suit 49/2008

Decision Date : 30 April 2009

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Adrian Tan, Wendell Wong and Sophine Chin (Drew & Napier LLC) for the plaintiff; Mustaffa bin Abu Bakar (Mustaffa & Co) for the first and second defendants; Ismail Atan (Nanyang Law LLC) (to 9 February 2009) and Roy Yeo (Sterling Law Corporation) (from 9 February 2009) for the third defendant

Parties : Tan Choon Yong — Goh Jon Keat; Tan Hui Kiang; Alphomega Research Group Ltd

Companies – Oppression – Factors to take into consideration when deciding whether oppression under s 216 Companies Act (Cap 50, 2006 Rev Ed) extant – Application of s 216 Companies Act to non-quasi-partnership with external shareholders – Scope of remedies for oppression under s 216 Companies Act – Section 216 Companies Act (Cap 50, 2006 Rev Ed)

30 April 2009 Judgment reserved.

Tan Lee Meng J:

1 This judgment concerns a dispute between shareholders of Alphomega Research Group Ltd ("the company"), which led to the filing of three suits.

2 In the first suit, Suit No 49 of 2008, the plaintiff, Dr Tan Choon Yong ("Dr Tan"), a minority shareholder as well as the company's former Chief Executive Officer ("CEO") and former director, claimed to be the victim of oppression by the majority shareholders and directors, including the first defendant, Mr Goh Jon Keat ("Mr Goh"), and the second defendant, Ms Tan Hui Kiang ("Ms Tan"), who is Mr Goh's relative. Among the remedies sought by Dr Tan under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") is an order that the company be wound up on just and equitable grounds.

3 In the second suit, Suit No 855 of 2008, Mr Goh and Ms Tan sued Dr Tan for defamation with respect to certain statements made by Dr Tan during an extraordinary meeting of the company on 19 February 2008.

4 Finally, in Suit No 856 of 2008, Dr Tan sought damages from the company for breach of his employment contract on the ground that he was summarily dismissed on 21 February 2008 without just cause.

5 All three actions were consolidated by an Order of Court on 13 November 2008.

6 During the course of the trial, Mr Goh and Ms Tan had second thoughts about proceeding with Suit No 855 of 2008. As such, they sought and were granted leave to withdraw their defamation action against Dr Tan.

7 As for Suit No 856 of 2008, towards the end of the trial, the company offered to compensate Dr Tan for summarily dismissing him without giving him the requisite notice of six months provided for under his employment contract. As the company's offer of compensation was accepted by Dr Tan, he was given leave to withdraw his claim for damages for breach of his employment contract.

8 In view of the above-mentioned developments, this judgment will only concern Suit No 49 of

2008, which relates to Dr Tan's complaint of oppression.

Background

9 In 2006, while Dr Tan was the Managing Director of CPG Laboratories Pte Ltd ("CPG Labs"), Mr Goh and his cousin, Mr Heng Jee Kian ("Mr Heng"), who is Ms Tan's husband, interested him in joining a company to be set up to provide a comprehensive range of consultancy services in the engineering and construction industries, including quality testing and inspection. Dr Tan, who was a specialist in such consultancy services, was interested in the proposal.

10 On 13 February 2007, the company was incorporated. Mr Goh was appointed the company's Chief Financial Officer ("CFO"). On 16 April 2007, Dr Tan resigned from CPG Labs, after which he joined the company and was appointed its chief executive officer ("CEO"). His monthly remuneration package was $17,800.

11 When Dr Tan joined the company, it had 4 directors, namely, Dr Tan, his wife, Ms Perlyn Sim Sock Lee ("Ms Sim"), Mr Goh and Ms Tan. Their shareholdings in the company are as follows:

Dr Tan	-	25.3%
Ms Perlyn Sim	-	0.8%
Mr Goh	-	25.3%
Ms Tan	-	25.3%

12 Mention must be made of the role of Ms Tan's husband, Mr Heng, who called himself a "founder of the company" and its "general manager" even though he had no employment contract with the company at the material time. Dr Tan asserted that Mr Heng was like a "shadow director" of the company. He added that Mr Heng took an active part in the day to day running of the company and worked together with Mr Goh on financial matters.

13 To raise money for the company's business, the company applied for listing on Phillip Securities' Over-The-Counter Capital ("OTC Capital") on 15 August 2007 so that its placement shares could be traded on OTC Capital. The role of OTC Capital in helping companies to raise capital is explained in its website as follows:

> OTC Capital … is a market making trading platform for the securities of unlisted Singapore companies. It facilitates companies to raise new capital in a relatively cost-effective manner and allows the trading of the securities between registered OTC investors with Phillip Securities Pte Ltd ("PSPL") as the market maker.
>
> OTC is not an approved exchange or a market and PSPL is not a recognized market operator market within the meaning of section 6 of the Securities and Futures Act ("SFA"). Therefore, OTC is practically self-regulated within the ambit of any relevant legislation or guidelines issued by the Monetary Authority of Singapore ("MAS"). The operations of OTC are conducted, managed and monitored by the personnel of PSPL and the management of OTC; while the OTC Committee approves the application submissions of companies seeking admission to OTC and also sets the rules of trading, disclosure and continuing obligations of the companies whose securities are quoted.

14 OTC Capital required the company to have a Corporate Advisor for so long as it retained its admission status. The company appointed Mr Tan Meng Heng ("Mr MH Tan") as its Corporate Advisor.

15 For the purpose of being listed on OTC Capital, the company prepared a "Small Offer Document" ("SOD") for OTC Capital and its investors. To attract investors to put their money into the company, the SOD highlighted Dr Tan's expertise in the company's business and the fact that he was going to lead the company.

16 On 4 October 2007, the company was listed on OTC Capital and it managed to raise $3,816,800 from 19,084,000 placement shares at $0.20 per share.

17 Within weeks after it was listed in October 2007, the company became dysfunctional and although Dr Tan and his specialist team from CPG Labs were crucial to the company's business, by December 2007, Mr Goh and Ms Tan planned to get rid of Dr Tan. Mr Goh called the Corporate Advisor, Mr MH Tan, to request that an announcement be made on OTC Capital's website that Dr Tan had been removed as the CEO. However, Mr Goh was informed that the proper procedure for removing a CEO must be followed.

18 Dr Tan complained that as soon as investors' funds had poured into the company following its listing on OTC Capital, he faced numerous obstructions in the running of the company. More will be said about these obstructions but what needs to be noted now is that Dr Tan claimed that he was denied access to important company accounts and human resources records and that despite his repeated requests, the employment "contracts" that Mr Goh and Ms Tan allegedly signed with the company in July 2007 were not shown to him. He was also not given sufficient co-operation to enable him to address OTC Capital's serious concerns about the manner in which the company had utilised investors' funds.

19 On 4 January 2008, OTC Capital's chairman, Mr Ong Teong Hoon ("Mr Ong"), had a meeting with Dr Tan, Mr Goh, Mr Heng and the company's deputy chief operations officer, Mr Leong Chin Toon ("Mr Leong"), to try and resolve the problems in the company. At this meeting, it was clarified that the CEO was in charge of the company and that Mr Heng should not meddle in the company's affairs for although he was a shareholder, he was neither a director nor an employee. Mr Ong said that at the end of the meeting, the parties agreed to try and work together. However, 6 days' later, on 10 January 2008, Mr Goh and Ms Tan instructed the company secretary to issue a Notice of an Extraordinary General Meeting ("EOGM") to be held on 28 January 2008 for the purpose of removing Dr Tan from the post of CEO and Dr Tan and Ms Sim from the board of directors ("the board"). The Notice stated that the EOGM was convened "by order of the board" when it was not.

20 On 14 January 2008, Dr Tan lodged a report with the Commercial Affairs Department ("CAD"), in which he complained that he had been denied access to the company's financial records, administrative records of the purchase of a factory at No 6 Sungei Kadut Way, records of the rental agreement and rental income from the said factory and the employment "contracts" of Mr Goh and Ms Tan. Dr Tan added that he was very concerned about the missing documents and that he was worried about the potential abuse of the company's resources to "enrich certain groups of shareholders and their supporters against the interest of the investors and company".

