Syarikat Wen Ken Drug Sdn Bhd and Others v Lo Hock Ling & Co
[2005] SGHC 205

Case Number : DA 5/2005

Decision Date : 27 October 2005

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Vincent Yeoh (Vincent Yeoh and Co) for the appellants; Chan Kia Pheng and Cheam Heng Wee (KhattarWong) for the respondent

Parties : Syarikat Wen Ken Drug Sdn Bhd; Wen Ken Drug Co (Pte) Ltd; Wen Ken Investments (S) Pte Ltd; Kaki Tiga International (S) Pte Ltd; Wen Ken Properties Sdn Bhd — Lo Hock Ling & Co

Civil Procedure – Appeals – Trial judge's findings of fact – When appellate court should interfere with trial judge's findings of fact

Civil Procedure – Pleadings – Appellant omitting to plead certain fact – Whether appellant entitled to rely on fact not pleaded

27 October 2005 *Judgment reserved.*

Judith Prakash J:

Introduction

1 This is an appeal arising out of the judgment of District Judge Tan Boon Khai dated 20 January 2005 in District Court Suit No 4552 of 2003 ("the Suit"). The Suit was started by Lo Hock Ling & Co ("LHL Co"), the respondent in the appeal, an accounting firm in Singapore, to recover its fees for accounting, audit and tax services provided to four out of the five defendants named in the Suit.

2 The defendants in the Suit, the appellants in the appeal, were a group of related companies incorporated in Singapore and Malaysia. Wen Ken Drug Company (Pte) Ltd ("WKD"), the second defendant in the Suit, is a company incorporated in Singapore. It is the holding company of the other four defendants in the Suit, two Malaysian companies and two Singaporean companies.

3 The appellants denied LHL Co's claim in the court below and counterclaimed for breach of an oral agreement ("the fee agreement") which they alleged had been made between the parties and which limited the amount that LHL Co was able to claim for the services it had provided. The appellants' case below was that the fee agreement limited LHL Co's fees to not more than $3,000 per annum for not less than ten years and that such fees were in respect of all audit, tax and secretarial work done for the four companies concerned by LHL Co and its associates ("the package fee"). The appellants also asserted that the fee agreement was made between the parties at the annual general meeting of WKD held in Singapore on 21 August 1999 ("the AGM"). The appellants made a counterclaim for the damages they had allegedly sustained by reason of LHL Co's breach of the fee agreement.

4 The judge found that the appellants had been unable to show, on the balance of probabilities, that the fee agreement had been concluded between the parties. He therefore gave judgment to LHL Co and dismissed the appellants' counterclaim.

Background

5 The factual background to the dispute was set out in detail in the judgment below ([2005] SGDC 52). A summary of the relevant facts follows.

6 The parties had a long-standing relationship. LHL Co was first appointed statutory auditor and tax agent of WKD in 1983. In 1985, it was given similar appointments in respect of Wen Ken Investments (S) Pte Ltd, the third appellant, and Kaki Tiga International (Singapore) Pte Ltd, the fourth appellant. Over the years, LHL Co issued several engagement letters to WKD and the third and fourth appellants spelling out the terms of its engagement. These were that LHL Co's fees would be time-based, *ie*, they were based on the time required to do the work by the individuals assigned to the engagement plus direct out-of-pocket expenses. It was not disputed by the parties that, until the fee agreement was purportedly concluded, LHL Co's fees were on these terms and these terms were effective until terminated, amended or superseded by the parties' agreement.

7 LHL Co was the tax agent for the first appellant, Syarikat Wen Ken Drug Sdn Bhd and had also assisted the latter's auditors, one Syarikat KW Feng ("KW Feng"), an auditing firm in Malaysia, in auditing work relating to the first appellant. KW Feng also did the audit work for the fifth appellant, Wen Ken Properties Sdn Bhd. LHL Co did not sue the fifth appellant. It was added as a party to the Suit by the other four appellants. The appellants' counterclaim alleged that the fee agreement applied to all the appellants including the fifth appellant.

8 The secretarial work of WKD and the two other Singaporean appellants was undertaken by a company called Rising Management Services Pte Ltd ("Rising"). The two Malaysian appellants had their secretarial work managed by a firm called YY Corporate Services Sdn Bhd ("YY"). Allegations were made that there was a relationship between one of the directors and shareholders of YY and the owner of KW Feng.

