Sharikat Logistics Pte Ltd *v* Ong Boon Chuan and others
[2014] SGHC 224

Case Number : Suit No 212 of 2011

Decision Date : 05 November 2014

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Kannan Ramesh SC, Paul Seah, Cheryl Nah and Tan Jie Xuan (Tan Kok Quan Partnership) for the plaintiff; Josephine Choo, Quek Kian Teck and Yap Jie Han (WongPartnership LLP) for the first and fourth defendants; Kelvin Lee Ming Hui (WNLex LLC) for the second and third defendants; Burton Chen and Yeo Millie (Tan Rajah & Cheah) for the fifth defendant.

Parties : Sharikat Logistics Pte Ltd — Ong Boon Chuan and others

Companies – Oppression – Minority Shareholders

5 November 2014 Judgment reserved.

Judith Prakash J:

Introduction

1 This case arises from a dispute amongst the shareholders of the fifth defendant, TG-SN Pte Ltd ("the Company") who are:

(a) the plaintiff, Sharikat Logistics Pte Ltd ("Sharikat"), which holds 40% of the Company's issued share capital;

(b) the fourth defendant, TG Development Pte Ltd ("TGDPL"), which holds 51% of the Company's issued share capital; and

(c) the third defendant, Kok Yin Leong ("KYL"), who holds the remaining 9% of the Company's issued share capital.

2 The Company was incorporated on 21 April 2006 as a joint venture between TGDPL and Sharikat in order to construct and manage an industrial development. The original directors of the Company were the first defendant, Ong Boon Chuan ("OBC"), who was also the sole director and controlling shareholder of TGDPL, and Phang Say Lang, also referred to as "Joseph" ("PSL"), who was a director and majority shareholder of Sharikat. Subsequently, the second defendant, Ong Kai Hoe ("OKH"), also became a director of the Company. As the relationship between PSL and OBC broke down, PSL/Sharikat were often represented at the Company's meetings by PSL's younger brother, Pang Sheh Fatt, also referred to as "Sean" ("PSF"). PSF served as an assistant general manager of Sharikat.

3 Sharikat's case is that OBC used TGDPL's position as majority shareholder of the Company and his own position as its nominee on the board of directors the Company ("the Board") to oppress Sharikat as a minority shareholder. This was done initially in collusion with KYL and, later, with OKH as well. It is relevant that OBC is the father of OKH and the brother-in-law of KYL.

4 TGDPL and OBC, who were represented by the same solicitors, contend that far from being a case of minority oppression, this is a case of Sharikat abusing the process of the court in order to extract the maximum price for its 40% stake in the Company. From their perspective, Sharikat is a disgruntled shareholder who wants out of the Company on the best possible terms.

5 KYL and OKH take similar positions. KYL was a minority shareholder at all material times and OKH was never a shareholder of the Company at all. As such, each of them says that he can only be made liable for oppression if Sharikat is able to show that he was an "actor" and "played a major role" in the oppression or was directly involved in the transactions leading to the oppression. They assert that Sharikat has not met this threshold.

6 The Company has taken a neutral position and is content to abide by the decision of the court.

Background

7 I will set out the background briefly before summarising the allegations that Sharikat has made. I will go into the facts in more detail as I discuss the various issues and allegations.

8 The main individuals involved in this dispute are PSL and OBC. PSL is a businessman with experience in industrial construction and development and holds 90% of the shares of Sharikat. OBC is a very successful businessman who owns and/or controls several companies and has an interest in many others. I will refer to the companies connected with OBC collectively as "TG Group". The TG Group includes TG Properties Pte Ltd ("TG Properties") and TG Realty Pte Ltd ("TG Realty"). OBC has been in the business of building construction and real estate development for more than 30 years. However, he had no experience in industrial development prior to the formation of the Company.

9 As of 2003, KYL, an architect running his own practice, and PSL had been friends for many years. At about that time, OBC and PSL became acquainted. They got on well and made a few joint tenders for construction projects. In February 2006, PSL learned that the Jurong Town Corporation ("JTC") was calling for tenders to develop and lease out 18 units of single-storied terraced factories with mezzanine ancillary offices ("the Units") at Lot 1967C MK34 (Plot N) at Banyan Drive, Singapore ("the Property"). PSL then approached KYL to discuss the possibility of a joint tender by KYL and Sharikat for the development ("the Project"). KYL suggested that OBC be asked to join in the Project. Subsequently, the three men agreed to set up a company to undertake the Project if the joint tender was successful.

10 PSL, KYL and OBC started work on a tender and agreed that, pending the formation of a joint venture company, the tender would be submitted by TGDPL. The tender was duly submitted to JTC on 3 March 2006 (the "bid submissions") and on 30 March 2006 JTC sent TGDPL a letter ("the Selection Letter") stating that it had been selected as the developer of the Project. The Company was incorporated a few weeks later with the shareholding split 60:40 between TGDPL and Sharikat. There had been some discussion about giving shares to KYL (the exact proportion is a matter of dispute) but on incorporation this did not materialise as KYL did not have the funds to participate in the joint venture at that time. In 2008, TGDPL transferred 9% of the issued shares of the Company to KYL.

11 The paid up capital of the Company was $500,000 of which TGDPL provided $300,000, while Sharikat provided $200,000. PSL and OBC were appointed directors of the Company on incorporation. Initially, the Company's bank account was operated by KYL and PSL as joint signatories. On 7 December 2007, OBC became a joint signatory in place of KYL.

12 On 24 May 2006, JTC sent TGDPL a further letter ("the Offer Letter") which contained the

terms and conditions upon which JTC was prepared to allocate the Property to the Company. The Offer Letter stated that the licence of the Property would commence on 19 June 2006 and once construction of the Units had been completed, there would be a 20-year lease of the Property with effect from the licence commencement date. The rental would be $121,500 per annum. On 2 June 2006, TGDPL informed JTC that the new entity incorporated to execute the Project was the Company and, on the same date, the Company itself wrote to JTC accepting the terms and conditions set out in the Offer Letter.

13 The parties agreed that TG Properties would be the main contractor for the construction of the Project but that PSL would supervise it. They further agreed that a bank loan would be taken to finance the Project. Accordingly, a loan facility of up to $2.8m (the "construction loan") was secured from Hong Leong Finance Ltd ("Hong Leong"). The repayment of the construction loan was intended to come from the rental of the Units. The Company appointed Ms Tan Meow Hwa of AC Consortium Pte Ltd as the Project Architect. It was agreed that KYL would be involved in the administration of the Project and would prepare and submit all progress claims under the building contract for and on behalf of TG Properties for certification by the Project Architect.

14 The Project commenced in June 2006. Construction went smoothly and the Units were completed in mid-2007. The temporary occupation permit was issued on 13 June 2007. Shortly thereafter, all the Units were occupied by tenants acceptable to JTC.

15 Disputes between OBC and PSL began in or about late 2007.

The legal principles

16 This action is based on s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act"), a section that has been frequently invoked in our courts. It provides for protection of a minority shareholder where:

(a) the Company's affairs are conducted or the directors' powers are being exercised:

(i) in a manner that is oppressive to the shareholder; or

(ii) in disregard of the shareholder's interests;

(b) or an act is done or threatened or a member's resolution is passed or proposed which:

(i) unfairly discriminates against one or more shareholders; or

(ii) is otherwise prejudicial to one or more shareholders.

17 The provisions of the section have been considered in many cases and the principles to be used in applying it are fairly well established. Therefore I will not embark on a detailed discussion of the law. The case of *Over & Over Ltd v Bonvests Holdings Ltd* [2010] 2 SLR 776 ("*Over & Over*") clearly expresses the main principles. The test is whether there is a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect (at [77]). The unfairness that has to be established is commercial unfairness (at [81]). It was held also that in deciding whether to grant relief under s 216, the court has to take into account both the legal rights and the legitimate expectations of members (at [78]). Further, in the situation of a quasi-partnership company, due to the peculiar vulnerability of minority shareholders in such companies premised on informal understandings and assumptions, the court should apply stricter scrutiny (at

[83]).

18 I will not elaborate on the law here but will deal with it as and when it may be necessary in the course of discussing the issues.

The oppressive conduct

19 The alleged oppressive conduct undertaken by the first and fourth defendants has been summarised by Sharikat as follows:

(a) Claim for agency fees by TG Realty

It had been agreed, prior to the tender for the Project that TG Realty would be appointed to secure tenants for the Units. However, after the bid was won, PSL and KYL were informed by JTC that it had already matched the Units to tenants. As such, Sharikat took the position that TG Realty did not need to, and did not in fact, do any work to secure tenants for the Units. However, the defendants insisted that TG Realty should be allowed to claim $50,000 as agreed agency fee and, on 10 November 2008, OBC and KYL passed a shareholders' resolution to that effect.

(b) Refusal to pay for accounting and administrative services ("the Services") rendered by Sharikat despite paying the TG Group for the same

The Services were provided by Sharikat and by the TG Group at various points in time. At a shareholders' meeting on 30 May 2008, it was agreed that Sharikat and members of the TG Group should be entitled to claim fees for the Services they had rendered in the past. However, at a meeting on 10 November 2008, TGDPL and KYL voted in favour of a resolution not to pay Sharikat but only to pay the TG Group for past Services.

(c) Issue of wrongful Progress Claims by TG Properties

Sometime in December 2010, Sharikat discovered that the Progress Claims for the Project had included items of work which had either not been carried out (*ie*, the "Air-Conditioning & Mechanical Ventilation" works ("the ACMV Works")) or were not supported by any documentation (*ie*, variation works that were not accompanied by any variation orders issued by the Project Architect ("the Variation Works")). Despite the fact that Sharikat raised these irregularities at the 4 January 2011 extraordinary general meeting ("EGM") and at the 14 February 2011 EGM, OBC and OKH proceeded to authorise payment of the last remaining unpaid progress claim (*ie*, Progress Claim No 10) to TG Properties in March 2011.

(d) Refusal to pay PSL the Project Management Fees

In breach of the parties' agreement to do so, OBC refused to pay PSL the $15,000 agreed project management fee.

(e) Refusal to distribute profits of TG Properties in breach of the profit-sharing agreement

In breach of an alleged profit-sharing agreement, OBC refused to distribute TG Properties' profits and denied the existence of the profit-sharing agreement.

(f) Attempts to remove PSL as director and to vary the bank mandate

After PSL refused to authorise payment of agency fees to TG Realty, OBC sought to have him removed as a director of the Company and to vary the bank mandate which at that stage required all cheques to be signed jointly by OBC and PSL. To this end, OBC circulated signed resolutions purporting to accept PSL's resignation as a director, adding PSF and KYL as directors and varying the bank mandate to include KYL as an alternate signatory to PSL. OBC also requisitioned meetings on 10 November 2008 and 10 March 2009 to procure the passing of these resolutions.

(g) Appointment of OKH as director and variation of the bank mandate

After failing to have PSL removed as a director at the 4 January 2011 EGM, OBC used TGDPL's majority vote at equity level to have his son, OKH, appointed as a third director of the Company, and to vary the bank mandate to include OKH as an alternate signatory to PSL. This allowed OBC and OKH to dominate the Board and to jointly approve payments without having to obtain PSL's approval.

(h) Appointment of OBC as managing director and introduction of a remuneration of $7,000 for OBC

OBC used TGDPL's majority vote to have himself appointed as the Company's managing director at the 4 January 2011 EGM. This was in spite of Sharikat's objection there was no need for the Company to have a managing director. Thereafter, although the Company had never paid its directors any remuneration in the past and the directors had few or no executive duties, OBC used TGDPL's majority vote to introduce a remuneration of $7,000 per month for himself as managing director at the 14 February 2011 EGM. He also introduced directors' remuneration of $1,000 a month for OKH and PSL.

(i) Refusal to declare dividends

At the 14 February 2011 EGM when the issue of dividends was raised by PSF, OBC refused to declare dividends although the construction of the Project had long been completed and at the time the Company had a surplus of approximately $700,000 in its coffers.

(j) Attempt to dilute Sharikat's shareholding in the Company

After the commencement of this action, OBC sought to raise a rights issue on the alleged basis that the Company needed funds to repay the construction loan and for future expansion. In fact, there was no urgency to repay the loan and the Company was a single purpose vehicle to develop and manage the Project. The true purpose behind the rights issue was to dilute Sharikat's shareholding in the Company.

(k) Not keeping Sharikat informed of Company matters

PSL and Sharikat were kept in the dark on key matters relating to the Company.

20 By virtue of the acts set out in paras 19(a), 19(b), 19(c), 19(g), 19(h) and 19(j) above, namely:

(a) the claim for agency fees by TG Realty;

(b) the refusal to pay for the Services rendered by Sharikat despite paying the TG Group for

the same;

(c) the issue of wrongful Progress Claims by TG Properties;

(d) the appointment of OKH as director and variation of the bank mandate;

(e) the appointment of OBC as managing director and introduction of a monthly remuneration of $7,000 for OBC; and

(f) the attempts to dilute Sharikat's shareholding in the Company,

OBC has also acted dishonestly and in breach of his fiduciary duties as a director of the Company, and OKH, KYL and/or TGDPL have induced, procured and/or assisted in the said breaches and are to that extent liable for oppression as well.

The issues

21 Generally, the issues to be decided appear clearly from the summary above of Sharikat's contentions. There are, however, two issues which must be considered before the individual oppression points are dealt with. The first is whether the Company was at all material times a quasi-partnership as Sharikat alleges or a company in which there was a majority shareholder (TGDPL) and a minority shareholder (Sharikat), the latter being content to hold that position. The second "preliminary" issue arises out of the dispute between the parties as to whether the Company was intended to be a single-purpose company.

Is the Company a quasi-partnership?

Sharikat's arguments

22 Sharikat avers that the Company was at all times a quasi-partnership and that the relationship between the parties was based on mutual trust, goodwill and confidence. As a result, it was Sharikat's legitimate expectation that:

(a) Sharikat was entitled to nominate a Board representative and that representative would participate in and not be excluded from the management of the Company's business and operations;

(b) Sharikat and its Board representative would be involved in and consulted on all important decisions of the Company.

23 Sharikat relies on the following in support of its contention:

(a) PSL's evidence that the original understanding was that Sharikat and TGDPL would be equal partners with each of them holding 40% of the shareholding and KYL holding the remaining 20%. However, since KYL's financial difficulties precluded him from subscribing for his intended allocation of 20% of the shares, it was agreed that TGDPL would subscribe for KYL's allocation first and that was the only reason why, upon incorporation, TGDPL held 60% of the shares while Sharikat held 40% of the same.

(b) PSL's evidence that he had first approached KYL, his old friend, to discuss a joint tender for the project and it was KYL who suggested that OBC also be involved. This evidence was not challenged at trial. KYL corroborated PSL's evidence on the close relationship between PSL, OBC

and KYL.

(c) It was put to PSL in cross-examination that there was no quasi-partnership because OBC wanted to be the majority shareholder. PSL disagreed and stood firm on his evidence.

(d) OBC's own admissions during trial showed that the parties considered the joint venture to be a quasi-partnership:

(i) He admitted that he and PSL had been friends before the Project;

(ii) He admitted that he had trusted PSL and his relationship with Sharikat had "definitely" started off as a relationship of trust;

(iii) Although insisting that the Company was a joint venture incorporated with shares, he and PSL regarded each other as partners; and

(iv) OBC also made repeated references to a "gentleman's agreement" which suggests that his working relationship with PSL was not based strictly on the legal terms of their arrangement.

(e) PSL's evidence was that the initial discussions were to have the shares in the Company split 50:50 between TGDPL and Sharikat and this would be reflected in the Company's name (TG-SN Pte Ltd), "TG" and "SN" being the initials of the two shareholders. However, as KYL was contributing towards the tender, PSL proposed that Sharikat and TGDPL each give him 10% of the Company's shares from their respective shareholdings. OBC and KYL agreed but, due to his financial circumstances, KYL did not take up this option. When cross-examined on why he was initially not concerned that Sharikat would effectively be in the minority if KYL held 20% of the shares, PSL's response was that he trusted in KYL's integrity and also the Company was a straightforward investment involving the collection of passive income once the Project was completed. PSL only became worried after disputes between OBC and Sharikat began in late 2007 and it was then that he urged KYL to obtain the agreed 20% shareholding from OBC.

(f) A quasi-partnership is characterised by an agreement or understanding that all or some of the shareholders shall participate in the conduct of the business and is an association formed on the basis of a personal relationship involving mutual confidence. It is also evidenced by the informality of the parties' negotiations and the failure to record their agreements in writing. In this case, the evidence was that KYL, OBC and PSL started out as good friends and trusted one another and that all the discussions before the incorporation of the Company were informal. Further, the parties had entered into agreements verbally in relation to certain aspects of the Project.

(g) There was no shareholders' agreement and this suggests that parties intended the Company to be a quasi-partnership. If there was no quasi-partnership, it is only logical that parties would have insisted on an agreement to enshrine their respective rights.

(h) TGDPL, the nominal majority shareholder, and Sharikat had equal representation on the Board and their representatives were co-signatories of the Company's bank accounts. This situation points to the existence of a quasi-partnership.

OBC's and TGDPL's arguments

24 In response, OBC and TGDPL make the following points:

(a) The lack of a formal agreement cannot by itself point to the existence of a quasi-partnership;

(b) OBC had candidly admitted that prior to the Project he had no experience in industrial property development and therefore the manner in which Sharikat asserted the responsibilities for the Project should be divided did not give rise to a quasi-partnership;

(c) Sharikat's own case was that it had agreed to hold only 40% of the shares in the Company and therefore it had become a 40% minority shareholder from the date of the Company's incorporation. TGDPL was a 60% shareholder in the Company from its incorporation up to 29 April 2008 when, upon transferring 9% of the share capital to KYL, it became a 51% shareholder.

(d) On the evidence, Sharikat was content to be a minority shareholder because it was not in a financial position to lead the Project and was depending on TGDPL's financial support. Sharikat knew that TGDPL had not agreed to incorporate the Company on a quasi-partnership basis and that OBC wanted to be the boss. There was no trust between OBC and PSL such that OBC would agree to equal shareholding or allow Sharikat to dictate the Company's direction;

(e) Sharikat claimed that when its original proposal of a 40:40:20 shareholding could not be effected, it had agreed to let TGDPL hold 60% of the shares in the Company on the basis that the additional 20% were held on trust for the benefit of KYL. Sharikat gave no reason why it had agreed to let TGDPL hold all KYL's shares if it had wanted TGDPL to have no more shares than itself. In any case, under Art 7 of the Memorandum and Articles of Association of the Company, shares held on trust are not recognised.

(f) It was not true that PSL had proposed the shareholding structure be 40:40:20 in favour of Sharikat, TGDPL and KYL respectively. Actually, he had suggested that they hold the shares in the proportions 30:50:20. His explanation of how parties changed the shareholding structure when the Company was incorporated to 40:60 was untrue. OBC had always wanted to be the majority shareholder so that he could control the Company's business and he had rejected the 30:50:20 proportions because such a distribution of shares could result in a deadlock. KYL rejected PSL's proposal because he could not afford to acquire 20% of the shares.

(g) If indeed the Company was intended to be a quasi-partnership, then Sharikat's concerns over the percentage of shareholding at the outset would be unnecessary. Indeed, PSL had admitted in court that he had not heard the term "quasi-partnership" until Sharikat engaged a lawyer.

(h) It was clear from OBC's evidence that the Company was a joint venture; not a partnership. OBC did not use the word "partner" in the strict legal sense. During re-examination he explained that he treated whoever worked with him as a partner and even regarded his banker as his partner because his bank funded his operations and he and they had a certain working relationship.