21 On 15 January 2008, OTC Capital suspended the trading of the company's shares and requested the company to account for the use of placement proceeds raised on OTC Capital.

22 On 25 January 2008, Dr Tan sought and was granted an injunction by Choo Han Teck J to

restrain Mr Goh and Ms Tan "from convening, holding or otherwise allowing to be held an Extraordinary General Meeting … of [the company] on 28 January 2008 or on any other adjourned date and from carrying into effect the purported Notice of Extraordinary General Meeting dated 10 January 2008 … or further acting thereon".

23 On 26 January 2008, Dr Tan received a Notice from the company secretary dated 24 January 2008 cancelling the EOGM of 28 January 2008. OTC Capital was quite annoyed about the last minute cancellation of the EOGM as it had made arrangements with investors who required proxies at the proposed EOGM.

24 On 28 January 2008, OTC Capital wrote a strongly worded letter to Dr Tan. The relevant part of the letter is as follows:

> 5 Fundamentally, the Company's application to have its shares listed for trading on OTC Capital carries with it also the obligation generally to ensure proper disclosure of information and the conduct of its business affairs such that orderly market making and the integrity of trading via OTC Capital is not compromised.
>
> 6 … [Y]our CAD report flows from a fundamental dispute having arisen between yourself and other key officers and shareholders of the Company and that one result of that report is an attempt to have you removed as CEO and director of the Company.
>
> 7 We have only this morning been told that the EGM purportedly called to resolve on your removal as director and CEO is now cancelled but again without any explanation as to why or whether it is indeed a cancellation in acknowledgment that the proposal to remove you is now unequivocally withdrawn or still to proceed…
>
> 10 [W]e write to formally ask that the Company and its directors rectify the deficiencies in information disclosure to date and otherwise to take such actions as are required to permit orderly market making in the shares of the Company to resume. If you are still de facto as well as de jure CEO of the Company then it is your responsibility as its key management officer as well as a director to comply with our demand herein. *Please revert within the next two working days with satisfactory answers and responses to what we have asked for, failing which we may have no choice but to deem the Company and its directors in wilful breach of obligations to us*.
>
> [emphasis added]

25 After receiving OTC Capital's letter, Dr Tan convened an urgent board meeting on 30 January 2008 to discuss, among other matters, "an appropriate response to OTC Capital's queries and request for updated information" and "to update the board of the breaches of employee duties" by Mr Goh and Mr Leong and "to effect a change of signatories for any and all cheques drawn by the company".

26 On 30 January 2008, Mr Goh and Ms Tan turned up at the board meeting and insisted that the meeting was invalid because no proper notice had been given. They added that there would be a deadlock on the proposed resolutions. They then left the meeting 10 minutes after their arrival. This boycott of the meeting proved to be a costly mistake for them as the remaining two directors, namely, Dr Tan and Ms Sim, sacked both Mr Goh and Mr Leong for breaching their duties to the company.

27 The response of Mr Goh and Ms Tan was swift. They used their votes as majority shareholders to have two new directors, namely, Ms Yeoh Lay Cheng ("Ms Yeoh") and Mr Siswanto Djaja Putra ("Mr Siswanto"), appointed to the board. With their appointment, Mr Goh and Ms Tan were able to have their way at board meetings as the new directors, whose claim to neutrality rang hollow, invariably voted with them. These 4 directors will be referred to as the "majority faction" in the rest of this judgment.

28 Notwithstanding the injunction issued on 25 January 2008 by Choo J prohibiting the removal of Dr Tan as the CEO, the latter was summarily dismissed as CEO on 21 February 2008 at a board meeting, in respect of which the removal of the CEO was not on the agenda. The majority faction also saw to it that Mr Goh was reinstated as the CFO while Mr Leong was appointed the acting CEO.

29 On 11 March 2008, the Corporate Advisor, Mr MH Tan, resigned as he was no longer "able to work with the company or the current management". The company was asked by OTC Capital to appoint a new Corporate Advisor but it did not do so.

30 On 24 March 2008, OTC Capital informed the company that there were still "deficiencies in information" sought by it and that the company's listing on OTC Capital would be terminated as from 27 March 2008.

31 With the exit of Dr Tan and many of his key personnel, the company could not remain in the business of laboratory testing for the construction industry, in respect of which investors had invested in it through OTC Capital. At present, the company is primarily in the business of offering training services, a far cry from its original business, as stated in the SOD submitted to OTC Capital.

32 At the company's annual general meeting on 31 December 2008, the majority faction ensured that Dr Tan and Ms Sim were not re-elected as directors even though they held more than 25% of the shares. The proxy forms supplied to shareholders allowed the chairman to be a member's proxy if a shareholder did not name any person as his or her proxy. As the chairman of the AGM, Ms Yeoh, was not in favour of re-electing either Dr Tan or Ms Sim, the majority faction ensured that Dr Tan and Ms Sim were no longer on the board.

Whether there was Oppression

33 Dr Tan relied on s 216(1) of the Act, which provides as follows:

> Any member or holder of a debenture of a company … may apply to the Court for an order under this section on the ground —
>
> (*a*) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
>
> (*b*) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

34 For the purpose of s 216 of the Act, the alleged oppressive act must affect a member in his capacity as member.

35 In *Re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042 ("*Re Jermyn*"), the Buckley LJ, who delivered the judgment of the English Court of Appeal, shed light on what is oppression when he stated as follows at p 1059:

> In our judgment, oppression occurs when shareholders, having a dominant power in a company, either (1) exercise that power to procure that something is done or not done in the conduct of the company's affairs or (2) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company's affairs; and when such conduct is unfair or, to use the expression adopted by Viscount Simonds in *Scottish Co-operative Wholesale Society v Meyer* [1959] AC 324 "burdensome, harsh and wrongful" to the other members of the company or some of them, and lacks that degree of probity which they are entitled to expect in the conduct of the company's affairs…. Oppression must, we think, import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor.

36 In *Low Peng Boon v Low Janie* [1999] 1 SLR 761, the Court of Appeal regarded *Re Jermyn* as a guide for determining what is generally considered as oppression or a disregard of minority interests under s 216 of the Companies Act. LP Thean JA, who delivered the judgment of the Court, also referred to the following passage from the opinion of Lord Wilberforce in *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227, 229, a case in which the Privy Council considered the effect of the Malaysian equivalent of s 216 of the Act:

> The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked… there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play in which a shareholder is entitled to expect before a case of oppression can be made … their Lordships would place the emphasis on 'visible'. And similarly, 'disregard' involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or set at naught the proper company procedure…

37 How a person became a member of a company may be important when determining whether or not there is oppression. *Hick's and Woon's The Companies Act of Singapore – An Annotation* (1989) states the position as follows at p 441:

> Exclusion from management – The exclusion of a member from management of a company in breach of an express or implied understanding to allow him to participate in the management of the company would also justify relief under s 216. In the context of winding up, it has been held that to deprive a member of his right to participate in the management of the company in contravention of an express or implied agreement to allow him to do so would justify winding up on the "just and equitable" ground: see *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360; *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433.

38 That the circumstances under which a petitioner becomes a member of a company may be relevant was made clear in *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 ("*Tay Bok Choon*")

by the Privy Council. In this case, the petitioner, Mr Tay, acquired 25% of the paid up shares of a company in February 1980 after agreeing with the directors that he would be appointed a director as well as the chairman of the board of directors. In addition, his son was also appointed a director. In March 1980, a finance company offered to lend the company money if its paid up capital was increased by $100,000. Apart from paying his share of $25,000, Mr Tay lent one director $25,000 and another director $16,000 so that they could pay for their shares. Six months later, on 23 September 1981, the board, against the wishes of Mr Tay and his son, terminated the executive powers of the directors and conferred them on the managing director. In November 1981, Mr Tay and his son were removed as directors. Mr Tay petitioned to wind up the company, arguing that the undisputed facts created an expectation on his part that his participation in management would not be terminated without good reason and that he would remain a director so long as he held one quarter of the shares of the company. Mr Tay's argument was accepted by the Privy Council, which found that the trial judge was entitled to take the view that the admitted and incontrovertible facts proved that he had been led to believe, even in the absence of any express assurance, that he would participate in the management of the company and that he would in any event be entitled to a seat on the board of directors so long as he held one quarter of the issued share capital of the company.

