Lian Hwee Choo Phebe and another *v* Maxz Universal Development Group Pte Ltd and others and another suit
[2010] SGHC 268

Case Number : Suits Nos 536 and 75 of 2008

Decision Date : 08 September 2010

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Jimmy Yap (Jimmy Yap & Co), N Sreenivasan (Straits Law Practice LLC) and Srinivasan s/o V Namasivayam and Rahayu bte Mahzam (Heong Leong & Srinivasan) for the plaintiffs; Edmund J Kronenburg, Leong Kit Wan, Joan Sim and Lye Hui Xian (Braddell Brothers) for the first defendant; Davinder Singh SC, Harpreet Singh Nehal SC, Chew Kiat Jinn, Jackson Eng and Dawn Ho (Drew & Napier LLC) for the second and fifth defendants; Siraj Omar and See Chern Yang (Premier Law LLC) for the third defendant; Harish Kumar s/o Champaklal and Goh Seow Hui (Rajah & Tann LLP) for the fourth defendant; Thrumurgan s/o Ramapiram @ Thiru (Thiru & Co) for the sixth and seventh defendants; Allister Lim (Allister Lim & Thrumurgan) for the eighth defendant.

Parties : Lian Hwee Choo Phebe and another — Maxz Universal Development Group Pte Ltd and others

Companies – Minority Oppression

8 September 2010

Andrew Ang J:

Introduction

1 These two suits involve various claims by the plaintiffs, Lian Hwee Choo Phebe, also known as Jennifer Lian ("LHC"), and Kok Lan Choo ("KLC"), who were two minority shareholders in a company, Maxz Universal Development Group Pte Ltd ("MDG").

2 The plaintiffs originally filed Originating Summons No 18 of 2008 ("OS 18") on 8 January 2008 seeking, *inter alia*, an injunction against MDG and its directors to restrain them from allotting new shares in MDG. OS 18 was subsequently converted to a writ action, Suit No 75 of 2008 ("Suit 75"), on 29 January 2008. The main relief sought in Suit 75 was to set aside a rights issue of shares ("First Rights Issue") pursuant to a resolution by MDG dated 13 December 2007 ("First Rights Issue Resolution"). On 1 August 2008, the plaintiffs filed Suit No 536 of 2008 ("Suit 536") for relief from oppression under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"). Suit 536 arose from substantially the same facts as Suit 75. The defendants in Suit 75 were also defendants in Suit 536, although another five defendants were added as co-conspirators in oppression in the latter action. They were all directors or majority shareholders of MDG at some point. Although the plaintiffs originally pleaded the tort of conspiracy under Suit 536, this was abandoned in their closing submissions.

3 I heard both actions intermittently from July to October 2009. The parties agreed that the evidence adduced for the purpose of addressing the issues in Suit 536 would also be used to deal with the issues arising in Suit 75. On 1 February 2010, I ordered that the First Rights Issue be struck

down and, by way of relief under s 216 of the Companies Act, ordered a buy-out of the plaintiffs' shares. I now give my reasons for doing so.

Background

4 MDG was founded by one Vincent Ling Wong King ("Ling"), KLC's husband. He was approached by Seeto Keong ("Seeto") and Koh Keng Guan ("Gary Koh") to use the company as their corporate vehicle for property development. Ling agreed and gave shares to Seeto and Gary Koh, both of whom became directors. However, Gary Koh left sometime in 2003 because of bankruptcy proceedings taken out against him. In 2004, Ling transferred his shares to KLC. He remained active in the affairs of the company despite not holding shares or a directorship.

5 The first plaintiff LHC was in the business of property development. In January 2005, at the invitation of one Benedict Kusni ("Kusni"), she invested $100,000 in MDG through her corporate vehicle, Phebe Investments Pte Ltd ("PIPL"). She received 30,000 shares which comprised 10% of the shares in MDG. Those shares were registered under PIPL. (She later alleged that she ought to have been issued 60,000 shares but instead half of that number of shares was issued to Kusni without her knowledge or consent.)