(i) Sharikat's case that the Company was intended to be a quasi-partnership was not truthful because JTC had imposed, as a condition of the award of the Project to the Company, that TGDPL would hold at least 60% of the shares in the Company.

(j) Both OBC and PSL had dealt with each other as experienced and seasoned businessmen.

They were savvy enough to understand the implications of forming a company under the Act. It was not up to one party to unilaterally contend that there was an intention to form a quasi-partnership after the formation of the Company.

(k) The instances which Sharikat cited in support of its contention that the parties reposed trust and confidence in each other were misconceived. Sharikat had been confusing latitude given to the minority with trust and confidence.

25 The first and fourth defendants also urged me to take into account other facts which they submitted would negate the assertion that the Company was a quasi-partnership. They noted the following:

(a) At all material times, Sharikat had replied on OBC's resources to bid for the Project and that was why it was content to let TGDPL be the majority shareholder in Sharikat.

(b) OBC and TGDPL were required to furnish guarantees to JTC under the building agreement and JTC also required TGDPL to show that it had a fixed asset investment of $2.5m in buildings and civil work.

(c) OBC and TGDPL incurred various financial commitments for the Project:

(i) They funded 20% of the contract sum, *ie*, $700,000, for the Project.

(ii) They each furnished a guarantee to Hong Leong for the construction loan.

(iii) They injected funds into the Company in excess of TGDPL's 60% share capital. This resulted in the Company owing TGDPL the sum of $375,120.

My decision

26 I am satisfied that on balance it was Sharikat's intention, which the other parties agreed to, that the Company should be run on partnership principles with each shareholder having a say in its operation and not on the basis of normal company principles which give the final say to the majority shareholder. Whilst PSL did not know the term "quasi-partnership" when he went into the Project, this does not mean that he did not have such an arrangement in mind when the Company was formed.

27 It is clear from PSL's evidence that having heard of the invitation to bid for the Project he wanted to work jointly with KYL on it and subsequently agreed to bring OBC in because of the parties' friendship and, no doubt, the financial muscle that OBC could add to the Project. Although OBC denied it subsequently, the evidence showed that at the outset OBC and PSL had been friends and he had trusted PSL who had brought the Project to him. The parties had wanted to work together for some time as shown by the previous joint bids that they had made. As Sharikat submitted, there would have been every reason for the parties to agree to an equal shareholding and say in the Company. OBC himself referred in court several times to the friendship and trust between himself and PSL and the "gentleman's agreement" between them.

28 I do not agree that the evidence shows that at the outset, Sharikat was content to be a minority shareholder. At the outset and for some time thereafter, there were only two directors in the Company and thus Sharikat had an equal say in its running. The parties were not inclined to document their dealings and this is another indication of the level of trust that existed between them.

29 Sharikat maintained that KYL shares were meant to be held on trust by TGDPL. I accept the evidence that the original intention was for there to be three shareholders: PSL, KYL and OBC. I also accept PSL's explanation that he did not consider that giving 20% of the shares to KYL would allow OBC to dominate because he trusted his old friend to do what was right and, in any case, he did not contemplate any great complexity in running a company which would simply be receiving rental income after the Project was completed. When KYL was not able to take up the shares due to financial constraints, I accept that PSL agreed to TGDPL taking them up on KYL's behalf and holding them on trust for him. There was no reason to doubt that OBC, KYL's brother-in-law, could be relied on to transfer the shares to KYL once the latter was in a position to pay for them. The fact that the Memorandum and Articles of Association of the Company does not recognise trusts over shares is irrelevant. The existence of Art 7 does not prevent the existence of a trust and the creation of equitable interests in shares. The courts have seen many cases in which the beneficial ownership of shares has been disputed and have never disposed of such cases on the basis that the Articles of the company concerned expressly refused to recognise equitable interests in share capital.

30 The argument that Sharikat had given no reason as to why it had agreed to let TGDPL hold all of KYL's shares if it had taken care to propose that TGDPL hold an equal percentage of shares in its original proposal, is unfounded. In court, PSL stated that the parties had always intended that KYL would take up the shares held on his behalf and that his shares were merely "parked" under TGDPL.

31 It is not correct either that a condition of JTC's award of the Project to the Company was that TGDPL would hold at least 60% of the shares of the Company. PSL's testimony was that the arrangement for TGDPL to hold 60% of the shares, including KYL's 20%, was reached prior to JTC's Selection Letter and the parties had therefore informed JTC that the Company would be structured such that TGDPL would hold 60% of the shares. I accept this testimony. There was no particular reason for JTC to insist on TGDPL holding 60% of the shares and no evidence that JTC had, in its tender documents, required that the majority of the shareholding be held by any particular party with any particular financial structure. In the later Offer Letter, JTC referred to information given to it by TGDPL that there would be a new company incorporated to carry out the Project in which TGDPL and Sharikat would be shareholders. This was consistent with PSL's evidence as to what was told to JTC. Arguably, what was important to JTC, as expressed in its letter, was that the Company should have a paid-up capital of at least $500,000 and that due proof of this paid-up capital would be shown to JTC. Provided that the Company had the requisite paid-up capital, the proportions in which this was held by the shareholders would not matter to JTC.

Is the Company a single purpose company?

32 Sharikat asserts that the Company was a single purpose company incorporated only to undertake the Project. OBC and TGDPL say that it was incorporated to undertake industrial property projects generally and not only the development at Banyan Drive.

Sharikat's arguments

33 Sharikat relies on JTC's Selection Letter to substantiate its position on the nature of the Company. In the Selection Letter, JTC noted that in the "Application Form" for "Proposal To Develop & Manage The Process & Maintenance Facility", TGDPL had stated that it intended to "incorporate a subsidiary company as a single purpose vehicle" to own, develop and manage the facility. In court, OBC agreed that TGDPL had told JTC on 3 March 2006 in the bid submissions that the sole purpose of the Company was to own, develop and manage the Project. He also agreed that it was not a requirement of JTC that the Company should be a single purpose vehicle. KYL too agreed that there was no such requirement on the part of JTC.

34 The bid submissions were not produced in court. Sharikat argued that I should draw an adverse inference against TGDPL in this respect. Prior to the trial, Sharikat's solicitors had asked TGDPL's solicitors for the bid submissions but were informed that they were actually a set of presentation slides that had already been disclosed. In court, however, OBC confirmed that the bid submissions and the presentation slides were different aspects of the JTC tender. Sharikat submitted that no explanation had been given as to why the bid submissions were not in OBC's or TGDPL's possession, custody or control and therefore an adverse inference ought to be drawn that the documents showed that the Company had been incorporated as a single purpose vehicle.

35 In court, OBC had said that "single purpose" in the context of the letter meant that the Company was only to run industrial projects. Sharikat submitted that this position was not credible. Further, OBC had been shown the transcript of the meeting held on 14 February 2011 at which PSF had said that the Company was "formed in Day One is [*sic*] to look into this Banyan Drive Project" and Ms Joanne Chong Ker Shin ("Ms Chong"), an employee of the TG Group who was involved in many of the discussions, had agreed. OBC was present at the meeting and he admitted in court that he did not say then that the purpose of the Company was only to run industrial projects.

OBC's and TGDPL's arguments

36 In response OBC and TGDPL make a number of points. These are as follows:

(a) First, OBC's evidence was that he had agreed to participate in the Project with Sharikat because he did not have experience in industrial property projects and had wanted to venture into this area by leveraging on Sharikat's experience. In his mind, the Company was intended to undertake industrial property projects, not just the Project. OBC's evidence was credible especially in the light of what PSL himself had said.

(b) In PSL's narration of how the Company was conceptualised and incorporated, he had never asserted that he, OBC and KYL, had all agreed that the Company was meant to be a single purpose company. He also said that he had decided to involve other parties in the Project to create the potential to explore "future joint business opportunities". In fact, it had not been part of Sharikat's original statement of claim that the Company was a single purpose one and this assertion had only been added when the statement of claim was subsequently amended.

(c) At the meeting of 14 February 2011, the exchange between PSF and Ms Chong was a brief one consisting only of the following:

> Sean Pang:Yeah, no, the … company, okay, is actually formed in Day One is to look into this Banyan Drive Project.
>
> Joanne:Yah.

(d) It was difficult to see how Sharikat's case could be made out from that brief exchange. PSF did not assert that the Company had been incorporated solely for the Project. If that was the case, his suggestion during the same meeting on how more funds could be raised for future projects would directly contradict his single purpose assertion. The meeting went on to discuss whether dividends should be declared instead of keeping the accumulated profits for future projects. The discussion never excluded the possibility of the Company undertaking further projects.

(e) When Sharikat's solicitors sent its first letter of demand on 11 February 2011, this letter

did not mention that the Company had been incorporated as a single purpose company.

(f) As regards JTC's letter, the application form which it referred to was not produced in court. OBC had explained that he might have signed an application form but he did not fill it in and he was not in a position to explain the context of JTC's reference to "a single-purpose" vehicle. Sharikat had made no attempt to obtain a copy of the application form from JTC even though it bears the burden of proving that the Company is a single purpose one.

(g) The legal position is that if a company was intended to be a "single purpose" company, this must be indicated at the outset. It is not sufficient for a shareholder to contend, after the company's formation, that it is a single purpose one. During cross-examination, PSL confirmed that the words "single purpose" were not used when he, OBC and KYL discussed the formation of the Company.

My decision

37 I accept Sharikat's position that the initial intention of all the parties was to incorporate the Company for the express purpose of constructing the 18 Units comprised in the Project and thereafter renting them out. PSL's evidence was that KYL, OBC and he had agreed that if they won the tender from JTC, TGDPL and Sharikat would incorporate the Company as "a joint venture to develop the Project". This evidence was contained in PSL's affidavit of evidence-in-chief ("AEIC"). KYL and OBC did not dispute that this was the initial consensus. Further, neither of them asserted that, prior its incorporation, the parties had discussed the possibility of using the Company for purposes other than the Project. This possibility was only raised several years later.

38 The Selection Letter noted that TGDPL "intend[ed] to incorporate a subsidiary company as a single-purpose vehicle to own, develop and manage the Process Maintenance Facility". JTC could only have gleaned this intention from the bid submissions which were put in by TGDPL and signed by OBC. TGDPL should have kept a copy of the submissions and no satisfactory explanation was given as to why it did not produce the same in discovery. I do not accept the argument that Sharikat had the burden of obtaining this document from JTC since it was a document that had been prepared by TGDPL. I find the Selection Letter to be convincing evidence of the parties' intentions at the outset.

39 It is correct that the original letter of demand and the original statement of claim had not referred to the Company having been incorporated as a "single purpose" company. I accept Sharikat's explanation that the reason for the omission was that originally whether the Company was a single purpose one or not was not a live issue. It was only when OBC and TGDPL proposed the rights issue on the basis that the Company needed to raise funds for new projects (*ie*, after proceedings had been started and the statement of claim filed) that it became necessary for Sharikat to amend its statement of claim to state specifically that the Company had been incorporated solely for the Project. In any case, the two documents mentioned did in their own way indicate that Sharikat considered the Company to be a single purpose one. First, the letter of demand stated that it had been agreed that a joint venture company would be incorporated for the purpose of developing the Project. Second, the original statement of claim spelt out that the purpose of the Company was for the "building and leasing out [of] 18 units of single storey terrace factories … at Banyan Drive, Singapore".

40 I also note that prior to the Project, PSL, OBC and KYL had not all worked together in respect of any development. It made sense for them to agree to get together for a specific purpose and see how that turned out before getting involved in on-going business. It also made business sense to use the Company as a single purpose vehicle since the Project was a self-contained one and, once it was

completed, the income from the Project would be capable of paying off any loan taken for construction purposes. It is also relevant that the Company was incorporated after the Selection Letter. The parties did not set up a company in order to go into business together generally: they set up a company in order to carry out the construction and development of the Units in accordance with the bid submissions that were accepted by the Selection Letter.

Allegations of oppressive conduct by OBC and TGDPL

The agency fee issue

(1) Background

41 The purpose of the Project was to build the Units which would subsequently be rented out to entities approved by JTC. According to Sharikat's pleaded case, in March 2006, OBC, KYL and PSL agreed that TG Realty would be appointed as the estate agent to secure tenants for the Units and that it would be paid an agency fee to be negotiated at the relevant time.

42 In April 2006, JTC informed the Company that the Units had been "matched" to various companies which had asked JTC for offices and workshop areas within Jurong Island. JTC informed PSL and KYL that they had to negotiate leases and rentals with these companies and that the Units should be built to specifications that suited these companies' needs. In due course, on completion of the Project, these companies became the tenants of the Units.

43 PSL's evidence was that after receiving the list of matched tenants from JTC, he assumed that no agency fees would be paid to TG Realty because it had not done any marketing or incurred any expense to secure the tenants.

44 In late 2007, the Company received an invoice for $50,000 from TG Realty. When PSL enquired about this invoice, KYL explained that it was for agency fees for TG Realty. PSL refused to authorise payment to TG Realty as it had not secured the tenants and he was not clear how the sum of $50,000 had been arrived at.

45 PSL asserted that during discussions between himself, OBC and KYL on the matter, they agreed that Sharikat would handle the Company's accounts free of charge (apart from monthly disbursements of $200) in return for TG Realty not claiming agency fees. Matters did not end there. Further discussions took place at a meeting held on 30 May 2008. All three shareholders (*ie*, including KYL) were present. The parties have different versions of what was said at the meeting and the minutes prepared by Ms Chong went through several versions. In all versions, it was stated that PSL did not agree to commission being payable to TG Realty and that OBC objected and mentioned that TG Realty had been represented by KYL and had put in much effort into recruiting tenants. In one version, it was stated that OBC proposed a vote on the issue of approving the commission and that although PSL objected and KYL abstained, OBC approved the payment and because he held 51% of the voting rights, the commission payable to TG Realty was approved. Another version of the minutes stated that PSL voted against the resolution, KYL abstained and OBC voted in favour but in the end it was decided that the matter should be resolved in the next meeting without a special resolution.

46 The parties were unable thereafter to resolve the dispute over the agency fees. At the shareholders' meeting held on 10 November 2008, the payment of agency fees to TG Realty was approved by KYL and TGDPL in spite of Sharikat's objections. On 15 March 2011, OBC and OKH authorised payment of the $50,000 to TG Realty.

47 Sharikat complains that the approval and payment were oppressive acts.

(2) The arguments

48 OBC and TGDPL make the following points to rebut the allegation of oppression:

(a) There was an agreement between Sharikat and TGDPL that TG Realty would be entitled to a fee in relation to the tenancy of the Units and this agreement was reached right at the beginning when parties discussed the possibility of co-operating on the Project. At the time of this agreement, Sharikat was aware that there was a pool of potential tenants since this information had been conveyed by JTC when it asked for bids.

(b) PSL admitted that he was aware that prospective tenants were those who were already carrying out business at Jurong Island and the only uncertainty was whether they would take up all the Units. He told the court that he had not approved the payment to TG Realty as it did not work hard enough to deserve the fees as it was JTC that had secured the tenants.

(c) When the agreement to pay agency fees was made, Sharikat had not specified any condition to be fulfilled by TG Realty before it was entitled to payment. TG Realty had obtained a list of potential tenants from JTC and had secured the actual tenants from that list and worked out the details of the tenancy agreement with the tenants and concluded the same.

(d) Fortuitously for TG Realty, it did not have to expend as much resources to secure the tenants as Sharikat expected and it would be oppressive for Sharikat to deny TG Realty payment because it thought that that company did not work hard enough to deserve the fees.

(e) Although Sharikat argued that there was no agreement that the amount would be $50,000, in Sharikat's draft of the minutes of the 30 May 2008 meeting, Sharikat had inserted "Mr Joseph Phang agreed … and said that an amount of S$50,000 payable to TG Realty Pte Ltd for the above work done or direct cost/expenses incurred". Therefore, Sharikat had agreed to the sum of $50,000 for the work done or direct cost/expenses incurred. PSL's objection was to the amount being classified as "commission".

(f) Even if PSL did not intend for the sum of $50,000 to be paid out, contrary to the minutes of the meeting, it would still not be an oppressive action as TGDPL, as the majority shareholder, did not depart from the standards of fair dealing and conditions of fair play which it had to observe as determined in *Over & Over*.

(3) My decision

49 I accept that the parties had agreed early in their dealings with each other that TG Realty should be appointed to obtain tenants and would be paid a fee for so doing. At that time, JTC's "Request for Proposal" was in their hands and they would all have been aware that in para 6.7 of the same, JTC had stated that the "awarded developer should give priority to the readily [*sic*] pool of demand as identified by the [JTC]". However, that did not mean that they were aware that all the tenants would be found by JTC.

50 As it turned out, JTC did not have just a pool of potential tenants, it identified a specific tenant for each of the Units and gave the Company no leeway in the allocation of the Units. One of the tenants, Mr Tan Ngerng Heng, testified that JTC had conceived the Project at the request of the tenants themselves and told them that the developer would tailor-build the Units to meet the tenants'

requirements. After the Company's tender was accepted by JTC, JTC introduced Mr Tan and the other tenants to PSL and KYL as the Company's representatives. JTC told the tenants to liaise with these two men regarding the tenants' specific requirements and the terms of the leases. Mr Tan said that thereafter his discussions were with these gentlemen only. As far as he could recall, his only interaction with anyone apart from KYL and PSL was when certain employees of the TG Group of companies dealt with him to facilitate the signing of the tenancy agreement.

51 On the evidence, TG Realty did not need to undertake any marketing activity to acquire tenants for the Units. As far as negotiating with the tenants was concerned, this work was done by PSL and KYL. However, it was OBC's stand at the 30 May 2008 meeting that KYL had been acting for TG Realty in recruiting tenants, organising follow-up meetings with JTC on tenants' requirements and negotiating with JTC. In his AEIC, KYL said that he had assisted PSL in the day-to-day matters relating to the Project. He made no mention of having been engaged or requested by TG Realty to work with the tenants on its behalf. Thus, in all likelihood, any work that KYL did in respect of the tenancies and the tenants was done on behalf of the Company and not on behalf of TG Realty.

52 On the evidence, TG Realty's role in relation to the tenants and the tenancies was administrative at best. Whilst I accept that there was an agreement for TG Realty to act as the agent for the Units and to be paid for this work, I also accept that when this agreement was reached no specific fee arrangement was concluded. I would infer that at the time the parties probably thought that TG Realty would charge agency fees on the basis of the rental agreements concluded, the fee being a percentage of the rent as is common in such transactions. Prior to the 30 May 2008 meeting, I am satisfied that there was no agreement for TG Realty to be paid $50,000 for the work that it had done and that its invoice for this amount came as a surprise to Sharikat. It bears emphasising that the amount claimed was just the lump sum with no breakdown or indication how it had been arrived at.

53 The question is whether Sharikat agreed to the $50,000 fee on 30 May 2008. OBC gave no direct evidence in his AEIC on what happened at that meeting. He simply reproduced the following extracts from one version of the minutes of the meeting:

> TG Realty Pte Ltd is represented by Mr Kok Yin Leong in getting tenant through JTC, which is one of [TG-SN's] marketing plan …
>
> Mr Joseph Phang [*ie*, Phang Say Lang] agreed and said that an amount of S$50,000 payable to TG Realty Pte Ltd for the above work done or direct cost/expense incurred.

The above portions of the minutes were the same portions that OBC/TGDPL relied on in their closing submissions to bolster their argument about Sharikat's agreement.

54 PSL's evidence was that at the 30 May 2008 meeting, he objected to the proposed payment to TG Realty on the grounds mentioned earlier. He also pointed out that the amount to be paid to TG Realty had never been agreed upon. However, he had tried to be reasonable and said that TG Realty could claim any legitimate expense if it could prove that it had incurred such expense. In court, PSL maintained that his agreement had been limited to paying TG Realty what it could justify as expenses incurred in dealing with the tenants and that he had not agreed to a lump sum of $50,000.