39 In *Kitnasamy s/o Marudapan v Nagatheran s/o Manogar* [2000] 2 SLR 598, 607, ("*Kitnasamy*"), Chao Hick Tin JA, who delivered the judgment of the Court of Appeal, reiterated at [31] that the exclusion of a member from the management of a company in breach of an express or an implied understanding to allow him to so participate in the management would justify relief under s 216 of the Companies Act. In this case, the appellant, K, and the first respondent, N, were old friends while the second respondent, S was known as K's "uncle". K was a oiling and civil engineer experienced in track laying work. N informed K that there was a joint venture ("JV") seeking to secure a job for track laying works for the North-East MRT Line. K, N and S met the JV's personnel, who recognised K's expertise. K, N and S agreed that they would be equal partners if they secured a sub-contract from the JV for works on the said MRT line. Following the agreement, K was made a director of the company which was to be used as the vehicle for carrying out the project. However, the shares were in S' name and he agreed to transfer to K one-third of the shares. K prepared the quotation for the project and this was accepted by the JV. K then had differences with N and S about whether they should be drawing out moneys received by the company. K wanted the moneys to be kept by the company for the time being. Shortly thereafter, K was notified that an EOGM had been called for the purpose of removing him as a director of the company. The High Court refused to grant an interim injunction and K was removed as a director. However, the Court of Appeal, which overruled the High Court, held that there was at least an implied, if not an express, understanding that all parties would be involved in the management of the company. K had expended much effort and money in relation to the business of the company. He was entitled to expect that all parties would fulfil their respective parts of the bargain. The Court of Appeal thus ordered that K be reinstated as a director of the company and granted an injunction restraining N and S from removing K as a director until the trial of the action or further order.

Dr Tan's legitimate expectations

40 Dr Tan asserted that how he became a member of the company must be taken into account because he had left his former employer, CPG Labs, to join the company with the legitimate expectation and understanding that he would have an important role in the management of the company and the development of the company's laboratory testing business for the construction industry. In view of this, Dr Tan submitted that Mr Goh and Ms Tan acted oppressively against him when they arranged for his removal as the CEO and as a director.

41 Dr Tan had a good track record. A former Public Services Commission scholar, he obtained a

Masters degree in civil engineering from a French university and a PhD in civil engineering from the National University of Singapore. When he joined CPG Labs in 2001, that company had only 12 staff and its annual revenue was only $1m. By the time he left CPG Labs to join the company in 2007, he had been promoted from general manager to managing director and CPG Labs had 200 staff while its annual revenue had increased to $10m. Mr Goh and Mr Heng clearly recognised Dr Tan's worth and they courted him to helm the company, knowing that his expertise and the fact that he would helm the company were important to the listing of the company on OTC Capital. That was why Dr Tan was appointed the CEO of the company and why he and his wife, Ms Sim, were given half of the 4 positions in the board in 2007 even though they held only around 25% of the company's shares.

42 That Dr Tan was a major factor in getting the company listed on OTC Capital was accepted by its chairman, Mr Ong, who described Dr Tan as the "driving force" of the company. When asked what convinced him that the company's shares deserved to be traded on OTC Capital, Mr Ong testified as follows:

> Apart from [meeting] the criteria, what we felt was that although it is a start-up company, it comes across as old wine in new wine skin because [Dr Tan, the CEO of the company] was working with CPG, and he brings along with him his key staff. Now, his key staff not only were prepared to give up a secure job with CPG, but to join him in a new venture, that speaks quite a lot for the confidence they have in the business and in the man…. [m]ore compelling is that I also understand that many of the key staff also invest their money in the company. So that, to me, was a compelling investment story….

43 OTC Capital and its investors were duly informed in the company's SOD about the worth of Dr Tan and his team from CPG Labs to the company. The SOD explained that Dr Tan was responsible for "the overall management, strategic planning and business development" of the group of companies and it was on the strength of Dr Tan's expertise and experience that OTC Capital's investors were invited to invest in the company, whose business was stated as that of providing laboratory testing facilities in the construction industry. The SOD added at [14] as follows:

> **Strong Management Team and Technical Competence**
>
> *We are led by our CEO Dr Tan Choon Yong who has more than 15 years of experience in the consultancy and quality and management industry*. Many of our Directors and senior management have also accumulated vast experience in the various industries in which we operate and have the relevant technical expertise and qualifications….
>
> **Ability to provide one-stop and customised solution**
>
> Given our management's past experience and technical competence, we are more familiar with the requirements of quality standards for various industries and municipals, as compared to other companies. As such, we have been able to provide our customers with customised and cost-effective solutions. Our strong project management capabilities have also enabled us to respond to the needs of our customers in a timely manner. As such, we believe that this would not only augur well for the Group's bottomline but will also give us a strong competitive edge over our competitors and set the benchmark for the industry.
>
> [emphasis added]

44 When alerting potential investors to the risks to which the company was exposed, the SOD made it clear that the retention of Dr Tan and his specialist staff was important to the company. The

relevant part of the SOD is as follows:

> **We are dependent on our key management team and technical personnel**
>
> Owing to the specialised nature of our work, there is a limited supply of adequately skilled engineering and technical personnel. *Our continued success depends largely on our ability to attract and retain a sufficient number of suitably skilled personnel*. If we are unable to attract and retain a sufficient number of suitably skilled and qualified personnel, our business would be materially and adversely affected…. *The loss of their services without timely and suitable replacement will adversely affect our operations and hence, our revenue and profits*.
>
> [emphasis added]

45 Mr Goh sought to downplay Dr Tan's role in the company during the trial. However, when the company was queried by the Corporate Advisor prior to its listing on OTC Capital as to why Dr Tan was paid such a high salary when he was CEO of a small company, Mr Goh's reply to the query on 10 September 2007, referred to Dr Tan's "accomplishment" and showed the pivotal role of Dr Tan in the company. Mr Goh stated as follows:

> We feel that [Dr Tan's salary] of $15,000 is ***not too excessive*** for the following reasons: [emphasis in original]
>
> - Phillip was a PSC scholar who has made a successful transition to being an entrepreneur….
> - *In terms of his accomplishment over the last 2 months, the company has already managed to capture about 75% of the sand testing business in Singapore*. NO START-UP WOULD BE ABLE TO ACHIEVE THIS!
> - The company is not a start-up per se since *almost all the senior staff from the previous company have joined Alphomega*.
> - The industry in which the company is in is the fast-growing construction industry and the company is well positioned in serving a very niche market where technical expertise is crucial.
> - Based on a willing buyer and willing seller basis, *the prospective investors, all of whom currently have been brought in by the senior management team, have expressed confidence in Phillip and his leadership…*.
> - For SINGLAS to accede to test us for accreditation only after 2 months of operation is clearly an endorsement that the company is not a start-up for they would usually assess a prospective lab after it has started operations for about 1.5 years.
>
> [emphasis added]

46 After taking all circumstances into account, I find that there was an understanding between all parties concerned that Dr Tan would, without more, play a major role in the running of the company, not only as a director but also as its CEO. As Dr Tan had a legitimate expectation that he would be the company's director and CEO, attempts by Mr Goh and Ms Tan to renege on this arrangement

without just cause may, in line with *Kitnasamy*, be regarded as oppressive conduct that cannot be countenanced.

Why Mr Goh and Ms Tan were so adamant about removing Dr Tan

47 Why Dr Tan's relationship with Mr Goh and Ms Tan turned so sour only weeks after the company had been listed on OTC Capital must be investigated. Mr Goh and Ms Tan claimed that after the company was listed, they discovered that Dr Tan was incompetent and causing loss to the company. No acceptable proof of the company's loss was produced to the court. For a start-up company such as this, one cannot really tell within a few weeks after listing that Dr Tan was incompetent, and especially so when he had so recently been exalted by the company in its SOD as the impressive man who would lead the company.