6 MDG was controlled at that time primarily by Seeto, the third defendant, and Sebastian Wong Cheen Pong ("Sebastian Wong"), the sixth defendant. Seeto was the chief executive officer of MDG and held MDG shares from around May 2003 to May 2007. Sebastian Wong was an undischarged bankrupt and, oddly, the financial controller of MDG. The plaintiffs alleged that he was a *de facto* director and also a beneficial shareholder in MDG through his wife, the seventh defendant Loke Sau Fun ("Loke") and subsequently his daughter, Gwendolyn Wong Sze Wen ("Gwendolyn Wong"), the eighth defendant. Loke held 226,000 shares in MDG from November 2004 to June 2006 at the behest of Sebastian Wong because the latter was facing bankruptcy proceedings. When bankruptcy proceedings were commenced against Loke as well, she transferred the shares to their daughter Gwendolyn Wong. The shareholdings in MDG in January 2005 were as set out below:

Shareholder	Shares held	Percentage of total shares
Seeto	120,000	40
KLC	60,000	20
Loke	60,000	20
PIPL	30,000	10
Kusni	30,000	10
Total:	**300,000**	**100**

7 Sometime later in 2005, MDG successfully negotiated with the Sentosa Development Corporation ("SDC") for the acquisition and redevelopment of the former Sijori Resort at 23 Beach View, Sentosa Island ("the Property") then leased by SDC to Sijori Resort Pte Ltd ("SRPL") into a 200-room, five-star hotel ("the Project"). A special purpose vehicle, Treasure Resort Pte Ltd ("TR"), was incorporated on 28 June 2005 to be the owner and operator of the hotel (then renamed the "Treasure Resort") and to run the Project. MDG thus became, essentially, a holding company with approximately 94.6% of TR's share capital. (The exact number of shares in TR owned by MDG remains the subject of

litigation between MDG and other parties with which we are not concerned.) The value of the Property subsequently increased substantially after the Singapore government announced that a new integrated resort would be built on land adjacent to the Property.

8 In November 2005, the share capital of MDG was increased to $20m and 830,000 new shares were issued and allotted to the existing shareholders in proportion to their existing shareholdings. On 11 May 2006, LHC was appointed a director of MDG. She caused the MDG shares under PIPL to be transferred to herself. At or about this time, Loke transferred her shares in MDG to her daughter Gwendolyn Wong. In November 2006, following a dispute between LHC and Kusni, a shareholders' meeting was held at which it was agreed that Kusni would transfer to LHC the 10% shareholding previously issued to him. In turn, MDG would issue 113,000 shares to Kusni for a consideration of $100,000. The shareholdings in MDG in December 2006 became as follows:

Shareholder	**Shares held**	**Percentage of total shares**
Seeto	452,000	36.36
LHC	226,000	18.18
KLC	226,000	18.18
Gwendolyn Wong	226,000	18.18
Kusni	113,000	9.09
Total:	**1,243,000**	**100**

9 Apart from her initial investment of $100,000, LHC, through her corporate vehicle Corporate United Ltd ("CUL"), procured a standby letter of credit ("SBLC") for $200,000 to secure a $200,000 overdraft facility from Oversea-Chinese Banking Corporation Ltd ("OCBC"). This SBLC was to be discharged by 11 November 2005 but MDG failed to arrange for such discharge. In November 2005, LHC, again through CUL, provided another "loan" of $100,000 (it is unclear if what was provided was another SBLC) upon the request of Kusni and Seeto apparently to be used towards the acquisition of the Property. This "loan" was to be repaid by 16 December 2005 but it was not.

10 On 11 May 2006, LHC was made a director of MDG. Two weeks later, she agreed, after persuasion by Seeto, to procure another SBLC through CUL, this time for $1m to secure MDG's bank borrowings from OCBC. It was agreed that the SBLC would be discharged on or before 30 November 2006 but later, at Seeto's request, this was extended to 27 February 2007. Seeto provided his personal guarantee to CUL and also gave MDG's post-dated cheque for $1m as assurance that the SBLC would be discharged.

11 In or about June 2006, MDG obtained credit facilities from Moscow Narody Bank Ltd (later re-named "VTB Bank") of up to $8m to be used towards the purchase, renovation and refurbishment of the Property and for working capital.

12 On or about 1 November 2006, MDG also obtained banking facilities of up to $2.5m from Malayan Banking Berhad ("Maybank"). The facilities were later in November 2006 increased to $5m ("the Maybank loan") and utilised. The Maybank loan was secured by the joint and several guarantee of Seeto and LHC and by two Insurance Guarantee Bonds for a total of $5m by SHC Capital Ltd ("SHC").