55 I accept PSL's evidence. Further, I do not think that the minutes reflect an agreement by Sharikat for the Company to pay TG Realty $50,000. In all versions of the minutes, the discussion regarding the fee begins with "[PSL] do not agreed [*sic*] on the commission payable to [TG Realty]" as the tenants had not been secured by it. The version of the minutes amended by Sharikat and

subsequent versions state that PSL "said that an amount of $50,000 payable to [TG Realty] for the above work done or direct cost/expenses incurred". Although this amendment was not very happily phrased, in the context of the whole discussion, it must have meant, as Sharikat contended, that its agreement was only for TG Realty to be paid its expenses or direct costs incurred. It made no sense for Sharikat to agree to pay $50,000 and then qualify that sum by the phrase "direct cost/expenses incurred". Further, all versions of the minutes state that PSL objected to the payment of the $50,000 when a vote was called on the matter. The final version of the minutes states that the matter was to be "resolved in the next meeting without special resolution". Plainly, Sharikat had not accepted the $50,000 fee. If it had, there would have been no need to resolve the matter in a further meeting.

56 The matter was not resolved by agreement subsequently. Under cross-examination, OBC admitted that at the 10 November 2008 EGM, he and KYL had joined forces to push through a resolution for the payment of the commission to TG Realty against opposition from Sharikat. He further agreed that on 16 March 2011 he and his son OKH had signed the cheque in TG Realty's favour for the commission. He justified this on the basis that the resolution had been passed but he agreed that he was aware that Sharikat still objected to the payment.

57 In the circumstances, I find that TGDPL as a majority shareholder had acted oppressively when it authorised payment to its related company TG Realty of the sum of $50,000 when this amount had not been agreed to by Sharikat and there was no legal obligation on the Company to pay the same. Its action in forcing through the resolution authorising payment, and OBC's in signing the cheque, breached the standards of fair play that Sharikat was entitled to expect. They were also against Sharikat's legitimate expectations as a quasi-partner in the Company that the Company would be run in its interests as well as those of TGDPL. I will deal with OKH's position later.

The accounting and administrative fee issue

58 Sharikat's complaint is that OBC, KYL and TGDPL acted oppressively in approving the payment of fees for past Services rendered to the Company by the TG Group while refusing to pay fees to Sharikat for similar services.

59 The origin of this complaint lies in the fact that the Company had no staff and therefore the Services had to be provided by a third party. At different periods, different parties provided the Services as follows:

(a) TG Realty from 21 April 2006 to 4 December 2007;

(b) Sharikat from 1 November 2007 to 20 November 2008; and

(c) a member of the TG Group from 21 November 2008 onwards.

60 TG Realty was paid a fee of $1,000 per month for the Services between 16 June 2007 and 31 October 2007. Sharikat was paid nothing, but after 21 November 2008, the service provider was paid $1,500 per month.

61 There is no dispute that at one point of time PSL offered to have Sharikat provide the Services at no cost to the Company. Sharikat's position is that this offer was made by PSL in exchange for TG Realty foregoing its claim for commission in respect of the letting of the Units. When it became clear that TG Realty was maintaining this claim and that it was supported by TGDPL and OBC, Sharikat withdrew its offer and the parties agreed that both Sharikat and TG Realty should be paid for the Services provided to the Company. However, despite this agreement which was reached at the 30

May 2008 meeting, at the subsequent 10 November 2008 EGM, OBC exercised TGDPL's majority vote to pass a resolution that no fee was to be charged during the period when Sharikat was providing the Services.

62 Ms Chong prepared the minutes of the 30 May 2008 meeting. The material portions of the first draft of the minutes are as follows:

> Manage of accounts in future
>
> Mr Phang mentioned that previously he had agreed to manage the accounts free of charge with the understanding that there shall be no commission payable. Now he would like to charge a fee. Mr Ong object that there is such agreement and understanding.
>
> Mr Ong suggest to appoint an independent professional body to manage the account in future.
>
> All parties agreed to get 3 quotes for comparison …
>
> …
>
> Fee for managing accounts in the past
>
> Mr Ong agreed to [PSL's] proposal to pay a fee for the company that has been managing the account in the past months. Mr Ong suggest that both TG and Sharikat will get a fee based on the lowest quote obtained.
>
> Resolved, once the 3 quotes obtained shall hold another meeting for approval on the fees chargeable.

63 Sharikat subsequently suggested some amendments to these portions of the minutes but such amendments did not change the essence of what had been agreed. Therefore, it is safe for me to use these draft minutes as reflecting what took place in relation to these items.

64 The parties did obtain quotations from three independent organisations and each of these quoted a fee of $1,500 per month.

65 The matter was next raised at the EGM of 10 November 2008. This was the meeting at which TG Realty's commission of $50,000 was approved by a majority vote. As regards the provision of the Services, the minutes record the following:

> 2) Address the management of future account.
>
> Mr Ong Boon Chuan proposed to take back the managing of the full accounts from Sharikat Logistic. The scope of work will be as per the one of the 3 quotations. …
>
> Sharikat to close the accounts up to 31st October 2008 before hand over …
>
> The handover shall take place by 21st November 2008.
>
> The fee to be charged shall be @ $1,500 per month.
>
> Resolved by unanimous agreement, all parties agreed to the arrangement.

3) Address the fee payable for managing accounts in the past.

According to Mr Ong Boon Chuan, Mr Phang Say Lang had mentioned previously that he will not charge any fee for managing the account. Therefore, there shall be no charge made for period where Sharikat is managing the accounts.

Mr Pang Sheh Fatt (proxy) mentioned that he have to clarify with Mr Phang Say Lang on this and will have to confirm on this.

Resolved by majority vote that no fee to be charge during the period where Sharikat is handling the accounts.

66 From the two sets of minutes, it appears that on 30 May 2008, Sharikat withdrew its agreement to provide the Services for free. On the same date, TGDPL and Sharikat agreed that companies that had provided Services hitherto should be paid according to the lowest quote to be obtained from an independent company. At the 10 November 2008 EGM, OBC wanted to take back the provision of Services from Sharikat and pay a fee of $1,500 per month to whichever company provided them in the future. All parties agreed to this proposal. However, TGDPL then used its majority voting power to resolve that Sharikat should not receive any payment for the Services it had provided. This was an apparent reversal of what had been agreed to by TGDPL in May 2008.

67 In court, OBC explained that Sharikat was not paid any fees for the period between November 2007 and November 2008 because PSL had agreed that Sharikat would provide the Services at no cost. Similarly, as OBC had agreed that TG Realty would not charge the Company any fees for providing the Services during the period between 21 April 2006 and 15 June 2007, no payment was made to TG Realty. This was a consistent position taken for both Sharikat and TG Realty notwithstanding that parties did consider claiming these fees from the Company retrospectively. OBC further explained that after 30 May 2008, he decided that since both Sharikat and TGDPL had agreed not to charge the Company fees for past Services, then both parties should honour that agreement even though TG Realty stood to lose more based on the duration of its work. Accordingly, TG Realty had only claimed the sum of $4,600 for the period between 16 June 2007 and 31 October 2007 at $1,000 per month. PSL had agreed to this. OBC said that this was the cheaper approach for the Company: effectively the payment to Sharikat was netted off against the payment to TG Realty and this resulted in TG Realty receiving less money. The biggest loser in this situation was TG Realty while the biggest winner was the Company.

68 Accordingly, it was submitted, OBC's reason for not paying TG Realty and Sharikat was not tyrannical. Instead, it was motivated by what he considered to be fair to the Company, having regard to the parties' earlier promises to the Company. Sharikat's insistence that it should be paid for its Services which it had earlier agreed to render for free showed up Sharikat's propensity to take advantage of others, even if it had to renege on its agreement.

69 I think that this situation is a rather equivocal one and that the benefit of the doubt should be given to TGDPL. What emerged clearly from the evidence was that in the initial stages there was no formal arrangement regarding provision of the Services by either TG Realty or Sharikat. The respective parties provided the Services without necessarily requiring remuneration. It was only in March 2008 that PSL made the suggestion that Sharikat would not charge for the Services if TG Realty did not charge commission. There was, apparently, no discussion prior thereto whether the Company should pay its shareholders for Services and, if so, at what rate. Since Sharikat had originally been prepared to provide the Services for free, and since TG Realty also did so for all but the period of four months after May 2008 (when it had been agreed that Services should be paid for henceforth), I think that

on balance it was not oppressive for TGDPL to vote against paying Sharikat for past Services.

Refusal to pay project management fee to Sharikat

70 It is not disputed that PSL, OBC and KYL had agreed that PSL would be appointed to supervise the construction of the Project and that a fixed fee of $15,000 would be paid for such supervision. PSL was so appointed but no project management fee was ever paid.

71 According to PSL, on 30 May 2008, he reminded the other shareholders of the agreement to pay Sharikat a project management fee. Neither OBC nor KYL, who were both present at the meeting, denied this agreement. Sometime later, Sharikat informed TGDPL that it intended to set off the amount of $15,000 from the sums owed by Sharikat to the Company. OBC, however, refused to recognise that this sum of $15,000 was due to Sharikat and refused to allow a set off.

72 The defendants' position is that the Company has never refused to make payment of this item. The problem was, as OBC asserted in his AEIC, PSL and Sharikat had simply refused to issue an invoice to the Company in respect of this claim. Then they accused OBC of controlling the Company and denying the payment. That was not true. An invoice was required for legitimate accounting reasons and the defendants could not understand Sharikat's reluctance to issue an invoice.

73 In their closing submissions, OBC and TGDPL stated that by the start of the trial it was clear that all that TGDPL wanted was for Sharikat to submit an invoice. Further, PSL clarified in court that there was no problem in issuing the invoice and it would be reasonable to do so. OBC/TGDPL submitted that PSL/Sharikat's refusal to issue an invoice was disruptive behaviour. Eventually, Sharikat unilaterally set off the project management fee against its indebtedness to the Company as stated in its solicitors' letter of 24 February 2012.

74 Sharikat submitted in response that the Company and OBC had never requested it to issue an invoice. Therefore, it was entirely reasonable for it not to have issued one and the lack of the invoice was not a legitimate excuse to refuse payment of the project management fee. One of the tests of oppression is whether there has been a visible departure from the standards of fair dealing and violation of the conditions as of fair play which a shareholder is entitled to expect. Given that there was an agreement at the outset to pay Sharikat's project management fee, Sharikat submitted that OBC's and TGDPL's conduct in refusing to do so was yet another means of oppressing Sharikat's interest as a minority shareholder.

75 I do not accept that non-payment of Sharikat's fee was an instance of oppression. The fee was a debt due from one company to another and, as in any other similar case, non-payment would make the debtor liable to recovery action by the creditor. Sharikat had the means of enforcing payment in its hands at all times. It could have issued a formal demand for the payment and when the same was not made it could have sued for it or, as it eventually did, set off that payment against the amount it owed the Company. No doubt it would be a nuisance and a little costly for Sharikat to resort to such measures, but that does not mean that it was oppressed as a shareholder simply because it would have to take such action to recover an amount due to it. I suppose what I am driving at is that OBC's/TGDPL's failure to cause the Company to pay Sharikat the debt that was due, although subject to criticism, could not amount to oppression of Sharikat in its capacity as a shareholder.

Wrongful progress claims issued by TG Properties

76 It is Sharikat's case that OBC, with the assistance of KYL and OKH acted oppressively by causing the Company to pay TG Properties for work that it did not carry out for the Project. The work

which TG Properties claimed for and which Sharikat asserts was not done, comprises:

(a) the ACMV works; and

(b) the Variation Works.

Sharikat submits that payment of these claims benefited TG Properties and OBC to the detriment of the Company and were therefore also made in breach of OBC's fiduciary duties.

77 The background to this allegation can be stated briefly. As noted above, TG Properties was awarded the main building contract for the Project at the contract sum of $3.5m. The actual construction was done by subcontractors. As the building works progressed, TG Properties received payment by way of progress claims which had been prepared on its behalf by KYL. Each progress claim was submitted for certification to the Project Architect and upon such certification, the Company would pay the claim.

78 In all, TG Properties issued ten progress claims to the Company for the Project starting with Progress Claim No 1 which was dated 20 September 2006. Each of the progress claims was duly certified by the Project Architect.

79 In December 2010, Sharikat discovered:

(a) that Progress Claims Nos 2 to 10 each included an item described as "Air-conditioning & Mechanical Ventillation [*sic*]" and that a total of $213,000 had been claimed in respect of this item; and

(b) claims totalling $181,680 had been made under an item described as "VARIATIONS [*sic*] WORK" in Progress Claims Nos 9 and 10.

80 Sharikat was perturbed at this discovery. The ACMV item had been included in the contract sum on a provisional basis when parties were initially estimating the costs of construction of the Project. Subsequently, however, the tenants had installed their own air-conditioning equipment. Sharikat considered that since no work had been done by TG Properties for the ACMV item, no claim should have been made. As for the Variation Works item, Sharikat objected to the same because it could not find any variation orders supporting these works. Sharikat investigated further and concluded that:

(a) KYL had included items of work in the progress claims which had not been carried out and/or were not supported by variation orders;

(b) the Project Architect had not properly verified the legitimacy of the progress claims submitted by KYL prior to certifying them; and

(c) the unjustified claims had been orchestrated by OBC with the cooperation of KYL. As a majority shareholder of TG Properties, OBC was the only person who would directly benefit from the inflation of the progress claims.

81 In December 2008, PSL was asked to sign a cheque which had been issued by the Company as payment to TG Properties of Progress Claim No 10. The cheque had already been signed by OBC. PSL refused to sign it because of a dispute with OBC regarding the profit-sharing agreement. Subsequently, in December 2010, PSL was asked to sign another cheque in favour of TG Properties in

respect of Progress Claim No 10. It was prepared on OBC's instructions. PSL refused again.

82 In March 2011, after OKH had been appointed as a director of the Company and the bank mandate had been varied to allow the Company's bank account to be operated by one signatory from Group A (comprising OBC alone) and one signatory from Group B (comprising OKH and PSL), OBC and OKH signed a cheque for $183,750 in favour of TG Properties in payment of Progress Claim No 10. TG Properties received payment of this claim shortly thereafter.

83 OBC and TGDPL reject the insinuation that fraudulent progress claims were prepared on behalf of TG Properties. Their position is as follows:

(a) PSL was the director in charge of the Project and handled all matters relating to it. He appointed all key personnel for the Project including the Project Architect and the suppliers and subcontractors and approved all payments to them. Further, he was regularly on site supervising the construction of the Units.

(b) PSL had full knowledge of the basis of all the progress claims as he approved all of them and signed the cheques for all of them (except for Progress Claim No 10).

(c) The preparation and submission of all progress claims were discussed with PSL and KYL and they were certified by the Project Architect.

(d) Of the ten progress claims issued by TG Properties and certified by the Project Architect, Progress Claims Nos 1 to 9 were issued, certified and paid between September 2006 and June 2007. At that time, only KYL and PSL were the signatories of the Company's bank account; OBC was not a signatory.

(e) It was the legitimate expectation of OBC and TGDPL that PSL would carry out his duties responsibly and diligently and there was no reason for them to believe that the progress claims were fraudulent.

(f) Progress Claim No 10 was issued and certified in September 2008. Sharikat's initial reason for not approving payment had to do with a different dispute and it was only two years later that PSL refused to authorise the payment on account of "fraudulent claims".

84 OBC/TGDPL also submit that Sharikat's pleaded case gave the impression that Sharikat was not aware of the claims made. In addition, although the statement of claim insinuated, by way of a heading, that fraudulent progress claims had been made, the allegation of fraud was not specifically pleaded. During the trial, PSL and PSF initially took the position that the progress claims were fraudulent but subsequently each of them changed his position and conceded that there was no fraud. In fact, OBC/TGDPL asserts, the allegation of the progress claims being fraudulent is itself fraudulent.

85 OBC stated that when he first became aware of Sharikat's allegation that he was involved in issuing fraudulent progress claims, he responded to these allegations through his counsel in a letter dated 11 March 2011. This letter asserted that PSL had participated in the management of the Company and the Project from the outset and could not claim ignorance or oppression. PSL had worked closely with the Project Architect in managing the Project, including certifying progress claims and approving payment to various parties including Sharikat itself. Therefore, if there was any fraudulent claim, Sharikat who had authorised PSL to certify such payment, would be in the best position to answer them.

86 Further, OBC submits that he had repeatedly invited PSL to assist in the investigation of the matter. When the allegation of fraud was first brought to his attention by PSF on 4 January 2011, OBC had agreed that it was a serious matter and ought to be investigated. Another EGM was held on 14 February 2011 to look into this allegation and at that meeting OBC informed PSF that as he did not have personal knowledge of the construction works, he required PSL and KYL to assist in investigation. Further, as PSL had signed the Company's account, he did not know that PSL had issues with the accounts. Despite this, PSL did not attend at the directors' meeting held on 29 March 2011 to look into this allegation. At an AGM held on 22 July 2011, Sharikat was represented by PSL, PSF and one James Chia. OBC informed the meeting that he required the assistance of PSL to provide details of the alleged fraud. The minutes did not record PSL as having said anything and the matter was left unresolved.

87 Moving on from the parties' submissions, in order to decide whether there was oppressive conduct on the part of OBC/TGDPL, it is necessary to consider what actually happened. It was common ground that PSL was appointed to supervise and did supervise TG Properties' work in relation to the construction of the Units. There is no doubt that he was regularly on site supervising the construction. He admitted in court that he was actively involved in the Project and would check the materials supplied, the unit rates and the claims made by the subcontractors. He also agreed with the Project Architect's statement that she had always called PSL on the phone after the issue of the architect's certificates and he would arrange for them to be collected so that payment of the progress claims could be facilitated. On balance, he must have been aware of the contents of the progress claims, in general, even if not in detail.

88 In my view, however, the issue of whether the progress claims were fraudulent is a red herring. The main issue is whether Progress Claim No 10 should have been paid once a credible objection to it had been raised. There is also, in my judgment, a distinction to be drawn between the Variation Works and the ACMV works.

89 In respect of the Variation Works, PSL admitted that he knew exactly what Variation Works the subcontractors had made claims for because he had given the instructions for those works. He said that he did not complain about the subcontractors making their claims for the extra work as they had done the same and had to be paid. However, as far as TG Properties was concerned, as the main contractor making the claim against the Company, it needed to have an architect's instruction ("AI") and he considered that no payment could be made to TG Properties for any variation work that did not have the support of an AI. I consider that argument to be excessively technical in the circumstances of this case. The work had been done; PSL had knowledge that it had been done and that it had been paid for; I do not think that he could validly object to paying TG Properties in turn. As the person who gave the instructions for the extra work, he could have made sure that there was an AI for every item of such work. Having failed to do so, he cannot rely on the absence of the AI to challenge the payment. In any case, since TG Properties would have to be reimbursed for what it paid the subcontractors (the Company could not expect to get this work for free), it would not be oppressive for OBC/TGDPL to ensure that such payment was made.

90 The situation with regard to the ACMV works is different. The cost of these works (priced at $213,000) was included in the original budget for the construction of the Project. Once it became clear that the work was not required, no claim should have been made for it in any of the progress claims. This was done, however. The parties were rather slack about this, presumably because TG Properties was not a third party. I note the evidence that payments made by the Company to TG Properties in respect of Progress Claims Nos 1 to 9, where payment for the ACMV works had been certified up to 100%, were jointly signed by PSL. When confronted with this, PSL claimed that he had "blindly signed" the cheques which KYL asked him to sign. It is difficult to know what to make of this

evidence. Considering the depth of PSL's involvement in the Project, he was perfectly capable of checking the progress claims and ascertaining whether they had been properly drawn up. If they had not been, he should not have signed the cheques until the progress claims had been rectified.