48 As for Dr Tan's version of events, his counsel asserted as follows in his Opening Statement:

> In November 2007, barely two months after the listing of the Company, [the majority shareholders] started to wrest control of the Company from Dr Tan …. The plan was to remove Dr Tan, and then find some reason to de-list the Company. *The result would be that the majority shareholders would have raised substantial funds from the public, thus enriching themselves*.
>
> [emphasis added]

49 Dr Tan's allegation that the majority shareholders were enriching themselves was vehemently denied by Mr Goh and Ms Tan. However, the company's Corporate Advisor, Mr MH Tan, was worried enough to think that there might be a scam to misuse money that had been put into the company by OTC Capital's investors. OTC Capital's chairman, Mr Ong, explained as follows:

> It is the immediacy. The minute you … quote a company and then almost immediately you want to remove the CEO …, that doesn't come across very well to us and that was why [the Corporate Advisor] felt that it could be a scam but I told him "It is better not to … draw conclusions so early".

50 Dr Tan said that his troubles with Mr Goh and Ms Tan arose because he wanted to fulfil his fiduciary duties to the company. According to him, the situation turned especially nasty after he wanted to inspect the company's accounts and the employment "contracts" that Mr Goh and Ms Tan claimed to have entered into with the company, under which the duo were each entitled to the same remuneration as the CEO, namely, $17,800 per month.

51 The fact that a director receives remuneration to which he is not entitled is not, without more, oppression against the members and it is for the company to recover the amount siphoned from its coffers. However, in this case, the "contracts" must be considered at length, if only to understand why Mr Goh and Ms Tan reacted so strongly to Dr Tan's attempts to inspect them, and why they took oppressive action against Dr Tan to keep him at bay.

52 As Mr Goh and Ms Tan were directors seeking to benefit generously from employment contracts with the company, they were in a position of conflict of interest. However, they threw caution to the winds. Mr Goh signed Ms Tan's "contract", giving her the title of "executive director" of the company's subsidiary, Thalpha Engineering Pte Ltd ("Thalpha"), while Ms Tan returned the favour by signing Mr Goh's "contract". Both of them knew that neither "contract" had been authorised by the board or the shareholders at a general meeting. Mr Goh and Ms Tan claimed to have signed the "contracts" in July 2007 but these "contracts" were not disclosed to OTC Capital in the SOD, which

was prepared after that date. OTC Capital regarded the non-disclosure of these contracts in the SOD as a very serious matter and after the company was listed in October 2007, OTC Capital's chairman, Mr Ong, told Mr Goh during a lunch that Ms Tan would have to refund her "salary" to the company as she had no employment contract. Furthermore, Mr Ong warned that if the money was not refunded, Mr Goh would be "implicated as a party to defraud" and may be charged for committing a criminal offence.

53 Mr Goh said that he was "stunned" by Mr Ong's position. Whether or not Mr Goh was stunned, one would have expected him to respond to Mr Ong during the lunch by clarifying that Ms Tan had an employment contract with the company since July 2007, and especially so when he was warned by Mr Ong that he might be implicated as a party to defraud the company. Incredibly, Mr Goh did not mention the existence of Ms Tan's "contract" to Mr Ong during the lunch. The following part of his cross-examination shows his garbled response as to why he kept silent about Ms Tan's "contract":

> Q Why didn't you just tell Mr Ong that indeed, [Ms Tan] had a service contract …. It would be a simple matter for you, if such a service contract existed, to just tell Mr Ong that such a service contract existed. Why didn't you do that?
>
> A As I mentioned I was --- the whole lunch, I will stand by the whole events that took place. That was – …
>
> Q I know you were taken aback –
>
> A Yes. It was a very difficult lunch, yes….
>
> Q [S]o throughout the one-hour lunch, you did not – or rather you were not able to say to Mr Ong that contrary to what he believed, Ms Tan did have a service contract? You were not able to voice this out?
>
> A That's correct.

54 In view of Mr Goh's evidence, one may well ask whether the "contracts" were signed *after* the lunch and backdated to July 2007 so that Ms Tan need not have to pay back her "salary" to the company. Mr Goh insisted that the "contracts" were signed before the company was listed and he initially alleged that the Corporate Advisor, Mr MH Tan, had advised him that it was unnecessary to disclose the "contracts" in the company's SOD. However, this was vehemently denied by Mr MH Tan, who said that he did not know about these "contracts" at the material time. When cross-examined, Mr Goh finally admitted that Mr MH Tan was not told about Ms Tan's salary. As for Ms Tan, she accepted that she had negligently failed to notice the omission of her "contract" in the SOD.

55 If the "contracts" had indeed been signed in July 2007, then Mr Goh must have known that since OTC Capital had queried why the CEO was paid $17,800 per month, it would have been difficult for him to justify his and Ms Tan's monthly salary of $17,800. Hence, the silence in the SOD about these "contracts".

56 When cross-examined, Ms Tan conceded that the shareholders did not know that her salary was $17,800 per month and that they should have been told about her salary. More importantly, she agreed that the disclosure of the "contracts" in the SOD might have affected the decision of investors as to whether they should invest in the company.

57 Mr Goh and Ms Tan asserted that although they had not been authorised by the board to sign each other's "contracts", all the directors had agreed that they be paid the same salary as the CEO. If this is true, Dr Tan would not have demanded to see the "contracts" and if he did so, Mr Goh would surely have reminded him of the alleged agreement between the directors and shown Dr Tan the "contracts". Instead, Mr Goh remained silent and steadfastly refused to show Dr Tan the "contracts".

58 Mr Goh claimed that he could not be faulted for not giving Dr Tan a copy of Ms Tan's "contract" as he had handed over a copy of the said "contract" to the company's lawyers, Nanyang Law LLC, who refused to hand over the document to Dr Tan. However, the CEO of Nanyang Law LLC, Mr Ng Kim Tean, denied that this was the true position.

59 Neither Mr Goh nor Ms Tan adequately explained why they each deserved $17,800 per month. Mr Goh was merely the company's CFO and one would be hard put to justify paying him the same salary as the CEO. Even more troubling is Ms Tan's claim to a monthly salary of $17,800. Although she was termed an "executive director" in the "contract", she admitted that from July 2007 until the CEO was sacked in February 2008, she was not a full-time employee of the company and that she had no place in the company's organisation chart. No one reported to her and she reported to no one. She did not even have a company e-mail account at the material time. Although Mr Goh claimed that Ms Tan worked from home and reported to the board, Ms Tan conceded that there was no evidence that she had made any report to the board.

60 While referring to the "contracts" of Mr Goh and Ms Tan with the company, OTC Capital's chairman, Mr Ong, explained why he was concerned that there might be a plan to misuse investors' funds in the following terms :

> We look at it as possibly a misuse of proceeds from … [the fundraising on OTC Capital], because both [Mr Goh and Ms Tan] were receiving salaries as much as the CEO. In fact when we were considering the [listing of the company] we felt that the CEO's salary was too high for a start up company, and we actually queried the corporate advisor, who also queried the CFO… But we were surprised that [Mr Goh and Ms Tan were] drawing a salary as high as the CEO himself. So that …. was a concern for us…. We were puzzled as to how it's [Mr Goh] who signed the appointment for [Ms Tan] and [Ms Tan] signing the appointment of [Mr Goh].

61 When invited to justify Ms Tan's monthly remuneration, Mr Goh merely stated as follows:

> She played *several key roles*; number 1, the original draft of the [Small Offer Document] was prepared by her … with information that was provided by [Dr Tan]. On top of that, the logo was also designed by her, the letterheads … but, more importantly, she was crucial in raising the initial funds, the seed funds … amounting to [an] excess of 800,000 …
>
> So that was the period [prior to the listing of the company on OTC Capital]. Following that, we also made it very clear on the roadshow that we are aiming to go to Catalist, it was again to seek for investments …. So … that's the … scope of her work.
>
> [emphasis added]

62 Ms Tan echoed what Mr Goh said about her "key" roles and added that she "contributed" to the company's business plan. However, when cross-examined, she readily admitted that she really did not know much about the company's business. She stated as follows:

Q [Y]ou have no clue about the running of this business, right?