13 On or about 27 December 2006, LHC wrote to MDG saying that although she had been a shareholder and director for more than a year, she had not seen any of the company's accounts. She requested that she be given a set of MDG's accounts for 2005 and 2006. In the same letter, LHC asked when MDG intended to repay the outstanding $300,000 "loans" owed to CUL and how the "loans" had been utilised. Likewise, she asked how the $1m "loaned" from CUL was utilised. Finally, she also proposed that the company's cheques be signed by two joint signatories instead of the existing single signatories. She did not get a satisfactory reply and therefore instructed solicitors to make a demand on MDG on 19 January 2007 for repayment of the $300,000.

14 On 22 January 2007, LHC wrote to the company secretary of MDG requesting for copies of all the minutes of meetings of MDG's board of directors during the year 2006 and copies of all resolutions passed within the same period. She also asked for a copy of MDG's accounts "passed" at the last Annual General Meeting ("AGM"). Not having received any of the documents sought, she wrote to MDG's bankers on 29 January 2007 notifying them that with immediate effect all cheques and other correspondence with the bank had to bear her signature. (In the letters, she misdescribed herself as "Managing Director" but rectified the same by a subsequent letter of 7 February 2007.)

15 On 15 March 2007, LHC was removed from directorship of MDG by a group of shareholders – Seeto, Gwendolyn Wong and Kusni – at an Extraordinary General Meeting ("EGM").

16 In May 2007, the second defendant Tan Boon Kian ("Rodney Tan") invested in MDG through his wholly-owned British Virgin Islands corporate vehicle Roscent Group Ltd ("Roscent") by buying all the shares belonging to Gwendolyn Wong and Seeto, *ie*, 678,000 (or 54%) of the shares in MDG. Rodney Tan was a wealthy individual who controlled the Cairnhill group of companies ("the Cairnhill Group"). On 1 June 2007, Rodney Tan was appointed a director of MDG. Rodney Tan advanced a number of loans to MDG totalling $1,978,468.05. He eventually entered into a convertible loan agreement ("the CLA") with MDG on 27 July 2007 which entitled him to convert the loans into equity in MDG at par of $1 per share.

17 Meanwhile, on 22 May 2007, CUL filed Suit No 316 of 2007 ("Suit 316/2007") to recover the loans it had extended to MDG, although this action was later settled by Rodney Tan's repayment of the loans on MDG's behalf.

18 MDG held its AGM on 24 October 2007 ("the 24 October 2007 AGM"). "Drafts" of MDG's audited accounts for 2004, 2005 and 2006 were circulated to its shareholders before the AGM. In breach of the Companies Act, the accounts were not consolidated with TR's accounts. The plaintiffs sent a list of questions thereon to be tabled at the AGM. At the 24 October 2007 AGM, the majority of the shareholders "approved" the accounts as well as the remuneration of the directors without answering the plaintiffs' questions. (Parenthetically, the accounts ought to have been approved by the directors and laid before the members at the AGM.)

19 MDG held an EGM on 13 December 2007 to consider the First Rights Issue Resolution for the issue of 6.9 million new shares at $1 per share. 1.91 million of these new shares were to be issued with a view to meeting MDG's obligations under the CLA ("the Conversion"), while the remaining five million shares ("the Cash Call") were for raising money to repay the Maybank loan. Despite the plaintiffs' dissent, the First Rights Issue Resolution was passed by Roscent and Kusni, the majority shareholders at the time.

20 On 3 January 2008, the plaintiffs filed OS 18 in which they sought to restrain MDG from proceeding with the rights issue and, in the alternative, to have the First Rights Issue Resolution declared void. The plaintiffs concurrently filed an urgent application, Summons No 58 of 2008 ("Sum

58/2008"), for an interim injunction to prevent MDG from issuing the shares. Lee Seiu Kin J heard and dismissed Sum 58/2008 on 10 January 2010. However, MDG on its part undertook to reverse the share allotment and repay the consideration if the First Rights Issue Resolution was found to be invalid. Rodney Tan undertook to indemnify the plaintiffs for their loss in the event that MDG was unable to fulfil its undertaking. Sometime that day, Rodney Tan bought all of Kusni's shares and thereby became entitled to participate in the First Rights Issue in addition to Roscent being so entitled.