9 In December 1998, LHL Co was informed that, in the view of the directors of the first appellant, certain actions of LHL Co had caused loss to be sustained by the first appellant in relation to its tax affairs. LHL Co did not accept that there was any liability on its part for the alleged losses. These accusations, however, resurfaced during the course of the AGM. At the AGM, one Mr Cheong Wing Kiat ("Mr Cheong"), WKD's business development officer, alleged that LHL Co had been negligent, thus causing direct loss to the first appellant and indirect loss to WKD, as the parent company of the first appellant. Ms Lo Wei Min ("Ms Lo"), a partner of LHL Co, was present at the AGM as the representative of LHL Co. When Mr Cheong brought up the allegations of negligence, she denied them. Her explanation was not accepted by Mr Cheong. He then proposed that in order to settle the matter and compensate the appellants for the loss they had sustained, the fees for audit, tax and corporate secretarial work by LHL Co, affiliates and related companies should not be more than $3,000 per year for all the appellants for not less than ten years.

10 When Ms Lo heard Mr Cheong's proposal, she stated that LHL Co would review its fees with the directors of WKD. She said this, she explained, because she considered that it was the directors and not Mr Cheong who were the ones who were authorised to negotiate with LHL Co on professional fees for each financial year. Mr Cheong did not accept Ms Lo's position. He insisted that there should be no review of the proposed package fee. He requested the shareholders to pass the resolution he had proposed. Ms Lo did not argue with Mr Cheong. She kept silent. Subsequently, the shareholders of WKD passed a resolution. The wording of this resolution was set out in the minutes of the AGM. At the trial, there was a lot of controversy as to the accuracy of these minutes (prepared by Rising) but the wording of the resolution itself was not challenged. It read:

The members resolved that Lo Hock Ling & Co be and are hereby reappointed Auditors of the Company [WKD] for the ensuing year and that their remuneration, together with tax and corporate secretarial fees should not exceed $3,000 per annum for the next ten years.

The decision below

11 The judge first considered the pleadings. He noted that LHL Co's claim was against the first, second and fourth appellants for services rendered all of which were documented in invoices issued by LHL Co to the respective appellants. This claim had been met by the defence that on 21 August 1999, LHL Co through its partner, Ms Lo, orally agreed to perform and procure the performance of audit, tax and secretarial work for all the appellants at a total fee of not more than $3,000 per annum for not less than ten years. Further, in breach or in wrongful repudiation of the agreement so reached, LHL Co had failed, neglected or refused to perform or procure the performance of the said work at such fee for ten years. The judge observed that, in a nutshell, the appellants' case was that by the fee agreement, LHL Co had agreed that not only was it bound by the same but that the same would also bind any other party who was engaged to undertake the audit, tax and corporate secretarial work of the appellants. It was up to LHL Co to engage these other parties provided that the total fees paid by the appellants for all these services (whether to LHL Co or otherwise) were limited to the package fee. The fee agreement had been breached by the resignation of LHL Co, KW Feng, Rising and YY all of whom would otherwise have performed these services for the appellants at the package fee. It was the appellants' contention also that KW Feng, Rising and YY were LHL Co's affiliates.

12 The judge held that there was only one issue in the trial and it was whether LHL Co had an agreement with the appellants concluded at WKD's AGM wherein LHL Co agreed to be bound by the package fee.

13 The judge first considered the positions of KW Feng, Rising and YY. He held that, in relation to KW Feng, that firm and LHL Co had an informal arrangement on the appellants' audit work in order to save costs for the appellants. Apart from this arrangement, however, KW Feng and LHL Co were not connected or affiliated with each other in any way, nor were their directors or shareholders related by kinship or otherwise. They were separate entities and were independent of each other. The appellants had not been able to show by the evidence that LHL Co was affiliated with KW Feng in any way other than the professional tie-in mentioned.

14 In respect of Rising, the judge found that whilst some of the personnel of both businesses were related and that LHL Co had often introduced clients to Rising, each entity had its own management and there was no evidence to show that LHL Co was in control or exercised any power over the actions of Rising. It thus had no authority to bind Rising to the fee agreement. There was a similar situation with respect to YY which was a completely separate entity from LHL Co and had little or no relationship with LHL Co. The judge concluded that whilst each of the entities alleged to be LHL Co's affiliates had a business or professional relationship with it, they were separate and distinct entities who were not bound by the actions of LHL Co.