91 On the other hand, I consider that whilst PSL might have been reckless when he signed the cheques or might even have known that Progress Claims Nos 1 to 9 contained claims for ACMV works which had not been done, his signing of the cheques could not preclude Sharikat from raising the issue of an unjustified claim at a later stage when the work was completed and the Company was in a position to hold back some money from TG Properties. I think what is important here is not so much the signing of the cheques for the first nine progress claims as Sharikat's later objection to payment of Progress Claim No 10 because TG Properties had already been overpaid since the ACMV works had not been done and should not have been claimed for. PSL was quite candid in admitting that his original objection to Progress Claim No 10 had nothing to do with the dispute over the ACMV works. Once he raised this issue, however, the other shareholders had the duty to look into the issue and decide it fairly. It should also be noted that as a director of the Company, PSL had a duty to ensure that it did not pay out sums which it was not legally obliged to. Although he appreciated the true objection to the payment of Progress Claim No 10 rather late, as a director he was entitled to raise it in the Company's interests.

92 There is little evidence to substantiate the allegation that KYL and OBC were working together to deliberately inflate the progress claims and I reject it. It seems more likely that OBC was not aware of the issue until early 2011. However he definitely learnt of it at the EGM on 4 January 2011. At that meeting, PSF stated that there were irregularities in the progress claims and that they contained items of work which had not been carried out or were not supported by any documentation. At the 14 February 2011 meeting, OBC told PSF that he would investigate the matter. There was no doubt that the ACMV works were not done and if OBC had investigated the matter, he would have found this out. In fact, KYL's evidence was that he had told OBC this privately. However, without further discussion with the other director, OBC and OKH authorised payment of Progress Claim No 10 and signed the relevant cheque on or about 15 March 2011. OBC cannot shift the burden to PSL to undertake investigations and inform him of details. The essence of the objection had been clearly explained to him on 4 January 2011.

93 The entity that benefited from the payment of Progress Claim No 10 was TG Properties, a company belonging to OBC. If OBC had considered the matter objectively, he would have realised that before making payment he had to ensure that TG Properties was not being overpaid. He knew or could easily have found out that the ACMV works had not been done. Because of the relationship between himself and TG Properties he had to act extra cautiously to ensure that the Company only paid TG Properties amounts which it was legally entitled to for the work done. In this case, a serious objection had been raised and instead of discussing it further and/or getting an expert, like a quantity surveyor or lawyer, to advise the Company on the amount payable, OBC and his son simply proceeded with the payment to TG Properties. They completely disregarded a valid objection. I consider that this conduct was a departure from the standard of fair dealing which Sharikat was entitled to expect from the majority shareholder.

Refusal to distribute the profits of TG Properties in breach of the profit-sharing agreement

94 It is Sharikat's position that there was an agreement among the parties that the profits of TG Properties earned from the construction of the Project would be re-distributed among the shareholders of the Company in proportion to their respective shareholdings. Sharikat further contends that OBC, KYL and TGDPL acted oppressively in refusing to abide by this agreement.

95 OBC and TGDPL say that there was never any agreement between OBC and PSL that Sharikat would be entitled to share in any profit made by TG Properties from the Project. The true agreement in relation to the construction of the Units was a simple one. It was that OBC would undertake the construction of the Project at a cost of $3.5m based on the estimated construction cost of between $2.8m and $3m provided by PSL. If the construction cost was kept within the estimates, OBC could expect to receive a gross profit of between $500,000 and $700,000 before taking into account the expenses he or the TG Group had to bear. It was not credible that, as a businessman, OBC would promise PSL 40% of the profit from the Project when he, solely, was: (i) undertaking the risks of the construction; (ii) bearing the funding of the Project beyond the construction loan; and (iii) had agreed to allow Sharikat 40% of the profit in the Company through the rental of the Units.

(1) Sharikat's case

96 Sharikat's case is based on the assertion that sometime after PSL, OBC and KYL had won the bid for the Project they had agreed as follows:

(a) A tender for the main contract for the construction of the Project would not be called and instead, TG Properties would be appointed the main contractor. The reason for the choice of TG Properties was that it had lost money in previous years and OBC wanted, for tax purposes, to be able to offset its losses against its future revenue.

(b) TG Properties would be appointed on the basis of and on the understanding that it would re-distribute all profits earned from the Project to the shareholders of the Company in proportion to their respective shareholdings in the Company.

(c) TG Properties' cost of construction would be between $2.8m and $3m. The cost was to be financed by a loan from Hong Leong which was only prepared to finance 80% of the contract sum. In order to secure financing in the sum of $2.8m from Hong Leong so that TG Properties would be able to service the Project without being out of pocket, the contract sum under the building contract would be set at $3.5m.

(d) OBC had said that the cost of any works which had been provisionally budgeted for under the building contract but were not done would be deducted at the end of the day from the contract sum, thereby yielding a profit of between $500,000 and $700,000 which was to be distributed to the shareholders of the Company in accordance with the profit-sharing agreement.

(e) The difference between the amount of the construction loan and the contract sum would be funded by a shareholders' loan of $700,000 from TGDPL to the Company and the loan amount would then be passed on to TG Properties as part of the contract sum. This $700,000 would ultimately be re-distributed to the shareholders in accordance with the profit-sharing agreement.

(f) It would have made no sense for Sharikat to have agreed to TG Properties keeping the profits from the Project when it was intended that the $700,000 paid to it by the Company (through the loan from TGDPL) would not be used to fund the Project but would form part of the TG Group's working capital and, as such, the $700,000 funding by TGDPL was illusory.

(g) The $700,000 loan from TGDPL created a debt in the Company's books in favour of TGDPL. Sharikat would have to bear 40% of the loan and therefore if TG Properties was allowed to keep the anticipated profit of $700,000, Sharikat would bear 40% of the construction cost and 40% of such profit earned by TG Properties.

97 Sharikat relied partially on the oral evidence of PSL and KYL and partially on two documents which were exhibited to PSL's AEIC and were referred to as "PSL-45" and "PSL-46". Sharikat asserted that these documents evidenced the agreement that the parties had earlier come to.

98 In relation to KYL, his testimony corroborated that work on the Project was not done by TG Properties. KYL testified that PSL was in reality TG Properties' project manager. He confirmed that TG Properties was the main contractor only in name: it did nothing but prepare the progress claims and it was PSL who did all the usual work of a main contractor. Even OBC himself admitted that the construction work had been managed by PSL and TG Properties only collected money and sent out bills.

99 Sharikat submitted that on the evidence PSL was the *de facto* main contractor and as such there was ample reason for the parties to have agreed that TG Properties' profits from the Project would be shared amongst the Company's shareholders. Further, it was contemplated that there would be a profit of $700,000 and there would have been no reason for PSL to offer to control the budget at $2.8m if he did not have some share in the excess paid to TG Properties.

100 Turning to the two documents, both were prepared by Ms Chong. PSL-45 was prepared in 2006. This document reads as follows:

> **TG-SN Pte Ltd**
>
> TG-SN Pte Ltd's shareholders are Sharikat (40%) and TGD (60%). As of the last transaction where shareholders deposit $$ into the company to represent as paid up capital and withdraw the $$ as loan to shareholder, the loan to shareholder account balances should be @ 60/40.
>
> Now during the development of the factory, TG-SN not enough $$ to pay the differences of the jet up development cost ($3.5m) + GST. These differences have to be paid in order for Hong Leong to disburse the loan.
>
> To solve this issue, TGD will place more $$ into TG-SN as repayment for the shareholder loan. In this case, the loan to shareholder account balance will not be 60/40. This will continue until the loan had been fully disbursed.
>
> For TG groups, the cash flow is nett effect as the cash will flow back to TGP.
>
> Later when TG-SN start to have cash flow, TG-SN is supposed to transfer $$ back to TGD until the loan to shareholder account @ 60/40. Example, if loan to Sharikat account balance is $100,000, then loan to TGD should be $150,000.
>
> Once the balance is @ 60/40, then leave the $$ in TG-SN Pte Ltd.
>
> **TG Properties Pte Ltd**
>
> *TGP is the main contractor for the development of the factory @ contract sum $3.5m. If cost is $2.3m (as per Mr Kok), there will be a profit of $1.2m. Mr Kok mentioned that Sharikat will want to share on this profit. TGP will have to issue to Sharikat as expenses. Mr Kok to advise what is the expenses to be named.*
>
> *The purpose of using TGP as main contractor because TGP have many unabsorbed losses b/f. The tax saved will have to be shared to Sharikat. According to Mr Kok, the sharing should be*

TGD 80% and Sharikat 20%. These sharing again have to be issued out as an expenses in TGP. The name shall be advise again.

[emphasis added]

101 Sharikat submits that PSL-45 put in writing the joint venture agreement and understanding between the parties, in particular, the profit-sharing agreement. PSL's evidence was that he first spoke about the sharing of profits with KYL, and thereafter he, KYL and OBC discussed it. OBC then instructed Ms Chong to put the parties' intention in writing and PSL-45 was the result.

102 As for the second document, PSL-46, this is a four-page long document which was also prepared by Ms Chong. She circulated it at a meeting attended by OBC, KYL, PSL, one Kevin Tan and herself sometime in 2007. Sharikat's position is that this document contains calculations on how much the parties could expect to receive under the profit-sharing agreement, given that the cost of the construction for the Project had overrun the initial $2.3m estimate and the revised $2.8m estimate. Sharikat highlighted a portion of the document: the statement towards the end which reads:

Let say cost is $3.1m in TGP, profit equals

(240,000) (160,000) (400,000)

Sharikat contended that this section of the document clearly contemplated a split of TG Properties' expected profit of $400,000 into portions of $240,000 and $160,000 (60% and 40% of $400,000) respectively. This was contemporaneous evidence of the agreed profit split.

(2) OBC's and TGDPL's arguments

103 OBC and TGDPL say that Sharikat's alleged profit-sharing agreement did not exist. It is clear from the evidence that the $700,000 "profit" was actually working capital, contributed by the TG Group progressively during the Project, to fund various payments to the subcontractors and suppliers. The funds were required because although both Sharikat and TGDPL had paid up their share capital to the Company, they had taken the money out again as loans. Therefore, the Company's bank account did not contain much money during the construction of the Project.

104 Between September 2006 and the end of 2007, the TG Group had injected a total of $675,120 into the Company, an excess of $375,120 over and above TGDPL's share capital. Sharikat's claim essentially means that without contributing to the construction cost, it would automatically be paid $280,000 of the $700,000 contributed solely by OBC and his group. There was no logical reason for OBC and TGDPL to give Sharikat 40% of the funds which only they had contributed. PSL could only insist that this was pre-agreed as part of the "spirit" of the agreement as he was a businessman and had agreed to TG Properties undertaking the Project without a tender. However, PSL had admitted that Sharikat was in no position to undertake the construction of the Project and the parties had not considered getting it to do so.

105 As for Sharikat's contention that there was ample reason for the parties to agree to the profit-sharing agreement because PSL was the *de facto* main contractor managing the Project, this failed to take into account that PSL had agreed to be paid only the project management fees of $15,000. Sharikat's case was also flawed in that he had also assumed that the difference between the contract sum and the subcontractors' costs was the net profit for TG Properties. At best, that difference would be the gross profit because it did not take into account the cost of funding the $700,000 or the costs of OBC's staff (including KYL and the quantity surveyor) as well as ancillary

costs in attending to the Project as the main contractor.

106 During the trial, the parties had reached an agreement that the total amount paid by TG Properties to the various sub-contractors/suppliers was $3,261,997.19 although it had received invoices totalling $3,352,460.87. If the construction cost was taken as $3,261,997.19, then the maximum "profit" (*ie*, without taking into account overheads and cost of funds) would be $238,002.81 only. This sum was nowhere near the $500,000 to $700,000 estimated by Sharikat.

107 OBC/TGDPL submit that PSL-45 and PSL-46 do not support the profit-sharing agreement. They say that PSL was unable to explain what the documents were about, when they were prepared and whether they were discussed amongst the parties. He had first claimed that PSL-45 was never presented for discussion but then changed his evidence and claimed that it was presented for discussion during a meeting in 2006. He further conceded that PSL-45 was merely a record of what he had told KYL and he had never discussed it with OBC. In its attempt to make sense of the text of PSL-45, Sharikat had imputed verbs, nouns, syntax and suggested the context.

108 OBC's evidence was that KYL told him that PSL wanted a share in the profit of TG Properties. As he did not understand the basis of the proposal, he had asked Ms Chong to prepare a note. However, there was no subsequent follow-up and he could not remember much of PSL-45 except that it was an internal document. He had never discussed it with PSL as the latter had conceded.

109 As for PSL-46, the submission is that PSL's evidence on this document was equally weak since PSL had given varying dates on when it had been discussed with OBC and KYL; one date was the end of 2007 and the other estimation was between May and July 2007. Further, the document substantiated OBC's position that the basis on which he agreed to fund 20% of the contract sum was that it would be used as working capital for the Project because the initial paid-up share capital would be withdrawn as shareholders' loans. In accordance with this understanding, OBC and the TG Group did inject funds into the Company. That is why by the time PSL-46 was prepared and there was an overrun of the construction costs, the document stated OBC's position to be as follows:

> Instead of requiring $2.8m, in the above illustration a total of $3.1m is needed. Although the full contract sum of $3.5m and paid into TGP accounts, it was agreed that the $700k is not to be used to pay any sub-contractor as the $$ are actually transfer by TGD only. Now 3 months rental deposit is in and estimated to be $54820 x 3 $164,460 as per previous agreed to goes back to TGD to balance the loan ratio.

	TGD C62- [(700000*60%) + (181000-164460)] *60%	**Sharikat E62- [(700000*40%) + (181000-164460)] *40%**
The right loan ratio	(215,124) 60%	(143,416) 40%
Current ratio	(666,200) 127%	(143,200) – 27%
Differences	(451,076)	286,616

110 While it is obvious that PSL-46 contains various calculations, the numbers presented were premised on both the shareholders of the Company making capital contributions to restore the 40:60 shareholding ratio. According to OBC, PSL-46 was prepared around the time that the temporary occupation permit was issued for the Units and its purpose was to ask Sharikat to top-up the working capital as the cost of the Project had exceeded the estimate of $2.8m.

111 There was never an agreement between OBC and PSL that Sharikat would be entitled to share in the profit earned by TG Properties from the Project. Based on the evidence, PSL-45 was at best Sharikat's wish list conceived after the initial construction phase of the Project had commenced. Sharikat wanted to get a share of TG Properties' profit if it was able to control the construction costs so that the same did not exceed $2.3m. OBC never agreed to the profit distribution and there was no follow-up or discussion among the parties. PSL-46, on the other hand, set out OBC's position on recalibration of the shareholding to 40:60 being a prerequisite for profit-sharing. The numbers presented were premised on both shareholders in the Company making capital contributions to the extent needed to restore the shareholding to the original proportions. However, Sharikat had never injected further capital into the Company in order to recalibrate the parties' shareholding.

(3) My decision

112 Having considered the circumstances, I have come to the conclusion that Sharikat's version of what was agreed is more coherent and more in accordance with the documents PSL-45 and PSL-46 than the version put forward by OBC and TGDPL. I had some difficulty understanding this part of Sharikat's case during the trial but on further reflection the situation has become clear.

113 The first point to note is that Sharikat agreed to the appointment of TG Properties as the main contractor. No tender was called as would normally be the case. OBC/TGDPL did not challenge the assertion by Sharikat that TG Properties had tax losses and would therefore be able to make a tax saving on any profits gained from the Project. Secondly, it was not intended that TG Properties would actually act as main contractor. Instead, this role would be performed by PSL for a fee of $15,000. The sum of $15,000 was far less than the profit any main contractor would expect to earn on a project costing $2.8m. There was no reason for PSL to undertake this task if, nevertheless, any profit earned by TG Properties would remain with it since then, in effect, TG Properties would get a profit for doing nothing. Thirdly, there was no serious dispute that the parties intended to fund the Project entirely from the construction loan but had to set the contract sum at $3.5m in order to obtain an adequate loan facility since Hong Leong would only finance 80% of the contract sum. Although the difference between the contract sum and $3.5m was funded by the TG Group, this sum of $700,000 became a loan in the books of the Company and the Company incurred an obligation to repay it. The Company in fact repaid the loan in full in due course. Therefore, it was not correct for OBC to assert that he was funding both the shareholding and the construction. All along, the intention of all parties was for the construction costs (comprising both the construction loan and any additional funds borrowed from the TG Group) to be funded by the Company from the rental income generated by the Units. This is exactly what happened.

114 The original intention was that the $700,000 loaned by the TG Group to the Company would not fund payments to the contractors/suppliers of the Project, but instead flow through TG Properties and become part of the working capital of the TG Group. This is clear from PSL-46. Therefore the transfer of the $700,000 was intended to be a transfer from one pocket of the TG Group to another pocket of the TG Group and this would have benefited the TG Group to the exclusion of Sharikat, save for the existence of the profit-sharing agreement. As it turned out, the construction costs exceeded $2.8m by about $460,000 and that meant that the benefit to the TG Group was reduced accordingly. That reduction in the benefit, however, would not change the nature of the scheme. I am satisfied that PSL-46 clearly evidences the mechanism of the profit-sharing agreement. OBC and TGDPL's allegation that the purpose of this document was to ask the Company to make a contribution of capital to restore the shareholding proportions does not take into account the whole of the document.

115 There were some minor discrepancies in PSL's evidence regarding the preparation and

discussion of PSL-45 but I do not think such discrepancies undermine his evidence as a whole. It was agreed that both PSL-45 and PSL-46 were prepared by Ms Chong. Ms Chong was OBC's faithful and diligent employee at all material times. Even if OBC did not discuss PSL-45 with PSL as OBC alleges, it is probable that Ms Chong briefed him on it. As far as PSL-46 is concerned, OBC was aware of it and it was discussed at a meeting at which he was present.

116 I also accept PSL's evidence that TG Properties was supposed to charge the Company at the subcontractors' cost. As I have mentioned above, it made no sense for PSL to act as project manager if TG Properties was intended to charge as a normal main contractor would (*ie*, to include a profit element in its billing). Because PSL acted as the project manager, any expenses that TG Properties incurred in relation to its staff and its overheads would have nothing to do with the Project and could not be charged by it to the Company. I do not accept the argument made by TGDPL and OBC that it was entitled to charge for KYL's work in relation to the preparation of the progress claims. There was no agreement to this effect. The focus of the parties was on carrying out the Project at the least possible cost to the Company and therefore it must have been intended that KYL do the work for free. That was his contribution to the Project. If the Company had intended to pay its main contractor commercial rates, it would have offered the main contract out for tender instead of appointing TG Properties as the main contractor.

117 The next question is what profit was made by TG Properties. As mentioned above, the total payment made to the subcontractors and suppliers was $3,261,997.19. I consider that this figure should be taken as the cost of construction although the total amount for which the Company was invoiced was about $90,000 more. The Project was completed in 2007 and if the balance $90,000 has not been claimed by now, then, even if the claim is a valid and proper one, it is probably time-barred by now. The difference between $3.5m and $3,261,997.19 is $238,002.81 and this figure is the notional profit made by TG Properties. According to the profit-sharing agreement, Sharikat is entitled to 40% of this or $95,201.12.

118 What happens next? There are two possibilities. The first is for TG Properties to pay Sharikat the sum of $95,201.12 directly. The other is for TG Properties to refund $238,002.81 to the Company and steps can thereafter be taken by the Company to pay out the respective amounts due to the shareholders.