21 On 11 January 2008, the plaintiffs, Rodney Tan and Roscent submitted their response slips to subscribe to the First Rights Issue. A directors' meeting was convened on 14 January 2008 at the offices of MDG's solicitors, Drew & Napier LLC ("D&N"), to consider the response slips. It was decided that the plaintiffs' subscription response was invalid, but Roscent and Rodney Tan were to be allotted their shares as subscribed, and that the shares to which the plaintiffs would otherwise have been entitled would instead be allotted to Rodney Tan who had applied to pick up shares which other shareholders failed to subscribe for. Pursuant to the First Rights Issue, the shareholdings became as follows:

Shareholder	**Shares held**	**Percentage of total shares**
Roscent	4,441,636	54.54
Rodney Tan	3,249,364	39.90
LHC	226,000	2.78
KLC	226,000	2.78
Total:	**8,143,000**	**100**

22 The plaintiffs then took out an application on 14 February 2008 in Summons 663 of 2008 under Suit 75 to impugn the First Rights Issue Resolution by arguing, as a preliminary point, that it contravened Art 32 of MDG's Articles of Association. On 3 April 2008, I held that the First Rights Issue Resolution did not contravene Art 32 of MDG's Articles of Association and dismissed the plaintiffs' application. The plaintiffs' appeal against my decision was dismissed by the Court of Appeal on 13 January 2009 in Civil Appeal No 61 of 2008.

23 On 25 April 2008, MDG issued another notice for an EGM to be convened to consider a resolution to raise up to $6m through the issuance of new shares ("the Second Rights Issue Resolution"). Soon after this notice was sent, MDG filed Summons No 1924 of 2008 on 29 April 2008 to seek leave for it and its directors to raise up to $6m in a share issue. On 20 May 2008, I ordered that leave be granted to MDG and its directors to issue shares in MDG to raise $6m upon undertakings by MDG and Rodney Tan similar to those made in Sum 58/2008. (Although leave was granted for MDG to raise up to $6m, its board of directors recommended an immediate capital call of $3.5m.)

24 In May 2008, Wong Choon Hoy, one of the directors of MDG at the time, passed away. Rodney Tan approached the fourth defendant, Lim Kwee Wah ("Lim"), then an executive director of Cairnhill Group Holdings Pte Ltd ("CGH"), to take over Wong Choon Hoy's place on the board of directors of MDG. That same month, the shares held by Roscent were transferred to the fifth defendant, Cairnhill Treasure Investment (S) Pte Ltd ("CTI"). According to Rodney Tan, this was done at the insistence of SDC which did not want a British Virgin Islands registered company to be the controlling shareholder of MDG. Rodney Tan was the majority shareholder in CTI, holding 4,964 (or 99.3%) of the total shares. Seeto held the remaining 35 shares in CTI, a 0.7% stake. The directors of CTI

were Rodney Tan and his sister, Tan Poh Swan.

25 The EGM to consider the Second Rights Issue was held on 11 June 2008 and it was attended by the proxies for the various shareholders. Unsurprisingly, the Second Rights Issue Resolution to raise $3.5m was passed by a majority of the shareholders. On 10 July 2008, CTI and Rodney Tan indicated their wish to subscribe for their full entitlement of shares. The plaintiffs' solicitors Allen & Gledhill LLP ("A&G") wrote to MDG on 10 July 2008 to decline the offer of 97,125 new shares for each plaintiff on the basis that, contrary to what was implicit in that offer, the plaintiffs did not only hold a diluted 2.78% of the shares in MDG each. A&G made a counter-proposal with several conditions, the effect of which was essentially the restoration of each plaintiff's initial 18.18% shareholding in MDG. A directors' meeting, attended by Rodney Tan, Seeto and Lim, was held on 16 July 2008 at which the plaintiffs' counter-proposal was discussed and dismissed (with Seeto abstaining from voting). Their entitlement to the allotment of shares was offered to Rodney Tan and CTI, and Rodney Tan eventually subscribed for the shares initially offered to the plaintiffs. As a result, the shareholdings on 5 August 2008 became:

Shareholder	Shares held	Percentage of total shares
CTI	6,350,886	54.55
Rodney Tan	4,840,114	41.57
LHC	226,000	1.94
KLC	226,000	1.94
Total:	**11,643,000**	**100**

26 Following the Second Rights Issue, MDG raised another $2.5m in March 2009 through the issuance of 2.5 million new shares in the second tranche of its effort to raise $6m in financing.