15 Turning to the issue of the fee agreement, the judge noted that the appellants had not disputed that LHL Co's invoices had been issued to them. What they maintained was that the existence of the fee agreement negated LHL Co's claims. The judge then considered both parties' accounts of the fee agreement. He observed at [59] of his judgment that whilst the versions of facts given by the parties were similar to each other's in many respects, the crucial difference was whether Ms Lo had expressly agreed to be bound by the fee agreement. The appellants' Defence and Counterclaim was premised upon an oral agreement and this was not an easy issue to prove as there were no contemporaneous documents evidencing the fee agreement. In that regard, it was the

appellants' legal obligation to show on a balance of probabilities that the fee agreement was indeed concluded so as to prove their defence to the claim. If they failed to do so then LHL Co's claim would succeed. The judge concluded at [61] that the appellants had not satisfied the burden of proof.

16 The judge explained that there was no direct reliable evidence that the fee agreement was concluded at WKD's AGM. He noted that the appellants had no evidence apart from the oral testimony of Mr Cheong and one Mr Fu Siang Jeen ("Mr Fu"), that asserted that the fee agreement had been concluded at that meeting. The judge found both Mr Cheong and Mr Fu to be unreliable witnesses. It appeared to him that, although Mr Fu was a director of both WKD and the first appellant, he knew very little of the affairs of these two appellants other than the alleged negligence of LHL Co. His apparent lack of knowledge of even fairly basic matters of both WKD and the first appellant called Mr Fu's credibility into question and rendered suspect his assertions in respect of the fee agreement. At [70] of his judgment, the judge held that Mr Fu's evidence was littered with inconsistencies and confusion, to the extent that his credibility as a witness on the whole was called into doubt. Subsequently he held that Mr Fu's evidence was self-serving and some of his answers were speculative. The foregoing is a summary of the judge's findings. He gave detailed reasons in his judgment for so holding. It was clear to the judge that Mr Fu was not certain whether LHL Co had agreed to the package fee at the AGM. In fact, unintentional "slip-ups" made by Mr Fu indicated that LHL Co had not accepted the fee agreement and wanted to review the terms of the package fee before reverting on the matter.

17 The judge also gave detailed consideration to Mr Cheong's evidence. In his view, Mr Cheong had been caught out by counsel for LHL Co and had then turned defensive and given testimony that was completely new and which caught everyone off-guard. He made an assertion as to how LHL Co's negligence had caused loss to the first appellant in relation to the payment of Singapore taxes. This assertion had not been pleaded nor was it contained in any affidavit filed on behalf of the appellants. The judge found that Mr Cheong had changed his testimony in the course of the proceedings in order to find an excuse to justify LHL Co's purported acceptance of the fee agreement. The judge was extremely dissatisfied with what he termed "the flip-flopping of Cheong's evidence" and did not believe him.

18 The judge then considered the minutes of the AGM prepared by one Mr Au Yeung Kok Chee ("Mr Au Yeung"), the manager of Rising. The relevant parts of these minutes read as follows:

> APPOINTMENT OF AUDITORS
>
> Mr Cheong mentioned that due to the overpayment of withholding tax by the Company [WKD] and the Malaysian tax payment, the fees for audit, tax and corporate secretarial work by Lo Hock Ling & Co., affiliates and related companies should not be more than $3,000 per annum for [the appellants] for not less than 10 years.
>
> Ms Lo mentioned that the proposed fees would be reviewed.
>
> Mr Cheong insisted that no review should be made to the proposed fees of $3,000/- per annum.
>
> *Ms Lo accepted the proposed fees.*
>
> The members resolved that Lo Hock Ling & Co be and are hereby re-appointed Auditors of the Company for the ensuing year and that their remuneration, together with the tax and corporate secretarial fees, should not exceed $3,000 per annum for not less than 10 years.

[emphasis added]

19 Mr Au Yeung was called as a witness by LHL Co. He testified in his Affidavit of Evidence-in-Chief that, contrary to what was stated in the minutes, Ms Lo had not said anything at the AGM which would indicate her acceptance of the proposed package fee. Mr Cheong, who relied on the minutes to support the appellants' case, explained in court that the minutes took several months to be finalised because of numerous corrections that had to be made. There were two causes for the corrections; the first was that inaccurate or incomplete minutes were originally taken and the second was that Mr Au Yeung stubbornly refused to change or correct the minutes because the changes revealed the fee agreement had been concluded.