119 The oppression that Sharikat complains of would seem to lie mainly in TGDPL's refusal to recognise the existence of the profit-sharing agreement and to take steps to ensure that Sharikat receives its share of the profit. Up to trial, TGDPL was content for whatever profit had been made to stay in the hands of TG Properties and be dealt with as that entity saw fit. It was, however, within TGDPL's and OBC's power to direct TG Properties as to the proper return of the funds to the Company. I hold that their failure to do so was oppressive because they were favouring their own interests at the expense of the minority shareholder's. I will deal with KYL's position later.

Attempts to remove PSL as director and to vary the bank mandate

120 Sharikat contends that as revenge for PSL's refusal to authorise payment of $183,750 for Progress Claim No 10 and $50,000 for TG Realty's agency fee, OBC, TGDPL and KYL attempted to remove PSL as a director and also to alter the Company's bank mandate so that OBC could force through these payments without requiring PSL's removal.

121 According to Sharikat, three attempts were made. It relies on evidence given by PSL and PSF to establish:

(a) Sometime after 30 May 2008, KYL informed them that OBC wanted to remove PSL as a director of the Company;

(b) PSF and PSL said they would consider this provided that:

(i) the signatories to the bank account were to remain the same;

(ii) PSF would replace PSL, both as a director and as a guarantor for the construction loan;

(c) Sometime in October/November 2008, Sharikat was given a set of documents (I shall refer to these as the "Disputed Documents") by an employee of the TG Group. The Disputed Documents comprised:

(i) a draft resignation letter to be signed by PSL;

(ii) a director's resolution which had been pre-signed by OBC and which was to be signed by PSL purporting to appointing PSF and KYL as directors;

(iii) a consent to act as director and statement of non-disqualification to act as director to be signed by PSF; and

(iv) directors' resolutions which had been pre-signed by OBC and KYL and which were to be signed by PSF. These resolutions purported to approve PSL's resignation as a director and to vary the bank mandate so that the signatories were KYL/PSF and OBC.

(d) PSL and PSF refused to sign any of the Disputed Documents because they did not agree to OBC becoming joint signatory with KYL as that would mean OBC would have control of the bank account.

(e) On OBC's requisition, a Board meeting was held on 10 November 2008 at which resolutions were passed:

(i) Appointing PSF and KYL as directors;

(ii) Accepting PSL's resignation as a director; and

(iii) Varying the bank mandate to remove PSL as a signatory and include PSF and KYL as alternate signatories.

(f) PSF objected to the resolutions but they were signed by OBC and KYL (who was not a director). Subsequently, parties learned that the resolutions were void because the quorum for Board meetings had not been met.

(g) OBC requisitioned an EGM on 10 March 2009 to pass resolutions similar to those proposed on 10 November 2008, save for resolution (2) which was amended to reflect OBC's proposal to remove PSL as a director. This meeting was adjourned at PSF's request to enable the parties to spend more time to resolve the misunderstandings between PSL and OBC. No further meeting took place on this issue.

(h) Thus, according to Sharikat, the attempts to remove PSL as a director were made in

October or November 2008, at the Board meeting of 10 November 2008 and at the EGM of 10 March 2009. Further, OBC wanted to have three directors on the Board instead of the original two and this would mean that he would be able to out-vote PSL at Board meetings.

122 OBC/TGDPL's riposte is that the actions taken were not oppressive but simply an attempt to reduce hostility on the Board. They say it is clear from Sharikat's own evidence that PSL had agreed that he be replaced as a director by PSF. However, PSL subsequently changed his mind and did not follow up on this by returning the necessary papers that had been sent to him for signature. Significantly, during cross-examination, PSL agreed that notwithstanding the suggestion that he should resign as a director of the Company, Sharikat was never deprived of representation on the Board.

123 These defendants make the further submission that Sharikat's version of how events occurred was incorrect. They say that it is not correct that Disputed Documents were sent out of the blue in October/November 2008 for PSL's signature. The actual position is that the Disputed Documents were sent to Sharikat after the 10 November 2008 EGM to effect the resolutions passed at that meeting. They rely on two e-mails and, particularly the one from Sharikat's employee, Kevin Ho, to PSF attaching documents similar to the Disputed Documents complained about by Sharikat. This e-mail was dated 22 December 2008 and when it was shown to him in court, PSF confirmed that the documents attached to the e-mail were the same as the Disputed Documents.

124 I am of the view that it was not oppressive on the part of OBC/TGDPL to seek to replace PSL as a director of the Company with his brother PSF. PSL agreed in court that there was tension between himself and OBC and that was why initially he had agreed to be replaced, albeit subject to conditions. PSL was not entitled to expect that he should have a seat on the Board at all times. Sharikat was entitled to be represented but it could be represented as well by PSF as by PSL. In fact, after his friendship with OBC soured, PSL himself preferred not to attend meetings of the Company and to send PSF in his place. The various minutes of meetings which PSF attended show that PSF was quite capable of speaking up and representing the interests of Sharikat. It was not unreasonable for TGDPL to try and effect a change of Board membership so that Board meetings would not be disruptive and members of the Board could get along better.

125 The attempt at adding KYL as a director and alternate signatory of the bank account might perhaps be considered oppressive but that would depend on the reasons for this. It could have been a sincere attempt to break anticipated deadlocks. I will consider this issue later in relation to the subsequent change in the mandate.

126 As far as the number of attempts made is concerned, I accept the defendants' submissions. I think that even though PSL had agreed in conversation with KYL and PSF to relinquish his seat on the Board, it is unlikely that OBC would have tried to accomplish his removal simply by sending out the Disputed Documents without a directors' or shareholders' meeting. The defendants' version, which is that the EGM of 10 November 2008 came first and the Disputed Documents were sent out to effect the resolutions passed at that meeting, is more logical and more likely to reflect what actually happened. PSF represented Sharikat at that EGM and the minutes of the meeting note that OBC had proposed to appoint himself and KYL as directors and that KYL proposed appointing PSF as a director and replacement for PSL. OBC also wanted to change the bank signatory to himself and KYL and/or PSF. The matters reflected in the minutes were also reflected in the Disputed Documents. On balance, I consider that the Disputed Documents were sent out to effect the resolutions passed at the 10 November 2008 EGM and were not sent out in advance of the meeting. Therefore, the meeting was held for the purpose of discussing the issues and not for the purpose of overcoming PSL's refusal to sign the Disputed Documents.

127 I should also state that I have my doubts whether an intention of a majority shareholder to act oppressively actually qualifies as oppression if that intention is abandoned. The meeting of 10 March 2009 was adjourned at PSF's request to give the parties time to try and work out the dispute. The meeting was never resumed. In that light, it would not seem correct to hold that in March 2009 OBC and TGDPL were threatening to do an act or pass a resolution that would be prejudicial to the interests of Sharikat.

Appointment of OKH as director and variation of the bank mandate

128 It is Sharikat's case that OBC used TGDPL's position as the majority shareholder of the Company to appoint OKH as the third director of the Company and as the alternate bank signatory to PSL because he wanted to take control of the Board and the Company's finances and force through certain payments ("the Disputed Payments"). The Disputed Payments comprised:

(a) $183,750 for Progress Claim No 10;

(b) $50,000 for TG Realty's agency fee;

(c) $4,600 to TG Realty for the Services between 16 June 2007 and 31 October 2007; and

(d) $240,317 to TGDPL as repayment of its shareholders' loan.

129 The events leading to the appointment of OKH can be summarised briefly. On 4 January 2011, an EGM was held at which resolutions were passed to:

(a) appoint OKH as a director;

(b) appoint OBC as managing director; and

(c) vary the bank mandate by including OKH as an alternate signatory to PSL.

The 4 January 2011 resolutions were passed by majority vote, with TGDPL voting in favour and Sharikat voting against. KYL abstained from voting on OKH's appointment as a director but voted in favour of the other two resolutions. Thereafter, OBC and OKH signed directors' resolutions appointing themselves as managing director and director respectively and varying the bank mandate to include OKH as an alternate signatory to PSL. On or about 15 March 2011, OBC and OKH authorised payment of all the Disputed Payments.

130 On 19 January 2011, OBC requisitioned a Board meeting and an EGM of the Company to be held on 14 February 2011 to pass resolutions for the payment of directors' remuneration, namely, a monthly salary of $7,000 for OBC and a monthly salary of $1,000 each for OKH and PSL. These resolutions were duly passed by OBC and OKH at the Board meeting and by TGDPL at the EGM. PSF was present at both meetings but could not vote at the Board meeting. Sharikat voted against the resolutions at the EGM but KYL abstained.

(1) Sharikat's case

131 Sharikat submits that there was no need for OKH to be appointed as a director or for OBC to be appointed as managing director. Further, directors' remuneration was not justified because:

(a) there was no contract of employment between the Company and its directors;

(b) up to the date of the resolutions, the Company had not paid its directors any fees or remuneration;

(c) the directors had few or no executive duties as the Company was an investment company which owned the Units and collected rent. It is undisputed that the TG Group provided the Services to the Company for a fee; and

(d) prior to the 14 February 2011 meeting, the Company's shareholders had not discussed taking on further projects.

(2) OBC's and TGDPL's submissions

132 OBC submits that he had genuine concerns which led to the appointment of OKH. Between March 2009 and January 2011, the business of the Company was largely neglected apart from his refinancing of the construction loan. By January 2011, there was the pressing need to appoint an additional director to assist in the renewal of the tenancy agreements for the Units as the same had long since expired. They should have been renewed in June 2010 but none of them had been renewed. Rental was the Company's only source of income and the Company ran the risk of losing this source of income if all the tenants terminated their tenancies at the same time. Despite this risk, the Company had not come up with a clear strategy to deal with it.

133 As PSL had objected to all the previous candidates whom OBC had appointed (by whom he meant PSF and KYL) OBC had no choice but to appoint OKH to assist him. OKH had explained to the court that his appointment was mainly to assist in the Company's day-to-day operations and in this respect the most pressing concern was the renewal of the tenancy agreements. Further, OBC was looking at the possibility of further business opportunities and required another director to assist him as no action was being taken by PSL. OKH was therefore tasked to keep a lookout for opportunities for industrial projects but, despite the efforts made by OKH, the Company could not proceed with further opportunities due to a lack of funds.

134 The defendants submit that the tenancy agreements were renewed through the efforts of OBC assisted by OKH. OKH had assisted in the negotiations with the tenants. The revised rental rates were in the region of $1.10 to $1.30 psf which was a significant increase from the original rent of $0.60 psf. It was also higher than the figure floated by Sharikat which was $1 psf. As a result of the efforts of OBC and OKH, the Company earned additional rental income of approximately $40,000 per month.

135 The appointment of OKH also enabled the Company to proceed with other "day-to-day operations" such as the approval of legitimate payments to various companies in the TG Group. In the light of PSL's unreasonable behaviour of opposing every proposal by OBC and TGDPL, it was manifestly unfair for Sharikat to assert that OKH's appointment was oppressive. His appointment was purely out of necessity and due to a lack of other options.

(3) Discussion and my decision

136 In relation to this allegation of oppression, I have to decide what the intended effect of the 4 January 2011 resolutions was, whether the defendants were justified in appointing OKH as a director and alternate bank signatory, and whether it was justifiable to pay OKH a salary of $1,000 a month.

137 As far as the first point is concerned, there can be no dispute that once the 4 January 2011 resolutions were passed, OBC was in a better position to take control of the Company and its finances

if he wanted to. This was because with OKH as the third director he would have the possibility of out-voting PSL at Board meetings and would have the opportunity of persuading OKH to sign cheques which PSL refused to sign. In theory, it is not oppressive for one party to be able to out-vote another and to make payments which the other disapproves of. Generally, it is how power is exercised and not whether it exists which is determinative of the existence of oppression.

138 In this case, the motives behind the passing of the 4 January 2011 resolutions are doubtful. OBC was questioned quite strenuously about this. He agreed that the effect of OKH's inclusion as a signatory in the bank mandate was that it would enable him to make payment from the Company's accounts without PSL's approval. But he did not agree that OKH was so appointed in order to enable payment of Progress Claim No 10 to be made. He asserted that it simply helped the Company make the right payments. However, he did agree subsequently that he had wanted to get control of the bank account so that he could make the Disputed Payments. OBC's rationale was that these payments were overdue and he also considered that PSL's refusal to sign the cheque for the repayment of TGDPL's loan to the Company to be particularly objectionable. He did, however, admit eventually that except for the Disputed Payments, the bank account was being operated and all payments that needed to be made for the smooth running of the Company's business were made. This evidence was supported by KYL who admitted that he was not aware of any cheques that PSL had refused to sign, apart from the Disputed Payments.

139 In my judgment, it is clear from the evidence that the only reason why OBC needed to effect a change in the bank mandate was so that he could push through the Disputed Payments. I have already found against OBC/TGDPL in respect of the Progress Claim No 10 and the agency fee. It was therefore oppressive of him to force through these payments. As regards the other two payments, the reason for the objection to the loan repayment was that OBC was refusing to recognise the profit-sharing agreement. I do not think it was correct for Sharikat to object to the Company repaying funds it had borrowed from TGDPL because of OBC's stance on the profit-sharing agreement and therefore I do not consider that the repayment of this loan was oppressive. The Company had a legal obligation to repay it. That, however, does not ameliorate the wrongful motivation behind the change in the bank mandate.

140 In their pleadings, apart from the bank mandate, the defendants' primary justification for OKH's appointment was to enable the Company to carry out its day-to-day business and operations and to ensure that the Company's operations would not be affected by PSL's constant absence. By the time OKH was appointed, the construction of the Project had long been completed and no daily supervision of the same was required. Further, as far as general management and accounting work was concerned, that was being provided by a TG Group company for a fee. The main thing that the directors had to do at that time was to obtain renewal of the tenancies of the Units. This was not a particularly difficult task since the tenants wanted those premises. Given that OBC's evidence was that he was responsible for obtaining the new tenancies at an increased rental, albeit with the help of OKH, this task did not provide a justification for the appointment of a new director. OBC could as well have employed OKH on a temporary basis to assist him: OKH did not need to be a director.

141 It is also arguable that OKH's involvement in the negotiations for the renewed tenancies was rather counter-productive. On 29 August 2011, he wrote a letter to one of the tenants, Trilogia, in which he told that tenant that it should either accept an increased rental or leave the premises and gave the tenant only seven days to reply. The other tenants were upset by this and, through Mr Tony Tan, informed PSF of their disquiet. OKH agreed in court that the tenants had turned to PSF and PSL and that it was their efforts that calmed the tenants down. He claimed, however, that this was because the tenants were unfamiliar with him. OKH had to agree that the tenants' anger with his proposed increased rental was very strong but he maintained that eventually most of the tenants

agreed because he had thereafter spoken to them individually.

142 In respect of OBC's submission that OKH was appointed because PSL had rejected all other candidates for a third director, this does not seem to be logical. PSL's evidence was that he had changed his mind about stepping down as a director and putting PSF in his place because this move was tied up with the other changes to the management structure, *ie*, the addition of KYL as a third director and KYL as an alternate signatory on the bank mandate. PSF was concerned that once KYL became a director Sharikat's interests would be disregarded because KYL would work in concert with OBC. OBC must have been aware, when he pushed through the appointment of OKH, that Sharikat would have a similar objection to OKH. Further, OBC's selection of OKH was not calculated to soothe any fears that Sharikat had about being oppressed by the majority.

143 In court, both OKH and OBC adopted the position that OKH could be an effective check on and balance to OBC in the Company. The evidence, however, was that OKH was financially dependent on OBC and under his control. OKH was employed by TGDPL and had no other source of income apart from his salary from this company. OKH lived with OBC and, according to OBC himself, was "very close" to his father. OBC agreed that OKH was in fact TGDPL's and OBC's representative on the Board of the Company. OKH corroborated this evidence. He also agreed that there were no occasions on which he disagreed with his father when it came to passing resolutions in the Company. He testified that he thought his father always acted correctly. As Sharikat submitted, OKH was not independent and could not operate to check or balance OBC.

144 As for the monthly salary, Sharikat's position was that no salary should be paid to the directors and, in any event, OKH could not justify any payment to himself. I agree that there was no reason for the Company to pay either PSL or OKH a salary. There was no routine work to be done and the directors could have handled the renewal of the tenancies without a fee.

145 In my judgment, the appointment of OKH as a third director was oppressive to Sharikat because it gave (and was intended to give) TGDPL the opportunity to take charge of the Company regardless of Sharikat's concerns and to pay the Disputed Payments which Sharikat objected to. Further, the payment of salary to PSL and OKH was an unjustifiable expense for the Company which reduced its profits.

Appointment of OBC as managing director and introduction of a monthly salary of $7,000

146 OBC was appointed managing director of the Company and granted a monthly salary of $7,000 by the 4 January 2011 resolutions. In his AEIC, OBC explained that in early 2011, he considered that it was timely to spend more time in the Company to take care of the financial matters and venture into other businesses if possible. He wanted to attend to the tenancy issue and the interest payable on the Company's borrowings so that the Company could optimise its funds.

147 Sharikat contends that the Company did not need a managing director and that this appointment and the accompanying salary were prejudicial to its interests. The first point to consider in relation to this issue is whether there was a good reason for the appointment.

148 In response to Sharikat, OBC and TGDPL rely on the reasons that OBC had given for his appointment in 2011. First, during the 4 January 2011 EGM, OBC had explained that his appointment as managing director was to provide the Company with "a clear decision maker" as no action was being taken to renew the tenancy agreements.

149 At that time, OBC said, Sharikat was insisting on an approach which would have resulted in the

tenancies being renewed at only "$0.95 to $1.00 psf" and with all the tenancy agreements being renewed at the same time and therefore expiring at the same time. PSF was meeting the tenants with a view to negotiating a rental rate that was lower than the market rate. There was an impasse. In order not to compromise the Company's interests in maximising rental yield, OBC had no choice but to appoint himself as managing director. He would then be able to oversee the rental negotiations with the assistance of OKH.

150 Second, at the 14 February 2011 meeting, OBC explained that he had to be managing director in order to:

(a) maximise/optimise the Company's funds

(b) recover loans due to the Company, including those owed by Sharikat;

(c) take action to refinance the construction loan;

(d) conduct further study on possible investment opportunities; and

(e) settle the Company's management structure.

I will deal with the various points in turn.

(1) Maximising rental

151 The evidence does not support the justification OBC gave on 4 January 2011 for appointing himself managing director. At that time, there was no impasse regarding rental renewal and it would appear that most of the delay in obtaining formal renewed tenancy agreements at a higher rental was due to lack of response from OBC himself. Further, even after he was appointed managing director, it took more than a year before the first tenancies were renewed. OBC's own evidence was that the leases for all 18 Units were progressively dealt with and renewed only between 22 March 2012 and 26 September 2012.

152 The parties had agreed initially that Sharikat and KYL would deal with the tenancies. At first, on Sharikat's part, this task was handled by PSL. Subsequently, PSF became involved. The e-mail evidence shows that on 12 August 2010 Kevin Ho of Sharikat asked Ms Chong who was in charge of the extension of the tenancies. On 2 September 2010, PSF sent TGDPL an e-mail stating that the tenants were anxious to have renewed tenancy agreements. He stated that rental rates of industrial property had increased by between 20% and 30% since 2007 and it would be good business sense to renew the tenancy agreements with a significant rental increase. The next day, Ms Chong responded. She conveyed OBC's strategy which was to "break out the renewal date and wait for a better time then start renewal process". OBC also indicated that a 30% increase would be good but had to be effected tenancy by tenancy and not all at one time. Shortly thereafter, PSF asked for confirmation that the 30% increment "*ie*, $0.8 x 1.3 = 1.04 is our target" and also that OBC would confirm the final bottom line which PSF suggested be between $0.95 and $1.00. No reply to this e-mail was received and, on 7 December 2010, PSF sent a chaser suggesting a meeting to discuss the topic. That meeting was eventually held on 21 December 2010. According to the minutes, OBC noted PSF's proposed rental and he proposed that TGDPL take over the role of managing renewals. It was at this meeting that OBC handed out the notice calling the EGM on 4 January 2011 at which it was to be proposed that OBC be appointed managing director.