A *That's why we have GMs … here and there*.

Q [Y]ou have no clue about the running of [the company's] lab testing business?

A *No, I don't*.

[emphasis added]

63 Ms Tan's role in the preparation of the SOD was truly minimal. When cross-examined, she admitted that all that she did was to collate some information and send the draft to Mr Goh. As for the company's business plan, which was of course forged by Dr Tan, Ms Tan agreed that her contribution to the said business plans was also minimal. The relevant part of the cross-examination is as follows:

Ct We are talking about your company's business plans….

A Yes, … but … *to beautify it up and to make it sound nice*, the mission statement, core values, all those …

Q Okay. Let's divide it into two parts. The substantive business plan, which is the brains behind what the company is going to do; and let's call the second part, which is the beautification process, the language, the beautifying of that -- *you were involved in the second part; the beautification of the business plans; but the substantive brains behind what this company was going to do was done by [the CEO, Dr Tan]*; agree?

A Yes, he gave us the business plans.

[emphasis added]

64 What else did Ms Tan do for the company to justify her monthly remuneration of $17,800? She claimed that she "was doing background work" for listing the company on Catalist but she conceded that there was no proof that she did any such work. Finally, Ms Tan claimed that as she had raised funds for the company, her monthly salary of $17,800 was her "fair share". However, she did not raise significant amounts of funds for the company. She admitted that her husband, Mr Heng, played an important role in the soliciting of funds *before* the company was listed on OTC Capital, and that she raised no funds *after* the company was listed on OTC Capital in October 2007. What merits attention is her following admission during cross-examination:

Q So you … would have investors and public shareholders believe and accept that you deserve your pay of $17,800 when you essentially have no proof that you did anything – is that right?

A There is no proof, yes.

65 Undoubtedly, Mr Goh and Ms Tan breached their fiduciary duties to the company when they signed each other's "contracts" and Dr Tan had a duty to the company and its shareholders to question the propriety of the "contracts". Dr Tan took the view that these were sham contracts intended to enable Mr Goh and Ms Tan to exploit the company for their own benefit and he said that when his repeated requests to inspect the "contracts" were rebuffed, he refused to sign the salary cheques for Mr Goh and Ms Tan for the month of December 2007. Dr Tan asserted that Mr Goh threatened him with dismissal by the majority shareholders if he refused to sign the said salary cheques. In retaliation, Mr Goh refused to hand over Dr Tan's salary cheque for December 2007 until 15 January 2008. What is worth noting is that Mr Goh admitted that he withheld Dr Tan's salary because the latter did not want to sign the cheques for his and Ms Tan's salary.

66 Mr Goh and Ms Tan must have realised that they could lose their monthly salary of $17,800 if Dr Tan continued to insist on inspecting the "contracts". Furthermore, with OTC Capital's threat that Ms Tan must refund to the company the amount she took as salary and that if she did not, Mr Goh must be implicated in a plan to defraud the company, both Mr Goh and Ms Tan did not take well to what they perceived to be Dr Tan's interference with their entitlement of $17,800 per month. Hence, they took oppressive action against him and planned to remove him from the post of CEO some two months after the company was listed on OTC Capital.

67 Apart from the problems regarding the "contracts", Dr Tan said that he faced other obstacles in performing his role as CEO. He alleged that when he was not in the office on 22 November 2007, Mr Goh instructed his staff not to report to him directly but to report to Mr Leong instead. He also discovered that Mr Goh and Mr Heng had told many of the company's employees that he had to step down as the CEO.

68 Dr Tan recounted that soon after the listing on OTC Capital, Mr Goh, Mr Leong and Mr Heng began to run the company as if he was not around. He took umbrage at the fact that without his consent, they tried to close down the company's Training Department, Soil Investigation and Instrumentation Department and Civil and Structural Diagnostic Department. He had to intervene to prevent their closure. Dr Tan also pointed out that without consulting him, Mr Goh gave instructions for the termination of the contracts of 6 employees on 3 January 2008. He reversed Mr Goh's decision and reinstated all the 6 employees.

69 Dr Tan was also denied access to important financial and administrative records, including human resources files. More startling was that important financial and human resources records were missing from the company's premises. On 10 January 2008, Dr Tan e-mailed Mr Goh as follows:

> You have not furnished me any financial reports to-date for both Alphomega Research Group Limited and Thalpha Engineering Pte Ltd in your capacity as CFO of the company. I have requested from you several times the documents of Alphomega Research Group Limited as I want to do an audit on the documents. Yesterday, 9 January 2008, I have discovered all official company documents missing from our office premises. There are no financial records, no HR records and no administrative records of Alphomega Research Group Limited in both 629 Sungei Kadut Way, Singapore … as well as the small office at 114, Lavender Street … This can be viewed

as a serious breach of confidentiality of company documents. Please explain where all such company documents in your care went to. If you are in possession of them, kindly surrender all of them to me for an immediate company audit. I also need an explanation where all official company documents are to be accounted for.

70 In another email to Mr Goh dated 11 Jan 2008, Dr Tan stated:

[A]ll HR records of yourself, Mr Goh Jon Keat … and Ms Tan Hui Kiang, the non-executive director … as well as mine are not in the office. I have asked you several times for them for audit purposes as I have not sighted any of them to-date. Kindly pass them to me for sighting and audit.

I would like to have all the HR records by today. Furthermore, please account for the missing financial records and admin records of [the company] from the company premises as well.

71 Mr Goh did not respond to Dr Tan's e-mails. It transpired that he had kept many of the account books in his own house. This contravened Article 151 of the company's Memorandum and Articles of Association, which provides that the books of accounts shall be kept at the company's office or at such other place or places as the directors shall think fit. It was not disputed that the board had not resolved that the books should be kept in any place other than the office.

72 Mr Goh pleaded in his Defence at [19] that Dr Tan had requested him to keep account books and other documents at his residence as the company's premises were not secure. This is most unlikely for if Dr Tan had made such a request, he would not have asked Mr Goh where the accounts were. Mr Goh's testimony prompted the following exchange between him and Dr Tan's counsel:

Q So you are saying that Dr Tan, on the one hand, asked you to put the documents in your own home, but, on the other hand, wrote an email to you asking you where those documents are?

A In my – yes ….. I felt that he was laying the path for me to be entrapped –

Q How on earth would writing this email constitute a trap for you…?

A I would not know, so I just wanted to make sure that I am not entrapped in any way ….

Q So naturally, because it's a trap, you would have wanted to respond on record to say "Dr Tan, what on earth are you talking about? You yourself told me to keep all these documents in my own home. How can you write this terrible email to suggest that the documents are missing, when you know full well what has become of them?" Isn't that the best way to deal with such a trap?

A I conferred with my counsel and he said just to remain -- just avoid answering anything….

Q In retrospect … should you have responded by email to say "Dr Tan, it is you who asked me to keep these documents in my own home"?....

A Yes.

73 Although Mr Goh blamed his lawyer for advising him not to hand over the accounts to Dr Tan, he subsequently admitted that he was not sure whether his lawyer had anything to do with his refusal to hand over the accounts to the CEO.

74 Mr Goh and Ms Tan also hampered Dr Tan's role as CEO by not assisting him in answering OTC Capital's queries. When Dr Tan called an emergency board meeting for 30 January 2008 after OTC Capital gave him until that date to answer its queries, Mr Goh and Ms Tan turned up and staged a walk-out. They complained that they had inadequate notice of the meeting. However, unless the articles require otherwise, notice of a board meeting may, depending on the need, be called at short notice so long as it is sufficient to enable directors to attend it: see *Chow Kwong Ching v Chow Kwok Chi* [2008] 4 SLR 577, and *Browne v La Trinidad* (1888) LR 37 Ch D 1. Both Mr Goh and Ms Tan knew that OTC Capital had given the company a deadline and had suspended trading in the company's shares. By leaving the meeting for reasons best known to themselves and knowing that OTC Capital had already suspended the trading of the company's shares on 15 January 2008, Mr Goh and Ms Tan obstructed Dr Tan's work and failed to act as responsible directors.