20 The judge analysed Mr Au Yeung's evidence carefully. He found Mr Au Yeung to be so inconsistent in his evidence that both his evidence in court and the minutes of the AGM were unsafe and could not be relied upon. Mr Au Yeung was very unsure of his own evidence. His testimony was filled with information gaps and he was on the defensive as he tried to cover loopholes in his evidence. The judge found that Mr Au Yeung could not be relied on to take correct minutes of meetings. Submissions that the appellants themselves made showed clearly that the minutes of the AGM could not be relied upon because Mr Au Yeung had failed to take proper notes. Additionally, four versions of the minutes were produced and the district judge had great doubts on the veracity of all of them as there were too many changes, some pressurised by Mr Cheong himself, to the point that the judge considered that some of the minutes of the AGM appeared self-serving to the appellants' case. The judge stated that since he was unable to place any weight on the minutes of the AGM, his determining whether the fee agreement had been concluded boiled down to whether he accepted or rejected the oral evidence given by LHL Co and the appellants. On this issue, the evidence of the appellants' witnesses could not be accepted.

21 The judge also examined Ms Lo's evidence and was satisfied that it was generally consistent. Whilst there were some inconsistencies between her evidence in her affidavit and that given in court under cross-examination, she was able to provide plausible explanations for those inconsistencies. His view of Ms Lo and of her demeanour on the stand was that she was steady and candid and he concluded that her testimony was generally forthright and, considered with all the other evidence in the case, reflected the true version of events between the parties.

The appeal

22 In their case, the appellants stated that there were two issues before the court. The first was whether Ms Lo had agreed to the package fee or whether she had kept silent. The second was whether, if there was no fee agreement, LHL Co had proved its case such that it was entitled to the judgment prayed for in full. The first issue is an issue of fact. I should note here that however the appellants characterised the issues, I considered that the true issue before the appeal court was the same as that which was before the district court, *viz*, whether the fee agreement had been concluded at the AGM. The second issue formulated by the appellants was not a true issue because it was never pleaded in the Defence that even if there was no fee agreement, the terms and conditions of LHL Co's employment had not been agreed on and therefore it had to prove that it was entitled to claim the amounts it had charged for the work done. This lack of pleading was significant since LHL Co had worked for the appellants for years on the same terms, as I have noted in [6] above, and it was always the case put forward by LHL Co that those terms had not changed and it was entitled to continue to charge on that basis. To prove otherwise, the appellants should have pleaded otherwise. Not having done so, the second issue was in reality a non-issue.

23 The appellants have a heavy burden to bear in order to convince an appellate court to set

aside findings of fact made by the trial judge. It is well known that an appellate court will generally be reluctant to overturn the trial judge's findings of fact as the trial judge (in this case over five days) would have had the benefit of seeing and hearing the witnesses himself before he assessed their evidence. It has also been held that an appellate court should defer to the judgment of a trial judge on fact if it is unable to say with certainty that the trial judge was plainly wrong: see *Lee Suat Hong v Teo Lye* [1987] SLR 34 and *Peh Eng Leng v Pek Eng Leong* [1996] 2 SLR 305.

24 The appellants gave various reasons why the judge's finding of fact was incorrect and that Ms Lo must have accepted the package fee. First, they submitted that the flow of events would have been most unnatural if Ms Lo had not agreed to the package fee. The sequence of events was that firstly, Mr Cheong had made the proposal of the fee to Ms Lo; secondly, she had replied saying LHL Co would review the matter; thirdly, Mr Cheong had pressed the proposal on Ms Lo again and fourthly, the members had resolved to reappoint LHL Co as auditor and remunerate it based on the package fee. It was submitted that it was impossible to believe that after so carefully setting the stage with his impassioned complaints against LHL Co and after so carefully pinning down Ms Lo, Mr Cheong would suddenly let her remain silent. This scenario was unnatural. If even her earlier commitment to review was unacceptable to Mr Cheong, how could her silence have satisfied him? The appellants contended that with the momentum that Mr Cheong had built up, he would surely have persisted in pressing for an unequivocal answer, if Ms Lo had kept silent.

25 The second reason given was that as a matter of logic, the members attending the AGM could not have voted in favour of reappointing LHL Co as auditor if they had not heard Ms Lo agree to the package fee. If Ms Lo had said no to the proposal or had not answered, the appellants would not have reappointed LHL Co. Since the appellants did make that reappointment, her answer to the proposal must have been yes.