27 MDG filed Suit No 643 of 2008 ("Suit 643") on 11 September 2008 against LHC alleging that she had breached her director's duty by causing Maybank's refusal to provide MDG with refinancing. This claim was dismissed by Lai Siu Chiu J on 26 February 2010.

The pleadings

28 The plaintiffs' pleaded case was that:

(a) MDG's directors and majority shareholders had generally conducted the company's affairs under a shroud of secrecy and had denied the plaintiffs access to any meaningful information about the state of MDG's finances, its true shareholding in TR and its assets;

(b) MDG's directors and majority shareholders had failed to keep proper accounts and refused to provide any proper explanation as to the true value of the company at its Annual General Meeting on 24 October 2007;

(c) Seeto and Sebastian Wong had misappropriated or attempted to misappropriate funds belonging to MDG. Sebastian Wong had also asked Gary Koh to prepare fictitious invoices for the sums of $188,888 and $190,000 to be paid out to Seeto;

(d) MDG's majority shareholders had wrongfully removed LHC as a director to prevent her from inquiring into the financial affairs of the company; and

(e) MDG's directors and majority shareholders had acted unfairly to dilute the plaintiffs' shareholdings in the company.

29 The defendants denied all allegations of wrongdoing. In particular, Rodney Tan and CTI denied that they ought to be held accountable for those actions of Seeto and Sebastian Wong which had occurred before their entry into MDG in May 2007. They maintained that the plaintiffs had been given the information that they were entitled to as shareholders and that the rights issues were necessitated by the financing crisis that MDG was facing. They denied that the plaintiffs had been unfairly excluded from the allotment of shares in the First Rights Issue. Further, they pleaded that the board of directors was in no position to take up the plaintiffs' counter-offer in the Second Rights Issue and therefore had to deny the plaintiffs the offered allotment of shares. Seeto, Sebastian Wong and Lim pleaded that they did not breach their fiduciary duties, and that the rights issues were necessary for the financing requirements of MDG. Lim pleaded that he had no knowledge of the events that happened before he joined the board of directors. Loke and Gwendolyn Wong denied that they held shares on behalf of Sebastian Wong and denied knowledge of the wrongdoing pleaded by the plaintiffs.

The evidence

30 I set out below a summary of the testimonies of the main witnesses.

Lian Hwee Choo, Phebe

31 According to LHC, sometime in April 2006, Seeto enlisted her assistance to find an investor for the Project. She learnt for the first time that TR (and not MDG) would be acquiring the Property. She also learnt that SDC had given TR in-principle approval to acquire the Property and some additional land for the Project. She was impressed by Seeto's plans for the Project and delighted at the prospect of being a "part owner" of the same. According to her, the prospect became all the more exciting when she learned in the course of her search for investors that there were people willing to pay as much as $70m to take over the Project.

32 LHC's evidence was that when she relayed this information to Seeto, he sniggered and told her that the market was full of people looking for hotels and that the hotel would be a five-star hotel in a choice location facing the Merlion and near the Integrated Resort. He added that the buyer had not only to be immensely rich but also have the clout and talent to convince SDC to approve his involvement with "our hotel". She took his response to mean that they were not selling as yet. It became apparent to LHC that MDG had a very valuable opportunity and that her investment was turning out to be a very promising one.

33 LHC recounted that she agreed to be a director on 11 May 2006 upon the insistence of Seeto and Sebastian Wong, and that two weeks later she was persuaded by Seeto to procure the $1m SBLC to secure MDG's bank borrowings from OCBC. At that time, the $100,000 "loan" made by CUL to MDG was already overdue and the $200,000 SBLC had also not been discharged.

34 LHC further testified that on or about 9 November 2006, Seeto and Sebastian Wong showed Kusni and herself two pages of typewritten notes purporting to show that MDG had sufficient credit facilities to meet the company's financial needs for November and December 2006 with a balance of $936,599 to spare.