153 The documentary evidence was shown to OBC in court and he then agreed that the decision to

appoint himself had nothing to do with Sharikat's failure to follow up on the rental issue and that it had been diligently following up on this issue. He also agreed that Sharikat could have negotiated and secured a renewal of the tenancies without his participation and he then went on to state that when he appointed himself as managing director, the rental renewal was not the only issue. OBC went so far as to say that it might have been his mistake to give Sharikat's alleged lack of diligence in relation to the rental issue as a reason for his appointment as managing director.

154 There was no need for a managing director to be appointed to deal with the rental issue. OBC could have dealt with it in conjunction with PSF once they had agreed on a common strategy. The correspondence showed that PSF was eager to proceed with the negotiations with the tenants in 2010 and was simply waiting for confirmation on the rental rates from OBC. Even after OBC's appointment, he did not himself take immediate action on the tenancy renewals. Instead, he deputed this job to his son and this led to a protest by the tenants in September 2011 after OKH sent an e-mail to the tenants which appeared to give them an ultimatum regarding the revised rental. In relation to OBC's appointment as managing director, it is irrelevant that more than a year after his appointment the tenancy agreements were renewed at rates that were higher than those proposed in September 2010. If the tenancy agreements had been renewed at intervals from September 2010 onwards, the Company would have enjoyed increased rental from much earlier.

(2) Loan recovery

155 Both TGDPL and Sharikat took loans from the Company. TGDPL and OBC submitted that at the meeting on 30 May 2008, Sharikat had been asked to repay its loan. However, Sharikat did not do so thereafter. It was only on 24 February 2012 that Sharikat sent the Company a cheque for $56,501.54 being partial repayment of the loan. The recovery of this loan was one of the reasons for OBC's appointment.

156 Sharikat's position is that it is not liable to repay the remaining $32,289.94 because it has set the same off against the $15,000 that the Company owes it for the project management fee and the balance due for the Services. On the basis of my findings in this judgement, only $15,000 can be set off and the balance must be repaid.

157 It is clear from Sharikat's payment on 24 February 2012 that it had no good reason to withhold that amount for so long. It should have repaid the same sooner. Having said that, it does not mean that Sharikat's non-payment justified the appointment of a managing director. With the power that TGDPL had to control the Company it could just as easily, and with more justification, have passed a resolution to appoint a lawyer to start proceedings on the part of the Company to recover the loan. I find this reason for OBC's appointment to be inadequate.

(3) Refinancing the Company's borrowings

158 Under the terms on which the construction loan had been extended, Hong Leong was entitled to change the interest rate charged from October 2011. The new rate would have been around 5% per annum and this was a high rate in relation to the then applicable market rates. In his AEIC, OBC states that the most pressing issue facing him in 2011 was this matter of the interest rate.

159 The submissions made by OBC and TGDPL emphasised that it was in the Company's interest to refinance the construction loan. The submissions went on to recount in some detail efforts made by OBC to obtain financing from other parties and the obstacles that OBC considered Sharikat had put up to block these efforts. These efforts were made after January 2011 and it is not clear to me why OBC needed to be managing director in order to make them. He had obtained the construction loan from

Hong Leong without the benefit of that position and, as events turned out in 2011, even the title "managing director" did not help him secure alternative finance from a company called Sing Investments & Finance Ltd ("Sing Investments"). I deal with this issue in more detail below.

(4) Further investment opportunities for the Company

160 TGDPL submitted that as early as the 14 February 2011 EGM, OBC had already began to fulfil his responsibility as managing director by raising the possibility of further investment opportunities. OBC may have been interested in such opportunities but he did not need to be managing director to raise them. Secondly, as I have found, the Company was incorporated as a single-purpose vehicle and therefore there was no need for anyone, let alone a managing director, to look into further opportunities.

(5) Settling the Company's internal issues on management structure

161 The only changes in the management structure after OBC became managing director were the appointment of OKH as a director of the Company and his designation as an alternate signatory on the bank mandate. OBC himself admitted that no other change was made. However, OKH did not bring expertise or independence to the position. Instead, he assisted OBC to achieve what the latter wanted.

(6) My decision

162 As the Company did not need a managing director, it did not need to pay OBC $7,000 a month to act as such. In any case, there was no evidence before me that justified payment of such a salary to him. As far as further projects of the Company were concerned, by the time the action came on for hearing, OBC had not identified any additional projects for the Board's consideration.

163 TGDPL and OBC put forward his efforts towards obtaining new finance for the Company as part of the justification for his salary as managing director. They blamed PSL and Sharikat for the fact that the Company did not take up the Sing Investments' offer to refinance the construction loan. In his AEIC, OBC says that on 27 April 2011 Ms Chong sent PSL a loan application form for his execution. Sing Investments was prepared to extend a term loan of $2.3m and a revolving loan of $2m to the Company at interest rates which were much lower than those being paid to Hong Leong. PSL did not, however, sign and return the form. Sometime after May 2011, Sing Investments expressed its unwillingness to proceed with the loan facility because of the existence of this action.

164 The purpose of the term loan to be extended by Sing Investments was to repay the construction loan. The purpose of the revolving loan was less clear. On 3 May 2011, Sharikat's lawyers informed TGDPL's solicitors that Sharikat was in principle agreeable to the term loan provided that the interest rate was more favourable than that applicable to the construction loan. As regards the revolving loan, since the parties had not discussed this, Sharikat asked for an explanation as to the need for the revolving loan. No response was given by OBC, TGDPL or their solicitors to this query.

165 Acceptance of the Sing Investments offer would have meant the Company incurring more debt for no obvious reason. No explanation was given as to why an additional revolving facility was required. I accept Sharikat's submission that in those circumstances it was reasonable for Sharikat not to accept the Sing Investments offer.

166 Subsequently, PSF requested Hong Leong to revise its interest rate. Hong Leong responded on

8 September 2011 by a letter offering a revised interest rate of 3% per annum. OBC did not, however, take any action to accept this offer. He told the court that the new rate offered by Hong Leong was still higher than the 1.75% per annum quoted by Sing Investments and, in his view, paying 131% more than the rate quoted by Sing Investments would not be in the Company's best interests. This was not a very convincing reason for rejecting the offer since he would have known by then that, due to the law suit, Sing Investments was no longer willing to proceed with its facility. Whilst the Company might not have saved as much as he would have liked, it would still have been in its interest for him to accept the revised offer from Hong Leong. In my judgment, it was OBC's inaction that led to the Company having to pay the higher rate of 5% per annum.

167 Overall, it has not been established either that the Company was in need of a managing director or that it was reasonable to pay him $7,000 per month. The defendants point out that the court does not usually get involved with quantum of remuneration as this is a commercial matter that is outside the court's province. In the present case, however, I am satisfied that payment of remuneration to OBC was another way for the majority shareholder to prefer its interests over those of the minority shareholder.

Was there an oppressive refusal to declare dividends?

168 Sharikat's position is that it entered into the Project in order to have a source of passive income once the Units were completed and leased. It expected the Company to earn profits and to declare dividends. At the 14 February 2011 meetings, however, OBC on being asked whether the Company would be declaring dividends, said that he had no such intention. Sharikat argues that the refusal to declare dividends is oppressive of Sharikat's interest as a minority shareholder and that it is being deprived of the fruits of its shareholding.

169 OBC and TGDPL say that it is entirely a matter of business judgment and a decision to be made by the directors whether the Company should retain surplus funds for other contingencies or declare dividends. In this case, PSL and OBC had, at an earlier stage, considered the needs of the Company and agreed that the payment of dividends to the shareholders was not a first priority. Secondly, it had been agreed that the Company should not declare dividends before the equalisation of the shareholders' loans. OBC submitted that because Sharikat knew this, the topic of dividends was not brought up until the 14 February 2011 EGM. That meeting was held after Sharikat had decided to start the present action and Sharikat made its complaint then to ensure that all classic complaints in minority oppression cases could be included in its action.

170 It is common ground that at the meeting on 30 May 2008, parties agreed that the Company's surplus funds would be accumulated and be used to repay the construction loan. The meeting resolved that there would be a lump sum repayment of the loan each time the Company had surplus funds amounting to $50,000. However, this resolution was not in fact carried through in that the construction loan was not repaid subsequently when the surplus funds reached the specified level.

171 On 1 July 2009, Sharikat's Kevin Ho sent an e-mail to TGDPL stating that PSL had reviewed the draft audited accounts of the Company for the year ended 31 December 2008 and, in view of the Company's current bank balances, was suggesting that the Company should repay the construction loan. On 14 August 2009, Ms Chong told Kevin Ho that she was trying to refinance the construction loan to get a better interest rate. The following month Ms Chong sent Kevin Ho the revised offer from Hong Leong and said she would send over the original document for PSL's signature once OBC had signed it. On 2 December 2009, Ms Chong sent Kevin Ho a copy of a letter from Hong Leong advising the reduction of the interest rate to 4% per annum with effect from 23 November 2009. In the same e-mail, she stated "As for the previous planned prepayment, Mr Ong do not agree until the

equalization of the shareholder loan". Kevin Ho's response of the same date reads:

> Hi Joanne,
>
> I refer to the above mentioned and trailing email.
>
> Mr Joseph Phang agreed on Mr Ong proposal.
>
> Please kindly expedite on this issue.
>
> If you need further clarification, please feel free to contact me.
>
> Thanks & best regards.

172 The parties have a substantial disagreement on the meaning of Kevin Ho's e-mail of 2 December 2009. OBC and TGDPL say that "Mr Joseph Phang agreed on Mr Ong proposal" meant that PSL was agreeing to postpone prepayment of the construction loan until after the shareholders' loans had been equalised. Sharikat says that all that PSL was agreeing to was the revision of the interest rate as proposed by Hong Leong.

173 I should clarify what the dispute about "equalisation" of the shareholders' loans was about. As mentioned earlier, both Sharikat and TGDPL had taken loans from the Company in the amounts of the paid-up capital that they had furnished the Company. To finance the construction, TGDPL had subsequently paid $700,000 into the Company. This meant that its loan had been fully repaid and instead the Company was indebted to it. At the same time, Sharikat had taken no steps to repay its shareholders' loan. As a result, on an overall basis, the contributions of Sharikat and TGDPL no longer stood in the 40:60 proportions that had been agreed. TGDPL wanted to restore the position by taking money out of the Company to the extent necessary to bring the proportions up to the 40:60 level again. This was what was meant by "equalisation" of the shareholders' loans. Some of this discussion can be seen in PSL-45 at [100] above.

174 Sharikat submits that PSL never agreed to the prepayment being subordinate to equalisation of the loans and that OBC's insistence on this came from his self-serving desire, at the expense of the Company's best interests, to oppress Sharikat by putting it in a difficult position. In court, during cross-examination, PSL was referred to Kevin Ho's e-mail of 2 December 2009 and accepted that he had agreed to the equalisation proposal. Subsequently, he agreed that a document entitled "TG-SN Pte Ltd Shareholder's movement" was sent to him to consider how the shareholders' loans could be equalised. In re-examination, however, he was shown the whole e-mail trail as set out in [171] above, and he then said that his agreement was to the revision of the interest rate, not to the postponement of prepayment.

175 I am not convinced by PSL's change in stance. TGDPL understood Kevin Ho's reply of 2 December 2009 to mean PSL's agreement to the equalisation issue coming first. That was why on 16 December 2009, Ms Chong sent over the "TG-SN Pte Ltd Shareholder's movement" document. That document contained three options and Ms Chong asked Sharikat which option it agreed to. Sharikat did not reply. On 28 December 2009, Ms Chong sent a chaser asking if she could proceed to make a repayment to TGDPL of amounts advanced by it to the Company. It bears mention that Sharikat did not respond at any time to say that it was only agreeing to the revision in the interest rate and not to the equalisation. Further, Hong Leong's letter of 23 November 2009, which Ms Chong sent out on 2 December 2009, was a notification that the reduction in interest rate would take effect immediately and did not require any documentation to be signed by the Company. Accordingly, there was nothing

for PSL to agree to in relation to that reduction.

176 I note that in court OBC agreed that there was no need in fact to wait for an equalisation of the shareholders' loans before the construction loan was refinanced or partially paid down. However, that is not the point. The point is whether the non-declaration of dividends by the Company was oppressive. In all the circumstances, I do not accept that it was. Sharikat had agreed to wait until the loan was repaid and had further agreed to settling the equalisation issue before repayment of the loan. I find it significant that it was only around the time of the institution of this action that Sharikat asked for dividends to be declared. However, now the situation has changed and it would not be unreasonable henceforth to use part of the Company's profits, after servicing the construction loan, to pay dividends since the Company is a single-purpose vehicle with no other projects to attend to.

Attempted rights issue

177 On 29 July 2011, TGDPL requisitioned an EGM of the Company to pass resolutions to raise funds from shareholders for the purposes of repaying the construction loan and future expansion. The EGM was held on 15 August 2011. At the meeting, OBC said that a rights issue was necessary because the Company was in financial difficulty and could not refinance the construction loan on better terms. He added that once the loan had been discharged, the Units could be used as collateral to raise fresh financing for the purpose of new business opportunities. PSF objected to the passing of the resolutions on the basis that a Board meeting should first be called to discuss such an important issue.

178 Subsequently, by notices dated 18 August 2011, OBC called for a Board meeting and an EGM of the Company to be held back-to-back on 8 September 2011. These meetings were duly held and a resolution was passed authorising a rights issue of $2m for the purpose of repaying the construction loan and for future expansion. Just before the EGM, Sharikat filed an application for an order to restrain OBC, TGDPL and the Company from implementing any resolutions that would have the effect of increasing the Company's share capital. This application was heard and granted on 15 November 2012.

179 It is Sharikat's position that the attempted rights issue was motivated by the primary and ulterior motive of diluting Sharikat's shareholding in the Company.

180 OBC and TGDPL dispute Sharikat's interpretation of their motive. OBC's original intention, they say, was to raise funds for the Company by making loans to it. He explained that at the 15 August 2011 EGM he told all parties he wanted them to brainstorm and discuss the manner in which funds could be raised. It was only after OBC received a letter from Sharikat's counsel, wrongly asserting that the purpose of the meeting was to raise funds through a rights issue, that OBC conceived of doing so. Further, he had reconsidered making a loan to the Company since the other shareholder was not contributing but still owed the Company money. The rights issue was proposed for the *bona fide* purposes of refinancing the loan and for future projects and with the intention that all shareholders would participate in it.

181 The issue that has to be determined is whether there was a genuine business reason for the rights issue. As far as future projects were concerned, I have held that the Company was incorporated as a single-purpose company. Therefore, there could be no question of any future project being undertaken without the consent of Sharikat as to do so would mean a change in the agreement between the parties. By the time the rights issue was proposed, Sharikat and TGDPL were on very bad terms: Sharikat had already started this action alleging oppression. Accordingly, there was little, if any, prospect of Sharikat agreeing to expand the business of the Company beyond the

original agreement. Even if OBC genuinely believed that the Company was not a single-purpose one, he must have realised that Sharikat would not want to invest further funds in the Company and therefore he could not have sincerely considered that it would participate in the rights issue in order for the Company to undertake further business.

182 The other reason given for the rights issue was in order to pay back the construction loan and reduce the interest costs borne by the Company. At the time of the EGM, the interest paid by the Company was in accordance with Hong Leong's revised offer made in 2009. The applicable per annum rate was 4% from November 2009 to October 2010, 4.25% for the next year up to October 2011, and 5% for the year after that. TGDPL's position was that it had tried to reduce the interest rate but these efforts had not been successful. OBC thought that the Company was in a tight financial position and had to reduce its borrowing costs. This was because the Company's only source of income was rental and the tenants were in the process of collectively renegotiating the leases which were all expiring the same time. On the other hand, the Company's obligation to pay rent to JTC was fixed and could not be cancelled.

183 It is difficult to accept that OBC truly regarded the Company as being in a cash crunch. As I have noted elsewhere, he did neglect to accept Hong Leong's offer of a reduced interest rate, something which would have saved the Company money. Further, at the end of 2010, the Company had cash reserves of approximately $700,000. All the Units were occupied and although the tenancy agreements had expired in June 2010, the tenants had remained and were paying rent on a monthly basis. They had even approached PSF for renewed tenancy agreements as PSF had informed Ms Chong towards the end of 2010. Whilst the tenants were upset in September 2011 about prospective increased rental rates, they had not moved out but had conveyed their complaints to PSF and had met him and PSL to discuss the issue. Some tenants were even willing to buy over the Units to allow the Company to recover its development costs. In late 2011, the likelihood of the tenants moving out was therefore remote. That this was so was confirmed the following year when OBC and OKH concluded new tenancy agreements at very much higher rentals.

184 At the 8 September 2011 EGM, OBC issued a "Statement of Managing Director" ("the Statement"). In it he referred to three aspects of the Company's financial statement for the year ended 31 December 2010 which were causes for concern. These were:

(a) the Company's auditors had allegedly confirmed that the Company had an interest rate risk which arose primarily from its loans and borrowings;

(b) the Company had a fixed commitment to pay JTC rental; and

(c) the financial statements allegedly confirmed that the Company would have difficulty in meeting its financial obligations due to shortage of funds and that it had a liquidity risk because of the mismatch of the maturities of financial assets and liabilities.

185 OBC was extensively cross-examined on his justification for the rights issue. He admitted that the interest rate risk referred to in his Statement had simply been lifted from the "definition of interest rate" provided in the 2010 financial statements and was not a real warning of risk. Secondly, regarding the obligation to pay rental to JTC, he conceded that this was a recurring part of all the Company's financial statements. He further agreed that any increase by JTC of its rental was capped under the terms of the JTC lease agreement. Thus, there could be no unexpected exposure or risk to the Company. In any case, reading the 2010 financial statements, the auditors do not appear to have raised concerns with the lease commitments but had simply made statements of fact in relation to the same.

186 In the Statement, OBC had asserted that without rental income the Company would have a liquidity issue. In cross-examination, however, he admitted that the tenants wanted to stay on in the Units and were willing to accept some increase in rental. It appeared from the cross-examination that OBC had either misread the financial statements in relation to liquidity risk or had deliberately misinterpreted them. The section in question reads as follows:

> **Liquidity risk**
>
> Liquidity risk is the risk that the Company will encounter difficulty in meeting financial obligations due to shortage of funds. The Company's exposure to liquidity risk arises primarily from mismatches of the maturities of financial assets and liabilities. The Company's objective is to maintain a balance between continuity of funding the flexibility through the use of stand-by credit facilities.
>
> The Company maintains an adequate level of cash and cash equivalents; and ensures the availability of funding through committed credit facilities from financial institutions and from the directors or director-related companies as necessary.

187 It can be seen from the second paragraph of the excerpt that in the case of the Company, the auditors were not concerned with any liquidity risk. Indeed, their statement indicated that it had little or no liquidity risk. The reference to "committed bank facilities" should be noted. Whilst OBC was apparently keen at the EGM to repay Hong Leong, there was no indication that Hong Leong was unhappy with the way the construction loan was being serviced or that it was likely to recall the same. When shown the figures during cross-examination, OBC also had to concede that from 2010 onwards, the Company's cash position had constantly improved while its liability had decreased.