26 The third reason was that Ms Lo must have had the threat of being sued weighing on her mind at the AGM because she was aware of the appellants' letter sent in December 1998 accusing LHL Co of negligence. It would have been reasonable for her to settle to avoid a negligence suit and the time and costs incurred in defending the same. The fourth reason was that LHL Co could afford the settlement and this was because it could influence Rising, KW Feng and YY (through KW Feng) to work within the $3,000 fee amount. LHL Co was in a position to manage the position such that the settlement would not result in any significant out-of-pocket payments by it. Fifthly, during the 1999 AGM, LHL Co did not have any excuse for its negligence and did not deny its responsibility. The sixth reason was posed as a question, *ie*, why should the appellants have reappointed LHL Co if there had been no fee agreement. This sixth reason was a restatement of the second reason.

27 It can be seen from the above that the appellants in their arguments were trying to avoid the findings of the judge as to the credibility of their witnesses and establish the existence of the fee agreement by reference to logical argument and their interpretation of the background circumstances alone. The judge was fully aware of the background. The background by itself could not prove anything nor could logic. Additionally, the judge considered the points raised by the appellants, in particular whether fears of a negligence suit were weighing on Ms Lo's mind and why the resolution should have been passed at the AGM if Ms Lo had not agreed to the package fee. On the negligence issue, the judge accepted Ms Lo's evidence that the prospect of a suit did not worry her because she was satisfied that LHL Co had not been negligent. I find no reason to quarrel with that finding. Some people may find the prospect of a suit against them so worrying that they settle it notwithstanding that they have a good answer to the claim. Others are more robust and are more certain that, when all is revealed in court, their names will be cleared and the suit dismissed. The judge obviously considered Ms Lo to fall within the latter category and he was in a better position to assess her than I am.

28 As regards the reason for the passing of the resolution, the judge considered this question at length. He noted that the appellants' documents did not make clear the terms upon which LHL Co were appointed as auditors of WKD. In the draft minutes of the AGM, Mr Au Yeung had initially stated that the appointment was on the basis that the package fee pertained to WKD only. The draft minutes further stated that "[t]he auditors replied that the proposed fees would be reviewed in the ensuing year" thus indicating that the terms of the appointment had not been agreed upon. The minutes were then amended several times but the final version still stated that the package fee pertained to WKD only. However, WKD's directors then passed a directors' resolution on 5 July 2000 in which they stated that the package fee would cover not only WKD but also all the other appellants.

29 The judge asked which the correct version was and noted that no one gave him any explanation, least of all the appellants. In any case, he had grave doubts on the veracity of any of the versions of the minutes. He concluded at [113]:

> Having considered the totality of the evidence, and the great difficulties in reconciling the [appellants'] evidence, oral and documentary, with their numerous inconsistencies, my view was that while it was clear that a resolution was passed to appoint [LHL Co] as [WKD's] auditors, the terms of that re-appointment were not finalized. In that circumstance, and similar and consistent with the appointment [of LHL Co] at the [third and fourth appellants'] AGM, the terms were to be resolved later. This explained the passing of the resolution.

The appellants have not convinced me that that finding was against the weight of the evidence.

30 The next set of reasons given by the appellants related to events that occurred after the AGM. The first was in respect of a letter that WKD wrote to Rising in November 1999 asking for the minutes of the AGM to be furnished within seven days and stating that it expected Rising as WKD's company secretary to perform its duties with reasonable care and independence. The appellants wanted me to infer from this letter that the minutes would contain something important to WKD and this important thing had a connection with Rising such that Mr Au Yeung would be tempted not to record it accurately. The appellants submitted that nothing in the minutes of the AGM fitted that description other than the acceptance by Ms Lo of the fee agreement. I found this argument to be less than convincing. The appellants may very well have wanted the minutes to record that Ms Lo had accepted the fee agreement. That did not mean she indeed did so.

31 The next reason was that from the time of its letter dated 14 July 2000, WKD asserted the existence of the fee agreement in correspondence. That again was not a convincing argument. It was clear all along that WKD wanted LHL Co to charge it on the basis of the package fee. Of course it would have been to WKD's benefit to insist that the fee agreement had been concluded. What I found interesting was that it took a year for such a letter to be sent out. It would have been more convincing to me had WKD written to LHL Co immediately after the AGM to ask the latter to confirm that it accepted reappointment on the terms of the resolutions passed at the AGM.

32 Then, the appellants posed the question why no negligence suit had been brought against LHC Co. Their response was that the only act that could have appeased the appellants and persuaded them to hold their hands despite the pain of the first appellant's tax problems must have been Ms Lo's acceptance of the package fee. That was another self-serving argument. There could be many other reasons why no suit was commenced, for example, the fact that the first appellant had not suffered any loss by reason of the alleged negligence as Mr Cheong himself had admitted in court.