75 I find that by their obstructive acts referred to above, Mr Goh and Ms Tan made it difficult for Dr Tan to perform his task as CEO. Undoubtedly, they intended to sideline and oppress Dr Tan even though he was a member of the company with a legitimate expectation that he would be allowed to lead the company.

Misuse of company funds to pay for a lawyer to advise the majority shareholders in their conflict with Dr Tan

76 When considering the actions of Mr Goh and Ms Tan in thwarting Dr Tan at every turn, the role of the "company's lawyer", Mr Ng Kim Tean ("Mr Ng"), cannot be overlooked. While Dr Tan acted correctly by retaining Drew & Napier LLC as his personal lawyer to advise him on his problems with his fellow directors, Mr Goh and Ms Tan utilised the *company's* funds to pay for legal advice given to them with respect to their personal battle against Dr Tan.

77 Mr Ng admitted that he knew that neither the board nor the CEO would appoint him as the company's lawyer. All the same, he thought that as Mr Goh and Ms Tan were the majority shareholders, he could accept *their* invitation to become the company's lawyer. Ms Tan confirmed how useful Mr Ng was to her "side" when she testified as follows:

Q … I suggest to you that the only reason why you wanted … Nanyang Law was … you felt that Nanyang Law, and especially Mr Ng Kim Tean, was on your side? You felt that he was on your side?

A Yes….

Q … And you preferred them because … they were helpful to you. You considered them helpful to you. Right?

A Yes, they were helpful to us.

78 Mr Ng advised Mr Goh and Ms Tan without informing the CEO, Dr Tan, as to what was going on

behind his back. When cross-examined, Mr Ng accepted that he had acted inappropriately when he testified as follows:

Q … Mr Ng, since there are two camps, do you agree that as the company's lawyer, you must take great care to be neutral and not to take sides?

A I have admitted … that I should have done that, on hindsight…

Q You were not neutral.

A I was not neutral, that's right.

Q That is wrong?

A That is wrong, in hindsight, yes.

79 When confronted with evidence of oppressive behaviour, Mr Goh often claimed that he had acted on Mr Ng's advice. Towards the end of the trial, Mr Ng was subpoenaed by Mr Goh and Ms Tan, presumably to corroborate their evidence. This was a colossal mistake as Mr Ng distanced himself from their position and denied their allegations. Not surprisingly, after Mr Ng had testified, the company replaced his law firm, which had acted for the company at the trial for 5 weeks, with Sterling Law Corporation, which had the unenviable task of appearing for the company during the last few days of the trial.

80 What is noteworthy is that when cross-examined, Mr Ng admitted that he abetted Mr Goh and Ms Tan to "oppress and prejudice" Dr Tan's rights. After reviewing the evidence, I find that the use of company funds to pay for Mr Ng's services to the majority faction was uncalled for and is another example of oppression against Dr Tan.

Removal of Dr Tan as CEO

81 As has been mentioned, within two months after the company was listed on OTC Capital, Mr Goh and Ms Tan tried to have Dr Tan removed as the CEO. After failing to persuade OTC Capital to announce on its website in December 2007 that Dr Tan had been removed as the CEO, on 10 January 2008, they called for an EOGM not only to remove Dr Tan as the CEO but also to remove Dr Tan and Ms Sim as directors. Although Choo J had granted an injunction on 25 January 2008 against the removal of Dr Tan at this EOGM (which was eventually aborted) or any other EOGM, the majority faction relied on an incident in Pandan Valley Condominium ("the Pandan Valley incident") which occurred on 24 March 2007 to remove him as the CEO at a board meeting on 21 February 2008.

82 In the Pandan Valley incident, Dr Tan was involved in a row with a security guard at the Condominium. In the heat of the argument, he drove his car towards the security guard, causing the said vehicle to come into contact with the latter. Dr Tan faced a criminal charge in the Subordinate Courts for an offence punishable under s 352 of the Penal Code (Cap 224, 1985 Rev Ed), which concerns an assault or the use of criminal force on another person. On 21 February 2008, Dr Tan was fined and jailed for a day for his part in the fracas with the security guard, who was administered a "stern warning" by the police although he was not prosecuted.

83 By 21 February 2008, the majority shareholders were in control of the board. Mr Goh and Ms Tan had used their votes as majority shareholders to enlarge the board from 4 to 6 members.

Regrettably, the appointment of the two new directors, Ms Yeoh and Mr Siswanto, is further evidence of an elaborate plan to oppress Dr Tan as the new directors were not neutral. Both of them had been told by Mr Goh that Dr Tan was mismanaging the company and they admitted that without bothering to find out the truth, they had joined the board to keep Dr Tan in check. In her affidavit of evidence-in-chief ("AEIC"), Ms Yeoh showed her bias against Dr Tan when she stated at [6] – [8] and at [10] as follows:

> 6 Sometime in February 2008, I was approached by [Mr Goh and Ms Tan], … who informed me that the [company] *might have been mismanaged by [Dr Tan]*, who was [then] the CEO…..
>
> 7 I was told that to date, the [company] had lost more than $1 million …
>
> 8 They thus wanted me to become a Director … so that I can serve as a check and balance to ensure that the [company] was properly managed and run…
>
> 10 … It was *crystal clear* to me that the [company] would continue to be *mismanaged as [Dr Tan] would not shy away from using his position as CEO to continue to run the [company] down*.
>
> [emphasis added]

84 When cross-examined, Ms Yeoh agreed that it was reasonable for someone in her position to check with Dr Tan to determine whether the latter was, as alleged by Mr Goh, to blame for the company's alleged losses. Despite this, she never talked to Dr Tan. She had thought that it was "crystal clear" that Dr Tan would continue to run the company down and when asked why she did not discuss matters with Dr Tan, her answer was as follows:

> Q Why is it so difficult for you to understand this concept of talking to Dr Tan? ….
>
> A No. Why should I go up to Dr Tan? Why couldn't he come to me.

85 Ms Yeoh was so biased against Dr Tan that she suggested that the latter had lied that Mr Goh had not provided financial documents to him, an assertion that even Mr Goh did not make.

86 Mr Siswanto, who like Ms Yeoh, did not bother to find out from Dr Tan whether the company was really being mismanaged, echoed Ms Yeoh's biased words in his AEIC at [11] as follows:

> I understand that at that time, [the company's] board of directors was at a deadlock. [Dr Tan and his wife] would be on one side, whilst [Mr Goh and Ms Tan] would be on the other. *It was crystal clear to me that [the company] would continue to be mismanaged as [Dr Tan] would not shy away from using his position as CEO to continue to run the [company] down*.
>
> [emphasis added]

87 When cross-examined, Mr Siswanto proved why he was not an independent voice in the board when he said as follows:

Q Mr Goh told you that Dr Tan mismanaged the company and lost 1 million, and you didn't bother to verify this with anyone else; isn't that right?

A *Yes. I trust him* ….

Q You have agreed that the financial position of a company and the capabilities of a CEO of the company are very important….

A Yes.

Q *And on these two important matters*, I suggest to you that *you simply did what Mr Goh told you to do*, and you took his word for it.

A *Yeah. I trust Mr Jon Goh and Mr Leong*.

[emphasis added]

88 Having packed the board with their supporters in order to further oppress Dr Tan, Mr Goh and Ms Tan were able to ensure the dismissal of Dr Tan as the CEO on 21 February 2008.