188 Overall, on a consideration of the evidence, I am satisfied that there was no valid reason for the rights issue and that it was aimed at diluting Sharikat's shareholding. Accordingly, the calling of the 8 September 2011 EGM and the passing of the resolutions for the rights issue were oppressive actions on the part of TGDPL and OBC.

Was Sharikat kept informed of Company matters?

189 Sharikat has pleaded that it and/or its representatives were not always notified of the Company's Board and shareholders' meetings. It asserts that it was not informed of the following:

(a) A Board meeting held to appoint one Ms Khoo Chin Lee as joint secretary of the Company;

(b) A Board meeting held on 17 March 2011 at which OBC and OKH passed resolutions to change the effective date of payment of directors' remuneration from 4 January to 14 February 2011 and to use the amount paid on 25 February 2011 to offset future remuneration; and

(c) A Board meeting held on 1 April 2011 at which OBC and OKH passed resolutions to:

(i) appoint M/s Tan Rajah & Cheah ("TRC") to act for the Company in respect of the present action;

(ii) authorising OBC and/or Ms Chong to instruct TRC in respect of the suit; and

(iii) to affix the common seal of the Company to any documents which required sealing in connection with the suit.

190 The response of OBC/TGDPL to this complaint is that no Board meeting was held in respect of the appointment of Ms Khoo or the 17 March 2011 resolutions. Those resolutions were directors' resolutions in writing authorised by Art 90 of the Articles of Association of the Company. PSL's evidence was that he learnt of these resolutions when he was asked to sign them. Since no meeting was held and the resolutions were circulated for signature by the directors, Sharikat has no grounds of complaint.

191 As regards the appointment of TRC, the response is that these resolutions were raised and passed at the directors' meeting of 29 March 2011 which PSL failed to attend. Notice of the meeting was sent to Sharikat on 11 March 2011. Sharikat cannot complain if its representative failed to attend the meeting. There was no Board meeting on 1 April 2011.

192 Sharikat did not respond to the points made by OBC and TGDPL. I am satisfied that there is little merit in its complaint about not being kept informed of Company matters.

Oppression claim against KYL and OKH

193 KYL and OKH are not in the same position as OBC and TGDPL. OKH is a director of the Company but he does not hold any shares, directly or indirectly. KYL is a minority shareholder and not a director. In its statement of claim, Sharikat, although alleging that both KYL and OKH were complicit in the oppressive conduct of TGDPL and OBC, has only claimed relief against KYL. No relief is claimed against OKH.

194 Neither KYL nor OKH could have oppressed Sharikat if he had acted on his own. The allegation is that each of them supported the major shareholder, TGDPL, and OBC in various acts of oppression and must, therefore, be equally guilty of oppressive conduct. Relying on the case of *Chong Hon Kuan Ivan v Levy Maurice* [2004] 1 SLR(R) 545 ("*Chong Hon Kuan*"), KYL has submitted that as a minority shareholder, a claim under s 216 can only be sustained against him if he was an "actor" and played "a major role" in the transactions. OKH submitted, on the basis of the same authority, that the same principle applies against a party who is not a shareholder.

195 *Chong Hon Kuan* does not, however, stand for the principle that a director or shareholder must be a major player in order to be sued for oppression. In that case, the plaintiffs brought an action for oppression against, *inter alia*, the first and third defendants ("the applicants") who were directors but not shareholders of the company. No relief was claimed against the applicants. The applicants sought to have the action against them struck out. Choo Han Teck J refused to strike them out on the basis that allegations had been made that the applicants were responsible for misconduct and breaches of various agreements which could amount to oppression against the plaintiffs. Whether the applicants were relevant parties would have to be proved by the plaintiffs during the trial but the plaintiffs should not be deprived of the opportunity of presenting their case. Whilst Choo J obviously considered that the plaintiffs had to prove that the applicants were actors, in the sense that they had been responsible for misconduct and breach, he did not hold that the plaintiffs had to show that the applicants had "played a major role" in the transactions. He referred, in the course of his judgment, to *Re BSB Holdings Ltd* [1993] BCLC 246, where Vinelott J held that B Sky B (the applicant party in question) was properly joined because it was an actor who played a major role in the transactions. It should be noted that in that case B Sky B was not a director or a shareholder but an outsider. The role of "major player" was relevant in considering whether a complete outsider could be joined in litigation involving oppression allegations between minority and majority shareholders.

196 I am of the view that Sharikat has to show that KYL and OKH acted oppressively in their respective roles of shareholder and director. If they did so, it would not matter that they did not

instigate the actions in question or, in the case of KYL, could not have stopped them.

Allegations made against OKH

197 Sharikat asserts that OKH acted oppressively in that:

(a) he approved and paid the Disputed Payments without independently verifying the same;

(b) he approved directors' remuneration which was not justified and took a salary which he did not earn;

(c) he voted in favour of the rights issue when it was not justified.

(1) The Disputed Payments

198 I have held that it was not oppressive for the Company to pay two of the four Disputed Payments. The other two payments, *viz*, the $50,000 agency fee and the sum of $183,750 paid in respect of Progress Claim No 10, were questionable and should not have been paid. As a director, OKH approved these payments and, as bank signatory, he co-signed the cheques for them.

(A) OKH's Submissions

199 As regards Progress Claim No 10, OKH submitted that he could not be blamed for approving payment because he did not have sufficient knowledge of the dispute. He was only made a director on 4 January 2011 and the payment was made on 15 March 2011. On the face of Progress Claim No 10, the retention sum had been long overdue. Whilst Sharikat may have raised an issue regarding the ACMV works and the Variation Works, given his lack of knowledge of the Project and/or the construction works and/or the dispute between the parties, OKH cannot be faulted for approving payment of the retention sum.

200 In respect of the agency fee, this payment had been approved by the majority of the shareholders at the EGM of 10 November 2008. OKH had no reason to refuse to sign the cheque. He had counterchecked the resolution and verified the position. It was therefore reasonable for him to assist in the payment.

201 It bears repeating that until OKH was appointed an alternate bank signatory to PSL, OBC could not control the payments made by the Company: he needed PSL's signature and that was how Sharikat had been able to block settlement of the Disputed Payments for so long. The issue here is whether OKH acted in good faith or simply followed his father's direction.

(B) My decision

202 In relation to Progress Claim No 10, whilst it is true that OKH was not involved with the Company until January 2011, his protestations of ignorance rang rather hollow. On 11 February 2011, Sharikat's solicitors sent a letter of demand addressed to various parties including OBC and OKH. That letter set out Sharikat's allegations of oppression in detail, including Sharikat's contentions regarding the agency fee claim and Progress Claim No 10. On 24 February 2011, Sharikat's solicitors received a letter, purportedly signed by OKH. This letter referred to the letter of demand and was written in the first person. OKH stated that he was only appointed a director of the Company on 4 January 2011 and was not aware of events which took place prior to his appointment. Accordingly, he denied the allegations in the letter of demand in so far as they were made against him.

203 When OKH was cross-examined, he said that he did not receive the letter of demand. He could not recall it at all. It was submitted that it was not unbelievable that the letter, addressed to OKH and OBC, and sent to the same address where they both lived, was not read by OKH and that the reply was subsequently legally drafted for him and that he signed it without really knowing what the matter was about.

204 I do not accept the above submission. The letter of demand was a serious document and even if OKH did not receive his copy, which seems unlikely, I am sure that OBC would have told him about it. Although OKH is a young man, he was old enough in 2011 to understand the seriousness of the legal demand and to understand the reply that he signed, even if he did not draft it. Knowing that Sharikat had serious objections to the agency fee being paid to TG Realty and to the sum of $183,750 being paid to TG Properties, it behoved him to look into the matters seriously and not simply sign the cheques in blissful ignorance. His verification of the correctness of the payments comprised checking the same with TG Organisation, as the entity preparing and handling the Company's accounts at the material time. Further, the person he checked with was Ms Chong, OBC's assistant. In effect, OKH sought verification from the beneficiaries of the Disputed Payments. Such a superficial check would not be sufficient for OKH to satisfy himself as to the rectitude of the payments to TG Realty and TG Properties.

(2) Directors' remuneration

205 OKH submitted that remuneration of $7,000 per month to OBC as managing director was fair and that a director of OBC's experience and capability deserved more. OBC's role in renewing the tenancy agreements was critical for the Company and the Company gained much more than was paid in salary to OBC. In any event, OKH should not be faulted for voting at the Board level for this remuneration which had also been approved at shareholders' level.

206 As regards OKH's own remuneration, the same amount was also payable to PSL. Since no relief is claimed against OKH in respect of this remuneration, it should not be raised as an issue. The argument that the work that OKH did could not justify a salary of $1,000 a month is not logical because PSL was also given the same remuneration and PSL did even less work than OKH after the resolution was passed.

207 I have held that it was oppressive on the part of OBC and TGDPL to procure the former's appointment as managing director at a remuneration of $7,000 a month and also to appoint OKH as a director. As for OKH's salary, as Sharikat submits, he did hardly anything to earn it between January and September 2011 and even thereafter the work that he did in renewing the tenancies could have been done by PSF and PSL for nothing. The fact that PSL was voted a similar remuneration is irrelevant. PSL did not take it.

208 In my judgment, OKH could not justify his vote in favour of the $7,000 director's remuneration on 14 February 2011. He did not know much about the Company then and did not know why it needed a managing director and what amount of time OBC would have to spend on the Company's affairs. All he said was that his father had a good track record and experience and capability. These are good opinions for a son to have about his father but they do not justify a director voting in favour of a salary when the Company does not require a managing director's services. As for his own salary, perhaps at the time he voted for it, OKH genuinely believed that he would be doing enough work to justify it. I will give him the benefit of the doubt on that point.

(3) The rights issue

209 In his defence, OKH stated that he voted in favour of the rights issue because, having read OBC's Statement, he considered that the rights issue would be in the best interests of the Company. In his AEIC, he referred to the high interest rate that the Company was bearing and that it was necessary to move the loan away from Hong Leong as soon as possible. He said that his decision was based simply on the fact that the Company should avoid paying high interest, if at all possible.

210 Prior to the rights issue, on 11 August 2011, Sharikat's solicitors had written to OBC's and TGDPL's solicitors objecting to the proposed rights issue on the basis that it was intended as an oppression of Sharikat's rights as a minority shareholder. This letter was not copied to OKH or his solicitors. OKH averred that he had no knowledge at all of Sharikat's dispute in relation to the rights issue. Since Sharikat had not conveyed its objections to OKH, it could not complain that OKH approved the directors' resolution. At the material time, OBC had given him a clear and cogent explanation and on the face of it the rights issue was not oppressive as it was intended to reduce the interest payable by the Company and was open for subscription to all shareholders.

211 It is difficult to believe that by the 8 September 2011 Board meeting which preceded the EGM called to approve the rights issue, OKH was not aware that Sharikat objected to the rights issue. He was fully aware of the dissension among the shareholders. This action was started on 28 March 2011 and he was a defendant from the outset. On 6 September 2011, Sharikat had filed an application in the action to injunct the rights issue. As a director, OKH must have known of this. Knowing that Sharikat objected to the rights issue, he must have known that Sharikat would not take it up. He must also have known that there was no real urgency to refinance the construction loan since the Company had enough funds to meet its commitments. Whilst a lower interest rate would of course be preferable, the need for cheaper funds was no more than a pretext and OKH must have been aware of this. I do not believe that OKH was not in his father's confidence.

212 Knowing that the rights issue was a contentious one, that there was impending litigation and that the Company had no urgent need for refinancing, OKH did not exert independent judgment when he voted for the rights issue at the Board level. Instead, he assisted his father in the oppressive steps that were being taken.

(4) Conclusion on OKH

213 For the reasons given above, I am satisfied that OKH exercised his director's powers oppressively in relation to Sharikat.

Allegations made against KYL

214 Sharikat's allegations against KYL are that he acted oppressively in relation to:

(a) voting in favour of paying TG Realty its claim for agency fees;

(b) voting not to pay Sharikat's fees for the Services rendered to the Company and for not standing up to tell the truth about the agreement between PSL and OBC;

(c) in relation to the non-payment of the project management fees, KYL stayed silent in the face of OBC's refusal to make payment despite knowing that Sharikat was entitled to such a fee as he was party to the initial agreement;

(d) in relation to the wrongful progress claims by TG Properties, KYL's wrongful conduct lay in assisting in the preparation of the progress claims and not speaking up after Sharikat discovered

the irregularities when he knew that the ACMV works have not been carried out;

(e) in relation to the refusal to distribute profits in breach of the profit-sharing agreement, KYL's wrongful conduct lay in staying silent in the face of OBC's refusal to make payment despite knowing there was a profit-sharing agreement;

(f) in relation to the attempts to remove PSL and vary the bank mandate, KYL's wrongful conduct lay in being a party to the attempts, such as by signing directors' resolutions purporting to accept PSL's resignation as director and varying the bank mandate;

(g) in relation to the appointment of OKH as director and OBC as managing director and variation of the bank mandate, KYL's wrongful conduct lay in voting in favour of OBC's appointment and the variation of the bank mandate, and in not speaking up against OKH's appointment as director despite his doubts as to OKH's independence; and

(h) in relation to the introduction of directors' remuneration, KYL's wrongful conduct lay in abstaining from voting and not objecting to the resolution for the same despite knowing that there was no need for such remuneration.

215 I should say at once that in view of my findings in relation to the oppression allegations against OBC/TGDPL, the oppression allegations contained in [214(b)], [214(c)] and [214(f)] above cannot stand.

216 In relation to [214(d)], as I have said the preparation of the progress claims was not the real issue. Whilst KYL should not have included an allowance for the ACMV works in the progress claims until they actually started, I do not think that he had any intention of wrongfully benefiting TG Properties or oppressing Sharikat when he did so. Why would he put in something that PSL might find objectionable when he was working closely with PSL and knew that PSL would be able to check the progress claims against the progress of the work on the Project? So, that portion of [214(d)] cannot substantiate an allegation of oppression. As for the other part, while KYL did not state at the meetings that the ACMV works had not been done, he did tell OBC this in private. It would have been helpful for Sharikat's case had KYL said the same at a meeting which was being minuted but I do not consider his failure to do so oppressive since he did not, in the ultimate analysis, conceal the truth.

217 Before I go on to consider the other allegations, I note Sharikat's submission that KYL, apart from being OBC's brother-in-law, was dependent on him financially. In court, KYL admitted that between 2006 and 2008, 80% to 90% of his business came from OBC. KYL had financial difficulties and these would have been worsened had OBC taken away his business. OBC paid KYL a fixed sum of $20,000 a month which would be offset against the sums which OBC owed for KYL's services. At the end of each year, however, KYL explained, there would always be something outstanding from OBC to KYL.

218 In his closing submissions, KYL accepted that he had been dependent on the TG Group for 80% to 90% of his revenue at the material time. He asked, however, whether it was correct to expect him to cut his family ties and jeopardise his career and financial future in order to side with Sharikat. He submitted that the law does not require parties to be rescuers or martyrs to avoid being found liable for oppression. KYL had done his part by helping the parties to mediate, telling the truth to OBC that the ACMV works were not done, and abstaining from voting on numerous occasions.

219 I now turn to the allegations. In relation to TG Realty's agency fees ([214(a)]), KYL supported payment of the same at the 10 November 2008 EGM. It was clear from his evidence that he was fully

aware that the tenants had been supplied by JTC and matched to the Units by JTC and that TG Realty did not have to do any substantive work to find and sign up tenants. Further, the important issues with the tenants had been sorted out by himself and PSL. In voting for paying TG Realty nevertheless, KYL was wilfully disregarding the interest of the minority shareholder Sharikat in favour of the interest of the majority shareholder. I consider this action oppressive.

220 I consider that KYL behaved oppressively in relation to the appointment of OBC as managing director, the appointment of OKH as director and the variation of the bank mandate. He knew that these resolutions would give OBC complete control over the Company's affairs and finances without any check or balance at a time when the relationship between OBC and PSL had completely broken down. He may have expressed doubts about OKH's independence but if that was the way he felt, he should have voted against the resolution. His action in abstaining showed, in fact, his tacit support for the resolution. Similarly, he tacitly supported the payment of remuneration to the directors when it was an unnecessary expense for the Company and this was also oppressive.

221 KYL testified that he had voted in favour of appointing OKH as a bank signatory in order to enable the Company to proceed with its day-to-day operations as PSL had refused to sign cheques for various payments. This reason does not stand up to scrutiny. He was unable to give details of what these payments were and finally had to admit that the cheques that PSL had refused to sign were limited to those for the Disputed Payments.

222 The final allegation I deal with is that contained in [(214(e)]), being KYL's silence in the face of OBC's refusal to recognise and give effect to the profit sharing agreement. While morally it may have been the correct thing for KYL to stand up to OBC and tell him to abide by the agreement, I find it difficult to hold that it was oppressive of him to keep a low profile on the issue since he could not have moved OBC and the financial position was unclear. It is not as if Sharikat had been able to put forward an actual figure of what was due to it and had called for a shareholders' vote. Until midway through the trial, the parties had not even agreed on what the cost of the Project had been and had not calculated the profits. No final accounts had been prepared. It was clear to all that the cost estimate had been exceeded and that the profit was far from $500,000. It was even possible that no profit had been earned.

223 When discussions between opposing factions of shareholders take place, not every shareholder needs to speak up. It is only when a vote is called for that a shareholder must consider whether the action he is taking is a reasonable one in the interests of the shareholders as a whole or is aimed at oppressing one shareholder to unfairly benefit another. In the instance of the profit-sharing agreement I do not think that that point was reached.

(1) Conclusion on KYL

224 For the reasons given above, I am satisfied that KYL exercised his shareholder's powers to assist TGDPL in oppressing Sharikat in relation to a number of matters.

The remedies

225 Section 216(2) of the Act gives the court wide powers to remedy any oppression that it has found to exist. These include winding up the company and providing for the purchase of the shares of the company by other members of the company or by the company itself. The court may also direct or prohibit any act or cancel or vary any transaction or resolution.

226 In its statement of claim, Sharikat has prayed for various reliefs including a declaration that

OBC has breached his fiduciary duties as a director of the Company and that he be ordered to restore to the Company the sums wrongfully removed from it under the guise of progress claims to TG Properties, agency fees to TG Realty and directors' remuneration. There is also a prayer for KYL and TGDPL to be ordered to buy out Sharikat's shares in the Company or, in the alternative, for KYL and TGDPL to sell their shares in the Company to Sharikat.

227 Although one of Sharikat's prayers for relief is for the Company to be wound up, in its closing submissions Sharikat took the position that a winding up should only be ordered in the event that the court is not minded to make an order for a sell out or a buyout of shares. I agree that in this case a winding up order would not be appropriate since the Company is making profits and remains operational and successful.

228 I also agree with Sharikat's submissions that the relationship between Sharikat and the defendants has broken down and all trust and confidence in each other has been lost. I note that the defendants have not disagreed with this position. In the circumstances, the appropriate relief would be to order one set of shareholders to buy out the other. The question is which should do so and at what price.

Which party should buy out the other?

229 Generally speaking, when oppression is established, the majority shareholders are ordered to buy out the minority. TGDPL is willing to buy out Sharikat but Sharikat does not want to sell out. It would rather buy out TGDPL and KYL.