35 From the information given at the meeting, LHC figured that MDG ought to have been in a position to repay CUL the $100,000 "loan" which had been due since 16 December 2005. The $200,000 SBLC was to have been discharged by 11 November 2005 but it was not. The SBLC for $1m was to be discharged by 30 November 2006 but, as it turned out, it was not. (Subsequently, at Seeto's request, that latter date was extended to 27 February 2007.)

36 As a result of that meeting, LHC decided that MDG should repay the "loans" it had taken from CUL. Her suspicions were also aroused by the new BMW cars driven by Seeto and Sebastian Wong. She wrote to MDG on 27 December 2006 asking when it intended to repay her for the "loans" amounting to $300,000 it had taken and what it did with the "loans". She proposed that there should be two joint signatories for MDG's cheques as opposed to the existing one-signatory arrangement. Seeto replied on 12 January 2007 informing her that MDG intended to repay the $300,000 by the end of February 2007 but did not mention what MDG did with the money or whether he would add a signatory to MDG's bank account.

37 Through various letters in January 2007, CUL requested that MDG repay all its outstanding "loans". On 22 January 2007, LHC wrote to MDG's company secretary requesting copies of all minutes of meetings and directors' resolutions for 2006, as well as its most recent financial statements. There was no response to those letters. On 29 January 2007, LHC wrote to MDG's bankers, OCBC, MNB and Maybank informing them that she was making an inquiry into MDG's accounts and that they should not accept any cheques, documents or correspondence from MDG that did not bear her signature. This was followed by another letter on 30 January 2007 written by LHC's solicitors at the time, L S Tan & Co, to Seeto, in which LHC demanded that Seeto should:

(a) provide all of MDG's financial statements for 2005 and 2006;

(b) provide a copy of all minutes and resolutions of MDG's board of directors and shareholders in 2006;

(c) provide a copy of all of MDG's bank statements for 2006; and

(d) add her as a joint signatory to operate MDG's bank accounts.

LHC's solicitors warned that legal action might be taken if LHC's demands were not met.

38 Seeto replied to LHC directly on the same day with a conciliatory e-mail informing her that Sebastian Wong had already been instructed to add her as a joint signatory to MDG's bank accounts. Sebastian Wong confirmed this instruction in an e-mail dated 6 February 2007. However, on 5 February 2007, Seeto took a slightly different tone and sent a letter to LHC's solicitors, informing them that the demands contained in their letter of 30 January 2007 should have been directed to MDG or its company secretary and not to him in his personal capacity. He added that the accounts of MDG were being finalised for audit and would be presented to shareholders at the next AGM "in accordance with the statutory time frame". (I should add that in truth, the accounts for previous years had yet to be finalised!) On 7 February 2007, LHC wrote to the banks with a request for copies of MDG's bank account statements. On 27 February 2007, LHC received from MDG's company secretary copies of its directors' resolutions passed in 2006 and its financial statements for the year ending 31 December 2003. The company secretary informed LHC that this was the set of financial statements laid before the last AGM of MDG. At around this time, LHC tried to encash the post-dated cheque given to CUL by Seeto as assurance for the $1m SBLC but it was dishonoured. On 28 February 2007, Maybank provided LHC with, *inter alia*, copies of MDG's bank statements for the months of November 2006, December 2006 and January 2007. Further letters sent in March 2007 by LHC's

solicitors to Seeto repeating her demands for MDG's financial information were ignored.

39 On 15 March 2007, Seeto and Gwendolyn Wong convened an EGM at which they passed a resolution removing LHC as a director. LHC was not given a chance to defend herself as the meeting scheduled to begin at 9.00am was over by the time she arrived at 9.05am. Despite this state of affairs, LHC instructed her solicitors to write to MDG on 16 April 2007 requesting information on the following matters that she had discovered or noticed:

(a) Her signatures on a Deed of Indemnity (in favour of SHC in consideration of their issuing the Insurance Guarantee Bonds to secure the Maybank loan) and on the directors' resolution authorising the same were forgeries;

(b) MDG's bank statements provided by Maybank did not explain the whereabouts of $2.5m of the Maybank loan;

(c) one Shen Yixuan ("Shen") claimed to be entitled to a transfer of 674,800 of MDG's shares in TR; and

(d) one Chiang Sing Jeong ("Chiang") claimed to be entitled to 40% of the shareholding in TR.