89 What was the real reason for the removal of the CEO? Mr Goh stated in his AEIC at [94] as follows:

The Plaintiff was removed as CEO for the following reasons:

94.1 the day before the Board of Directors' Meeting, the Plaintiff had been convicted of a criminal charge for assaulting the security guard at the Pandan Valley condominium for which he was fined and sentenced to a one-day imprisonment term;

94.2 in fact it had transpired that the Plaintiff had used his motor vehicle as a weapon;

94.3 the Plaintiff was very aggressive, brazen, contemptuous and pejorative in his behaviour by constantly questioning the appointment of Yeoh and Chuang (notwithstanding the vote taken at the Extraordinary General Meeting on the 19th February 2008), and his dismissal as the CEO.

90 Mr Goh's explanation is not convincing. After all, he, Ms Tan and Mr Heng knew that Dr Tan faced the criminal charge in question *before* they asked him to join the company. When cross-examined, Mr Heng, said as follows:

Q [T]he cumulative knowledge between you, Mr Goh, and [your wife, Ms Tan], as of May 2007, is that you didn't think it was an issue, and you continued to partner with Dr Tan to approach OTC for a listing; you agree?

A *Yes, we did not think it was [an] issue*.

Q You knew very well that his court case involving the incident at Pandan Valley was pending, and *yet neither your cousin, Mr Goh, nor your wife, Madam Tan, directors of Alphomega thought it fit or necessary to stop Dr Tan from joining the company; do you agree?*

A *Yes, I agree*, your Honour.

[emphasis added]

91 In any case, Dr Tan's conviction for his part in the Pandan Valley incident cannot be the real reason for the dismissal because even before he was convicted and sentenced on 21 February 2008, Mr Goh and Ms Tan had tried to remove him as CEO by calling the aborted EOGM scheduled for 28 January 2008. Prior to that, Mr Goh had wanted OTC Capital to announce the removal of Dr Tan as CEO on its website in December 2007.

92 When cross-examined, Mr Goh agreed that neither Phillips Securities nor OTC Capital had thought that the criminal charge relating to the Pandan Valley incident had any impact on Dr Tan's ability to be the CEO. More to the point, Ms Tan's husband, Mr Heng, agreed that the Pandan Valley incident was a private matter between two individuals and he testified that Dr Tan's ability to lead the company was not affected by the outcome in the case when he stated as follows during cross-examination:

Q *[R]egardless of the outcome of this incident at Pandan Valley* between Dr Tan and the security guard, isn't it true that … *all three of you: you, Mr Goh, and your wife* ---- all felt that it would not affect his ability to discharge and perform his duty as CEO of Alphomega?

A Yes, your Honour.

[emphasis added]

93 The manner in which the board meeting was planned and the testimony of the directors who dismissed Dr Tan showed that the real reason for his dismissal had nothing to do with his conviction. The agenda for this board meeting, in respect of which two days notice was given, was ostensibly to welcome the new directors, Ms Yeoh and Mr Siswanto, to address OTC Capital's queries and to discuss the bank mandate of the company's bank accounts. However, the true purpose of the board meeting can be gleaned from the events prior to the meeting.

94 The "company's lawyer", Mr Ng, testified that hours after Dr Tan was sentenced on 20 February 2008, Mr Goh and Ms Tan met him at his office and said that they wanted to remove the CEO. He said that he was instructed to prepare a script to be read out at the board meeting on the following day

to justify the removal of Dr Tan even though the removal of the CEO was not on the agenda for the meeting. Mr Ng, who emailed the script to Mr Goh and Ms Tan, testified that he was instructed by them not to forward a copy of the script to Dr Tan. Ms Tan admitted that Mr Ng's script for the removal of Dr Tan was only given to the majority faction and that no one handed a copy of that script to either Dr Tan or his wife, Ms Sim.

95 It is not acceptable that Dr Tan had no notice of the plan to remove him and that the issue of removal of a person as important as the CEO was raised by the majority faction under the item "Any Other Business" in the agenda. When cross-examined, Ms Tan made the following damning admission:

> Q So you would agree that Dr Tan and Perlyn, especially *Dr Tan … was hopelessly outnumbered and ambushed*, right? *With regards to the termination … as CEO, he had no clue what was coming, right?*
>
> A *Yes*.
>
> [emphasis added]

96 When the question of the removal of the CEO was finally brought up, the chairman of the meeting, Ms Yeoh, dutifully read the script prepared by Mr Ng. That script contained many glaring errors. First, it included a statement that Choo J's injunction against the dismissal of Dr Tan was no longer in force. This was patently untrue. Secondly, the script contained a statement that the decision of the board to sack Mr Goh and Mr Leong on 30 January 2008 had been declared invalid by the High Court. This was also untrue for while an application had been made to the High Court to nullify the decision to sack Mr Goh and Mr Leong, no decision had been made by the High Court on 21 February 2008. Those who knew about these glaring errors in the script did not correct the chairman. When cross-examined, Mr Goh admitted that he had informed Ms Yeoh that the termination of his contract was held by the High Court to be invalid.

97 Considering that there were many items on the agenda, including the addressing of the queries of OTC Capital, the CEO was obviously not given much time to address the allegations against him as the entire meeting ended only after around an hour. How serious the majority faction was about the other items on the agenda may be gleaned from the fact that when Ms Yeoh was cross-examined as to why she refused to accede to Dr Tan's request at this meeting to discuss a number of important letters from OTC Capital, her answers showed her attitude towards him and her preoccupation with the size of her investment in the company:

> Q So you never met with Dr Tan? This was the first time you were meeting with Dr Tan to discuss the letters from OTC, isn't that right?
>
> A Yes.
>
> Q But you refused his request to discuss these letters, isn't that correct?
>
> A No…. How can I trust him? How can I listen to him? *He should listen to me. I am the bigger shareholder. I invested .. half a mil there*.

[emphasis added]

98 Why Ms Yeoh's investment of half a million dollars, which is just enough to pay the salaries of Mr Goh and Ms Tan for about 14 months, gave her the right as chairman to refuse to allow a discussion of a matter of such importance as OTC Capital's concerns about the company cannot be fathomed. In any case, Dr Tan, who owns 25.3% of the company's shares, had a much larger number of shares than Ms Yeoh.

99 Mr Goh's view that the company had to sack Dr Tan because of the Pandan Valley incident was not backed by his fellow directors in the majority faction. Ms Tan distanced herself from Mr Goh's position and said that she wanted Dr Tan removed because she was concerned that he was causing the company to lose money. Although the majority faction's witnesses cited a number of examples of Dr Tan's wrongdoing, the following part of Ms Tan's cross-examination showed just how insubstantial the allegations were:

Q Do you accept that now, Mdm Tan, as you sit in court, that *you have no reasons to allege that [the CEO, Dr Tan] has mismanaged the company, and thereby to terminate him?*

A But the fact the company is in the red…

Q Yes or no?

A *Yes*.

[emphasis added]

100 The final blow delivered by Ms Tan to the defendant's case for the removal of Dr Tan CEO was when she finally conceded that Dr Tan should not have been summarily dismissed on 21 February 2008.

101 The third director who voted for Dr Tan's removal, namely, Ms Yeoh, was so determined to shore up the majority faction's position led her to make assertions that even Mr Goh and Ms Tan did not find it wise to make. She was often hesitant and evasive. During cross-examination, she surprisingly asked whether she could give an "ambiguous" answer and whether she could refuse to answer a simple question posed to her. The following part of the proceedings illustrates the unhelpful answers she furnished during cross-examination:

Q [D]r Tan is saying that HR, administrative and financial records could not be found in the office to enable him to reply to OTC's queries – do you see that? ….

A Yes, but … it's there.

Q Where?

A *In the company*.

Q Don't lie, Ms Yeoh.

A *No, I seen it myself*.

Q Ms Yeoh, Mr Goh … has given evidence in court to say that he kept the financial documents of the company in his own home?.

A Yeah, so I say … it's in the company, you know --

Q 21 February 2008, you knew that Mr Goh was keeping the company's financial records in his own home?

A Yes.

Q *So why did you tell the court just now that it was in the company's premises?*

A *It was in the company and then secondly he take home*.