230 Sharikat submits that the present case is an appropriate one for the majority to sell its shares to the minority because:

(a) Sharikat's shareholding is 40% which is not insignificant especially in comparison with TGDPL's 51% shareholding;

(b) Sharikat was the one who was running the business before the parties fell out:

(i) PSL had initiated the joint venture and OBC admitted that he needed Sharikat's expertise to handle the Project and had left it to PSL and KYL to handle the bid submissions;

(ii) PSL dealt with the tenants and maintained a good relationship with them;

(iii) PSL was the one involved in the day-to-day running of the Company and handled the construction of the Project; and

(iv) Sharikat had sought to follow-up on the renewal of the tenancies in 2010 while OBC and TGDPL took their time in responding to e-mails and taking action.

(c) The other shareholders had mismanaged the Company by causing it to make wrongful payments and causing the relationship between the Company and the tenants to deteriorate, thus imperilling the Company's only source of income; and

(d) Sharikat had made the most significant contribution to the development and management of the Project and it would be unfair to deprive Sharikat of the benefit of the passive income that it had legitimately expected to receive when it entered into the joint venture to develop and manage the Project. OBC had testified that TGDPL did nothing in relation to the construction

work; it only collected money and sent bills. There was no reason why OBC should get the benefit of the passive income, which Sharikat had worked so hard for, while Sharikat was forced to sell its shares due to the defendants' oppressive conduct.

231 Sharikat supports its submission by reference to Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 2nd Ed, 2007). At p 238, the learned author notes that breath and width of the court's discretion under s 216(2) give the courts power to order that the minority shareholder instead buys out the majority share and obtains control of the company. Sharikat also cites two English cases, *viz*, *Re Ringtower Holdings Plc* [1989] 5 BCC 82 and *Re Copeland & Craddock Ltd* [1997] BCC 294, in which the possibility of a minority buy out was mentioned though not decided on. In the second case, the court observed that it was not plain and obvious that the minority shareholder should be bought out where he had run the business before the parties fell out.

232 The defendants do not accept the suggestion. TGDPL's closing submissions point out that none of the cases cited by Sharikat actually allowed a minority shareholder to buy out a majority shareholder.

233 Sharikat has not cited a specific case where a majority has been ordered to sell out to the minority. It should be noted that in the same text, Margaret Chew warns that an order that the minority buy out the majority, should be cautiously made because it amounts to a judicially endorsed compulsory acquisition of the majority shares (at p 238). She suggests that such an order would be appropriate only where the mismanagement has been oppressive and egregious but where the winding up of the company may not be desirable in so far as it might have societal repercussions (at p 239). The cases that the author refers to concerned companies that ran clubs whose winding up might have had such repercussions.

234 It is obvious that winding up the Company would have no societal repercussions. The other issue is whether the majority shareholders' conduct has been so egregious that I should compulsorily dispossess them. In this connection, it is significant that not all of Sharikat's complaints have been upheld. In particular, I have not accepted that the progress claims were fraudulent from the outset and that Sharikat was not aware of what was being claimed. I also considered it incorrect on the part of PSL to prevent repayment of the shareholders' loan advanced by TGDPL. In addition, the complaint regarding the dividend policy was opportunistic.

235 In my view, the more egregious acts on the part of the majority shareholders were the appointment of OBC as managing director at a monthly remuneration of $7,000 and the bringing of OKH on Board as a director and alternate bank signatory in order to obtain control of the Board and the bank account. Bearing in mind the basis on which the Company had been incorporated, it was not correct for TGDPL to try and run the Company as its own tool. It is some mitigation, though not a complete excuse, that it was faced with a situation where some justifiable payments could not be made because of shareholder disputes and to that extent the Company could not meet its lawful obligations. Thus, it resorted to wielding its majority vote to move things in the direction it wanted.

236 I do not consider the mismanagement egregious enough to order the majority to sell to the minority. While Sharikat has submitted that it would be inequitable for it to sell out to TGDPL because then the oppressor will benefit from the Company's earnings in the future, I do not find that result so inequitable as to compel TGDPL and KYL to sell their shares to TGDPL. Although PSL worked hard in relation to the construction of the Project, it was the parties' bargain that he would do this as part of Sharikat's contribution to the joint venture while TGDPL would provide the financial support. TGDPL carried out its obligations by obtaining the construction loan and also by funding the difference between the contract sum and the construction loan. Further, PSL was not the only person involved

in the Project during the construction stages. KYL handled all the paper work and worked with PSL in relation to the bid submissions and dealings with the tenants. He was not paid anything for this work except perhaps in the 9% shareholding that was transferred to him subsequently. Once the Project was completed, it more or less ran on auto-pilot with very little having to be done by any party. Whilst Sharikat may have expected to enjoy passive income from the Project for many years to come, a sell out at a fair price will give it a return on its investment and a capital sum which it can reinvest in some other form of income-earning asset.

237 Having decided that Sharikat should be bought out, the next decision to make is which defendant should buy its shares. Although in its pleadings Sharikat asked that TGDPL and KYL only be ordered to buy it out, Sharikat's submission is that both OBC and TGDPL, being the principal oppressors and majority shareholders, should have the primary responsibility to purchase the shares, with KYL being liable to buy whatever they do not. KYL did not make any submission on this point while OBC's/TGDPL's closing submissions seem to assume that any order for a buyout of Sharikat's shares would involve both TGDPL and KYL. KYL is not a person of means, however, and it would be futile to order him to buy any shares that the major shareholder fails to purchase. Further, in December 2012, OBC and TGDPL made an open offer to Sharikat for its shares. TGDPL was therefore, willing to buy all of Sharikat's shares itself. I have concluded that the order should be directed at TGDPL alone, although if OBC wants to buy a portion of the shares himself, he may.

How should the buyout be priced?

238 Sharikat adduced evidence from two experts on the possible value of its shareholding in the Company. The first was Mr Vishal Sharma ("Mr Sharma"), an executive director of KPMG Corporate Finance Pte Ltd, who gave evidence on the value of the Company's shares. The second was Ms Soo Suat Mui ("Ms Soo"), an associate director of CBRE Pte Ltd, who gave evidence on the value of the Property.

239 OBC and TGDPL adduced expert evidence from Mr Andrew Ooi Lih De ("Mr Ooi"), an executive director at Deloitte & Touche Financial Advisory Services Pte Ltd. Mr Ooi's evidence was mainly on how the net asset value ("NAV") of the Company was to be assessed.

Valuation date

240 The first question to consider is what the appropriate date for valuation is. The English courts generally consider the date of the order to be more appropriate than the date of commencement of action or the date of the unfair prejudice (see *Re London School of Electronics Ltd* [1985] 3 WLR 474). Singapore courts have not stated any general principle, having chosen different dates depending on the circumstances, but in *Over & Over* the Court of Appeal ordered that the value of the company was to be assessed on the basis of the fair market value of its assets as of the date of its decision.

241 Sharikat submits that in the present case the correct date of valuation should be as close as possible to the date of the order. OBC and TGDPL submit that due to the fact that this dispute started more than three years ago, valuation of Sharikat's shareholding should be done by way of a separate exercise on a valuation date to be determined by the court. It should be based on the updated net profit of the Company, taking into account also the court's determination on whether the sums paid out to various parties from March 2011 should be returned to the Company.

242 Sharikat's response is that with the expert reports and testimony of two expert share valuers and one expert land valuer, there is sufficient evidence before the court to decide on the share

valuation without directing that further valuations be undertaken.

243 I note that the valuations are somewhat out of date. Ms Soo valued the Property as at 10 September 2012. Mr Sharma valued the shares of the Company as at 31 August 2012 and Mr Ooi worked off its audited financial statements for the financial year ended 31 December 2010. However, as the Company is not in a dynamic business and its income and expenditure are relatively stable, I do not think it would be unfair to use this evidence in the valuation exercise. There may have been a change in the value of the Property since August 2012 but a positive change would enure to the benefit of TGDPL. Even if there has been a negative change in its value, it is not unfair to use the higher value as TGDPL would retain the Property and have the possibility of making up the loss in value over the longer term and, in any case, the purpose of the exercise is to compensate Sharikat which is exiting the Company unwillingly because of OBC/TGDPL's oppressive actions. I therefore consider that if the evidence is of a sufficient standard, the value of the shares as at end August 2012 should be used for the purpose of the buyout. To direct a further valuation would be unnecessarily costly and time-consuming and may even give rise to further disputes.

Should acts of oppression be taken into account?

244 Sharikat has submitted that various sums which were wrongfully removed by the defendants from the Company should be taken into account in valuing the Company. I agree. In previous oppression cases, the court has directed valuers to take into account moneys that had been misused or lost by virtue of the oppressive conduct (see, *eg*, *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] 4 SLR(R) 745).

245 In this case, the sums that should be taken into account are:

(a) $50,000 paid to TG Realty;

(b) $183,750 paid to TG Properties; and

(c) Directors' remuneration of $8,000 per month from January 2011 onwards.

Whether a discount should be applied

246 Citing the text book, Robin Hollington, *Shareholders' Rights* (Sweet & Maxwell, 6th Ed, 2010) at para 8-59, Sharikat submits that in the context of statutory remedies, if there is a general principle, it is that no discount is to be applied for a minority shareholding which is being sold in cases of oppression. OBC and TGDPL do not accept that that is a strict rule. They say that if the minority has acted in such a way as to deserve its exclusion from the Company, the minority shareholding should be sold at a discount even if there was oppressive conduct by the majority (see *In re Bird Precision Ltd* [1984] 2 WLR 869). I have no reason to disagree with that principle. In the present case, however, I do not consider that Sharikat's behaviour was such as to justify its exclusion from the Company. Therefore, the ordinary position that there should be no discount for the purchase of the minority interest applies here.

Valuation evidence and assessment

247 I now turn to consider the evidence on valuation.

248 Ms Soo valued the Property at $6.5m. Using this value, and without taking into account any moneys wrongfully removed from the Company, Mr Sharma estimated that as at 31 August 2012, the

fair value of the Company was $4.7m and Sharikat's 40% equity stake was $1.9m. He also did a calculation on the basis that $604,680 had been wrongfully removed from the Company. Having added that sum back to the Company's value, he estimated the fair value to be $5.3m and Sharikat's 40% equity stake to be $2.1m.

249 I have found that $50,000, $183,750 and directors' remuneration of $8,000 a month should not have been paid out of the Company. On that basis, up to 31 August 2012, the total sum of $152,000 was wrongfully taken out as directors' fees. If the total amount wrongfully taken out is taken as $385,750 (*ie*, $50,000+$183,750+$152,000), then using Mr Sharma's approach, the value of the Company would be $5,085,750 and Sharikat's 40% would be worth $2,034,300.

250 Mr Ooi's expert report was not quite a valuation of the Company. The scope of his work, as stated in the report, was to:

(a) comment on the different valuation approaches and the appropriateness of using the realisable net asset value ("RNAV") method to value the Company;

(b) comment on the appropriateness of applying a discount to the 40% interest in the Company;

(c) based on the audited balance sheet of the Company as at 31 December 2010 ("the FY 10 Balance Sheet") calculate an illustrative RNAV of the Company;

(d) based on the illustrative company RNAV, calculate an illustrative value of the 40% interest based on a range of discounts; and

(e) provide additional illustrative values of the Company and the 40% non-controlling interest should the value of the Banyan Drive property be different from that carried in the FY 10 Balance Sheet.

251 Mr Ooi opined that, based on the FY 10 Balance Sheet (where the value of the Property was stated to be $4.2m), the illustrative company RNAV was $1,910,201. If no discount is applied to that figure, Sharikat's shareholding would be worth $764,080. Mr Ooi, however, stated in court that his scope of work was not similar to Mr Sharma's and that his report was not a valuation report.

252 Even if Mr Ooi's report was to be regarded as a valuation report, I could not use it for the purpose of determining the price at which OBC/TGDPL should buy out Sharikat since he based his calculations on the 2010 figures and that was too long ago. I now have to consider whether it would be correct to order the buyout based on Mr Sharma's valuation or whether I should order an updated valuation to be done.

253 Mr Sharma's valuation was based, to a large extent, on the valuation of the Property done by Ms Soo. The reliability of this valuation must therefore be considered first.

254 OBC and TGDPL submit that Ms Soo's expert report is wholly inadequate and of no assistance because:

(a) Ms Soo's instructions were to provide a valuation of the Property for an intended sale;

(b) she applied the capitalisation approach in arriving at a value but did not explain why she had adopted this approach

(c) she had also applied a "capitalisation factor" to project the revenue which the Units could potentially generate during the remaining period of the lease (14 years) but she did not explain how she determined that factor though she had assumed that the Units would generate a net annual rental of $819,794;

(d) Ms Soo counterchecked her calculations against "sales evidence" but the properties which she used for this purpose were not comparable to the Property and when she was cross-examined on the point, she conceded that her sales evidence was of no assistance;

(e) Ms Soo told the court that for typical industrial buildings, the primary method of valuation would be the direct comparison method but in this case she had used the capitalisation approach instead because the Units were considered on a collective sale basis and occupied a bigger land area than that of the comparison properties;

(f) Ms Soo made various deductions to arrive at the annual rental on a per square foot basis but she was not able to justify those deductions.

255 The criticisms set out above are unjustified. During the hearing, the defendants asked Ms Soo questions about the methodology of the capitalisation approach, the specific numbers used for the constituent elements and the capitalisation factor. Ms Soo answered all these questions in detail. She explained that generally industrial property can be valued by one of three methods which are the direct comparison method, the capitalisation approach and the replacement cost method. In this case, she had chosen the capitalisation approach as the main method of valuation because the Units had been constructed for the purpose of generating rental income and the proposed sale of the Units as a whole was in effect the sale of an income-generating asset. She explained that the Units should not be valued in the same way as industrial property which was sold for the purpose of owner occupation, a more typical use of industrial property.

256 Ms Soo said that the capitalisation approach involves the estimated annual net rent of the property being capitalised over the remaining term of the lease at an appropriate rate, after deducting the land rent payable, property tax payable and other outgoings. She explained that she had used a gross rental figure of $1.10 per square foot per month. I note that this figure was based on the lowest rental paid in respect of the Units and was, thus, conservative. From the gross rental, she had deducted operating expenses of 10 cents per square foot per month based on her knowledge of typical expenses for this type of property (she was not given the actual figures by the parties). Having derived the net rent, she deducted the rental paid to JTC and the property tax and an allowance for vacancies which she calculated at 5% of the gross market rental, a conventional figure used by valuers. According to Ms Soo's calculations, the gross rental of the Units per year was $1,226,294 and the net rental per year after all the deductions mentioned was $819,794. She also explained that from the annual net rental, she obtained the capital value by using a capitalisation factor which converted the income stream over the lease term to the present value on a lump sum basis. The formula used was a standard formula used by the industry and it was found in the textbooks.

257 As regards the assumption that there would be a steady rental rate over 14 years, Ms Soo explained that fluctuations in rental rates are, as a method of standard practice, only taken into account under the discounted cash flow approach and not under the capitalisation approach. Whilst the defendants are not happy with this assumption, they have not adduced any evidence that invalidates Ms Soo's method.

258 As for the sales evidence, Ms Soo did accept that there were shortcomings with adopting the

direct comparison method in respect of the Property because it was not a typical industrial building and the comparison properties listed in her report were not very similar to the Property. Ms Soo explained that this was one reason why she did not adopt the direct comparison method but only used it as "a sanity check" and while it was not ideal, it was the only way she could countercheck her numbers. In any case, in the ultimate result, Ms Soo's valuation was, on a price per square foot basis, lower than that of the comparable properties.

259 I am satisfied with the explanations that Ms Soo gave in court when she was questioned about her valuation. The fact that she did not know that her evidence would be used in court, but thought that she was valuing the Property for the purposes of sale, does not detract from applicability of her valuation. The Property is the Company's main asset and any valuation of the Company would have to take into account what the sale value of the Property would be. There was no expert evidence to contradict Ms Soo's methods and calculations and the defendants were simply trying to poke a few holes in her testimony. In my view, they did not succeed in showing that her valuation was irrational or unprofessional or departed in any way from the methods and approaches used by property valuation experts.

260 Turning to the share valuation exercise, the defendants note in their closing submissions that both Mr Ooi and Mr Sharma adopted the asset-based method in valuing Sharikat's 40% share in the Company. This was because the value of the Company is largely dependent on the value of the Property. Both referred to the same textbook on valuation, *viz*, Shannon P. Pratt, Robert F. Reilly & Robert P. Schweihs, *Valuing a Business, the Analysis and Appraisal of Close Held Companies* (McGraw-Hill, 4th Ed, 2000) ("*Pratt's*") which is much used in the United States.

261 The difference between Mr Ooi and Mr Sharma lies in the standard of valuation: Mr Sharma applied the "fair value" standard while Mr Ooi applied the "fair market value". The effect of applying either standard to the share valuation is to determine the application of various discounts to the valuation of the minority share interest. Mr Ooi's opinion was that in considering what "fair market value" amounted to, one would have to consider the issues of control and marketability and the liquidity of the shares in question. These issues affect minority shares. Accordingly, in valuing Sharikat's shareholding, he said that there should be a discount to the NAV of the 40% shareholding.

262 Mr Sharma's view was that there should be no discount in valuing the minority's shareholding whether for lack of control or lack of marketability. He considered that the fair value standard of valuation should be applied and in support of this cited a paragraph in *Pratt's* which states that the standard of value for minority suits ought to be fair value. Mr Sharma agreed that this text is US-centric but testified that many valuation practitioners use such books because there is a large amount of data available in the United States. He also said that he believed that the United Kingdom and Australia take similar approaches to discounts and premiums.

263 Mr Sharma's evidence is that the "fair market value" and "fair value" standards differ in that the former "does not actually consider the particular circumstances of a given buyer or seller in determining value", whereas a fair value actually looks at very particular circumstances of the buyer and seller. Therefore, as Sharikat submits, Mr Ooi's adoption of "fair market value" is unsurprising, given that he was instructed to render an expert opinion on a 40% minority interest generally and was not requested to undertake a full valuation and to determine what would be the fair value on a control basis and what would be the corresponding fair value for a minority interest. Mr Ooi testified that his scope of work was to give his professional view on whether discounts are applicable to a minority interest. He was not instructed to undertake a full valuation and to determine what would be the fair value on a control-basis and what would be the corresponding fair value for a minority interest. I asked him how his report would help me decide what the discount should be if I decided

that there should be a discount. Mr Ooi frankly replied that he did not have an answer for me as that was not what he was requested to do. He could not form a view on whether a 5% discount or a 40% discount would be appropriate.

264 So, I am left with a situation where one expert says that no discount should be applied in valuing a minority interest for the purpose of an oppression action, based on an authority that both experts accept, and the other expert has not considered what discount would be appropriate in the circumstances. It is also worth noting that Mr Ooi agreed that he had not considered the two chapters in *Pratt's* which deal specifically with share valuation in a minority oppression action and said he would have done so had he been asked to value a minority stake in that context. It is clear that the defendants did not produce adequate evidence of how a minority stake should be valued in a minority oppression action and, therefore, they are not able to challenge Mr Sharma's opinion. Accordingly, I accept Mr Sharma's valuation of Sharikat's shareholding. As I have stated in [249] above, this should be adjusted to $2,034,300.

Conclusion

265 For the reasons given above, Sharikat's claim is allowed and I make the following orders:

(a) There shall be a declaration that OBC has breached his fiduciary duties as director of the Company;

(b) TGDPL shall forthwith purchase Sharikat's shares in the Company at the price of $2,034,300 less the outstanding amount owed to the Company in accordance with [156] above.

(c) OBC shall procure that TG Properties pays Sharikat the sum of $95,201.12 within 14 days and, in default of TG Properties doing so, OBC shall pay Sharikat the said sum.

(d) There shall be liberty to apply for such other orders as may be necessary to implement the order for purchase of shares made above.

266 As I have found all the defendants to have oppressed Sharikat, I shall hear the parties on the appropriate costs orders to be made.