33 The fourth reason given related to the subsequent conduct of LHL Co. Various aspects of

such conduct were mentioned. Firstly, the appellants said that although LHL Co wrote letters disputing the existence of the fee agreement, it and its affiliates had continued providing services for the financial years 1999 and 2000 despite knowing that the appellants insisted on the package fee. Secondly, LHL Co did not qualify the auditor's reports in the accounts to indicate the dispute over the fee agreement. Thirdly, LHL Co had arranged to lower the Malaysian audit fee from RM10,000 per year to RM2,052 a year and this must have been done to bring it within the $3,000 package fee. Fourthly, after the AGM, LHL Co did not bill the appellants for its tax work done for them. It was only after May 2002 when LHL Co received a letter from appellants threatening to sue it that it rendered a stack of bills for work done since 1998. I note here that these points were brought up before the judge and that LHL Co had given an explanation for them. Further, none of them were points that unequivocally led to the conclusion that LHL Co had agreed to the package fee. They were all points that could have been interpreted in varying ways.

34 It is also relevant that the appellants did not plead in their Defence to LHL Co's claim that LHL Co had by its conduct accepted the terms of the package fee proposed by Mr Cheong. What was pleaded in the Defence was, first, a positive case that the fee agreement had been concluded at the AGM and, second, a plea that estoppel prevented LHL Co for charging for work done before the AGM but for which invoices were raised after the AGM. It is a basic point that what is not pleaded cannot be proved nor relied on.

35 Further, LHL Co submitted that if the appellants had pleaded a positive defence along the lines of the assertion that even if there had not been any agreement made at the AGM, but LHL Co had by its conduct accepted the package fee proposed by Mr Cheong, LHL Co would have denied such a pleading. It would have adduced all necessary evidence at the trial of the action to show the judge how such a defence could not have applied because the parties had a binding prevailing agreement on costs which had not been terminated, and how LHL Co could not have by its conduct agreed to the package fee. LHL Co pointed out that at the time of the AGM, its engagement letter dated 16 March 1998 which set out the basis on which it was prepared to act as auditor for WKD stated the basis of its fees very clearly and also stated, "This letter will be effective for future years unless it is terminated, amended or superseded." The Companies Act (Cap 50, 1994 Rev Ed) then in force required by s 10(7) thereof that a company could only appoint an auditor when prior to the appointment the prospective auditor had given a written consent to act as auditor of the company. The letter of 16 March 1998 was LHL Co's consent to act as auditor of WKD and LHL Co took the view, as expressed by Ms Lo, that the prevailing agreement would remain in force unless her firm gave consent in writing to a change pursuant to the Companies Act. That is why she considered that the terms of engagement of the auditor were to be dealt with separately outside the AGM. Whatever may have been the merits of a defence along the lines suggested in LHL Co's arguments, the point I have to remember is that because the appellants did not plead that the fee agreement had been concluded by conduct, such omission prevented LHL Co from pleading a defence to such an assertion. It is not right at the appeal stage to make a respondent deal with a case that it never had a chance to deal with in the court below by way of pleading and evidence in support of such pleading.

36 At the hearing of the appeal, I did raise the issue of whether it was possible in law for LHL Co, by its subsequent conduct, to have accepted the package fee. Having considered the matter further, I have concluded that this issue is a non-starter as it was not part of the case before the judge. I also agree that the argument of acceptance by conduct can be turned on its head in the following way as submitted by LHL Co. LHL Co's letter of 16 March 1998 set out the terms on which it was prepared to act as auditor for WKD. If WKD did not want to continue to engage LHL Co as its auditor for whatever reason, but yet nevertheless saw fit to resolve at the AGM to continue to appoint LHL Co as its auditors for the next financial year, then WKD's conduct meant that it had appointed LHL Co on the terms of the latter's prevailing binding letter of engagement, *ie*, that dated

16 March 1998. This was because LHL Co was entitled to rely on an existing document which it knew bound both parties and could not be changed unless LHL Co agreed to change it. Therefore, the only issue was whether Ms Lo agreed to a change by accepting the proposed package fee at the AGM. If she did not, and the judge found that she did not, then the appointment at the AGM took effect on the terms of the prevailing letter and there was no offer that survived to be accepted by LHL Co by its conduct thereafter.

Conclusion

37 In the result, the appellants have not satisfied me that the findings of the judge were wrong or against the weight of the evidence. Accordingly, the appeal fails and must be dismissed with costs.