[emphasis added]

102 If there can be any lingering doubt as to whether Ms Yeoh gave Dr Tan a fair hearing before voting to dismiss him, these are dispelled by the following astonishing admission made by her during cross-examination:

Q I put it too you that you were determined to remove Dr Tan as CEO regardless of whatever explanation he could provide.

A Yes.

103 I thus find that in wanting to get rid of the CEO at all costs without finding out what was the true picture, Ms Yeoh did not act in the interest of the company or the shareholders and helped Mr Goh and Ms Tan to oppress Dr Tan.

104 The fourth director who voted to remove Dr Tan, Mr Siswanto also did not give Dr Tan a fair hearing at the meeting of the board on 21 February 2008. Initially, he claimed that he first knew about Dr Tan's conviction *during* the meeting of the board and that he thought for about 10 to 15 minutes before deciding to sack Dr Tan. Subsequently, he contradicted himself by claiming that he found out about the criminal conviction "*just before*" the meeting but this meant that he had only around one hour to consider the matter provided that he did not pay attention while other items on the agenda were being discussed. What mattered was that Mr Siswanto agreed that the Pandan Valley incident was a "personal" matter for the CEO and that that Dr Tan's conviction did not affect his ability to run the company as its CEO. When it was suggested that it was not very prudent to remove this CEO after having spent at most an hour thinking about this, Mr Siswanto had a different reason for sacking Dr Tan, namely that the latter had an "explosive character".

105 The evidence from Ms Yeoh, Ms Tan and Mr Siswanto totally undermined Mr Goh's assertion that Dr Tan was sacked because of the Pandan Valley incident. I hold that Dr Tan was unfairly

removed as the CEO of the company. In view of Dr Tan's legitimate expectation that he would have a major role in the running of the company, the removal of Dr Tan for ulterior motives amounts to oppression.

KPMG's investigation of Dr Tan

106 The oppression against Dr Tan did not end after his removal from the post of CEO. Another illustration of oppression against him is the appointment of KPMG to conduct a witch hunt against him after he was dismissed.

107 It may be recalled that OTC Capital, which was rather concerned about where the investors' money went, wanted an account of how their money was being spent. In response to this concern, Dr Tan instructed Ernst and Young to conduct a forensic audit of the company and on 5 February 2008, he wrote to OTC Capital to inform them of the appointment. However, after a few days of work, Ernst and Young withdrew because they were not paid an agreed initial sum of $60,000 as the company's bank accounts were frozen as a result of the dispute between its directors.

108 After having sacked Dr Tan, the majority faction could have asked Ernst and Young to continue with the audit to satisfy OTC Capital's concerns. However, this firm was not trusted merely because it had been appointed by Dr Tan. On 21 February 2008, the day Dr Tan was dismissed, the board authorised the newly-appointed acting CEO, Mr Leong, to appoint "an internationally recognized and reputable firm to conduct a forensic audit of the Group". Instead of arranging for a forensic audit of the Group, Mr Leong asked KPMG to conduct a review into the affairs of the company from 1 November 2007 to 21 February 2008 "to ascertain whether there is prima facie evidence of fraudulent conduct by Dr Tan, the former Chief Executive Officer".

109 Ms Tan accepted that those who gave KPMG the stated mandate had acted against the will of the board and not in the company's best interests while Ms Yeoh conceded that the mandate given to KPMG was an "unfair" mandate.

110 Among other things, the majority faction had complained that at a board meeting on 30 January 2008, Dr Tan had changed the signatories for the company's bank accounts and arranged that only he and his wife, Ms Sim, were entitled to sign the company's cheques. Mr Goh and Ms Tan insinuated that there must have been an ulterior motive when Dr Tan and his wife made themselves the only authorised signatories of the company's bank accounts. However, Dr Tan explained that he took this course of action because Mr Goh was harming the company's interests by not signing on time the cheques required for the company's business and employees' salaries. What cannot be overlooked here is that the issue of the company's bank accounts was placed on the agenda of the meeting and despite being able to attend this meeting on 30 January 2008, Mr Goh and Ms Tan staged a walk-out. Had they fulfilled their duties as directors and attended this meeting, Dr Tan and Ms Sim would not have been able to pass the resolution changing the signatories for the company's bank accounts. To complete the picture, Mr Goh then wrote to the relevant banks after this meeting and the company's accounts were frozen for a while thereafter. For the record, KPMG did not find that Dr Tan had committed any fraud. There being no reason to investigate Dr Tan for fraud, the net result of the KPMG audit was that the company had to pay KPMG $160,000 for an audit that did not meet OTC Capital's requirements. Instead, the KPMG audit formed part of the tale of oppression of Dr Tan.

Removal of Dr Tan and his wife as directors

111 As has been mentioned, Dr Tan and his wife, Ms Sim, were not re-elected to the board at the

company's annual general meeting in December 2008. Mr Goh and Ms Tan claimed that they did not remove Dr Tan from the board and that this was merely a case where directors did not secure enough votes to be re-elected to the board. What is clear is that Dr Tan could not have been left out of the board unless Mr Goh and Ms Tan, who owned more than 50% of the shares in the company, wanted this result. In view of my finding that Dr Tan became a member of the company on the understanding that he would have a meaningful role to play in the running of its affairs, the removal of Dr Tan from the board is, on the authority of *Tay Bok Choon*, yet another example of oppressive conduct against him.

Conclusion on allegation of oppression

112 Evidently, the majority shareholders and directors abused their voting powers to advance their own agenda to the detriment of the company and its minority shareholders, including Dr Tan, who had been deliberately excluded from the management of the company in contravention of an understanding that he would be allowed to participate in such management. Furthermore, the main object of the company, which is to provide laboratory testing for the construction industry, has been departed from. I thus find that Dr Tan is entitled to relief under s 216 of the Act.

Remedy for the Oppression

113 Where there has been oppression, the court has an unfettered discretion under s 216 of the Act to remedy the situation. Section 216(2) of the Act provides that the court may, with a view to bringing to an end or remedying the matters complained of, make such order as it thinks fit.

114 In *Tang Choon Keng Realty (Pte) Ltd v Tang Wee Cheng* [1992] 2 SLR 1114, Chan Sek Keong J laid down a helpful guideline as to how the discretion should be exercised when he said:

> I do not doubt that the court's discretion under s 216 is unfettered. What is important is how the discretion is to be exercised. My view is that it should be exercised for the purpose for which s 216 was enacted, ie '*with a view to bringing to an end or remedying the matters complained of*'. If the matters complained of can be remedied by an order other than a winding-up order, there is no reason for the court to wind up the company simply because its discretion is unfettered. In *Cumberland Holdings Ltd*, Lord Wilberforce, again delivering the opinion of the Privy Council in an appeal under the corresponding provision in New South Wales, said (at p 566):
>
> > Indeed the statutory provisions are widely expressed and effect should be given to them in accordance with their terms whenever the court comes to the conclusion that there has been a lack of fairness, or oppression, or lack of probity on the part of the majority, or of the directors representing the majority. But to wind up a successful and prosperous company and one which is properly managed must clearly be an extreme step and must require a strong case to be made.

115 Chan J added at [61] that "a winding-up order should only be granted as a last resort in an oppression petition, and a court should not (not, be it noted, *may not*) make such an order where there are sufficient alternate remedies to right the wrong done to the petitioner."

116 In the present case, the trust between the parties has completely broken down. It is also important to note that the company and its subsidiary, Thalpha, are no longer in the business described in the SOD that was furnished to OTC Capital and its investors. Had Dr Tan known that the business he was asked to take charge of would be totally changed shortly after the listing of the company on OTC Capital, he would not have agreed to become a member of the company.

117 Bearing in mind that a winding-up order should not be made if there are other ways to remedy the situation, the best way forward is for Mr Goh and Ms Tan to purchase the shares of Dr Tan at an agreed price or at a price determined by a jointly appointed valuer, whose decision, which is not to take into account any discount for minority shareholdings, shall be final. If there is no agreement between the parties on the price or on the mechanism and other relevant details for determining the price of the shares within 30 days, I order that the company be wound up.

Costs

118 Dr Tan is entitled to the costs of the action.