She received no meaningful response to her requests. LHC also obtained cheque imprints that showed payments made by Seeto from MDG's OCBC account. Amongst those were, a cash cheque for $172,656.25 dated 1 December 2006 to Tan Chin Heng, a cheque for $10,000 dated 6 December 2006 to Performance Motors, a cheque for $49,977.74 dated 9 December 2006 to Performance Premium Selection Ltd and a cheque for $10,000 dated 12 December 2006 to himself. Other cheque withdrawals were later discovered during trial.

40 MDG finally called for an AGM on 24 October 2007. It circulated to the shareholders the audited accounts for 2004, 2005 and 2006. In particular, the audited accounts for 2005 and 2006 contained a qualification from the auditor that the "unconsolidated financial statements do not give a true and fair view of the state of affairs of [MDG]". Prior to the AGM, LHC and Ling had written to the board of directors with a list of questions concerning, *inter alia*, the directors' remuneration, moneys owed by MDG, disputes regarding MDG's shareholding in TR and the above cheque payments that Seeto made out of MDG's bank accounts. At the 24 October 2007 AGM, LHC met Rodney Tan for the first time. She did not know that Seeto and Gwendolyn Wong had transferred their shares to Rodney Tan and that he had been appointed a director of MDG. Ling and LHC requested Rodney Tan, the chairman of the meeting, to discuss the audited accounts. Rodney Tan refused and adjourned the meeting despite LHC's objections. After the meeting resumed, LHC and Ling asked for information on the audited accounts; Rodney Tan's, Seeto's and Sebastian Wong's interests in Roscent; and how the $1m in MDG's OCBC account was used. According to LHC, LHC and Ling's questions were not answered. The chairman, Rodney Tan and MDG's solicitor Harpreet Singh, said that they would be given answers in writing, but no "meaningful response" to their queries was ever given.

41 On 27 November 2007, LHC and Ling received a notice from MDG informing them of the proposed First Rights Issue Resolution. Their solicitors at the time, A&G, wrote to Rodney Tan, Seeto and Sebastian Wong to seek information on the proposed issuance and clarification on why it was necessary to raise capital given that MDG had obtained a "$27 million" credit facility from Maybank. D&N responded that the First Rights Issue was for two purposes: for MDG to meet its obligations to Rodney Tan under the CLA and for the repayment of the Maybank loan. LHC claimed that she was put in a difficult situation; although she was keen to maintain her level of shareholding in MDG, she feared committing money to a management that was not prepared to be financially transparent.

42 At the EGM held on 13 December 2007, Rodney Tan explained that the Cash Call was necessitated by Maybank's request that its $5m loan to MDG be repaid. The plaintiffs attended the EGM through their proxies, Suresh Nair from A&G on behalf of LHC and Ling on behalf of KLC. The proxies were both instructed to vote against the First Rights Issue Resolution. Despite their objections, however, the resolution was passed by the majority shareholders at the time, Roscent and Kusni. During the EGM, letters of offer which disclosed that MDG intended to issue 6.9 million shares at $1 per share were handed to all shareholders. The letters of offer further stipulated that shareholders were to subscribe for their shares by returning the attached response slip by 11 January 2008 and that payment for the newly subscribed shares was to be made by the same deadline. Although no payment method was specified in the letters, the response slip was drafted as follows:

> I wish to subscribe for the [number] of New MDG Shares (as defined in your Notice) to which I am entitled and hereby enclose herewith a cashier's order for the amount of S$[amount], being the consideration payable for the New MDG Shares.

Although this response slip contemplated the attachment of a cashier's order, LHC explained that she did not think there was a specific time frame to make payment.

43 After the dilution of her shareholding, LHC claimed that Rodney Tan and Seeto taunted her by asking her to lend money to MDG on the same terms as Rodney Tan had under the CLA, knowing that she would not be minded to do so in the face of their oppressive conduct. They refused to answer LHC's solicitors' continued requests for information on the financial affairs of the company. In particular, LHC's solicitors sent a further letter to MDG on 10 June 2008, a day before MDG convened another EGM on 11 June 2008 to consider the Second Rights Issue Resolution. In that letter, LHC's solicitors asked the directors for information relating to the negotiations with SDC and whether MDG's shares were held in trust by anyone, but there was no response. Following the passage of the Second Rights Issue Resolution, LHC was offered new MDG shares based on her reduced shareholding of 2.77%. On 10 July 2008, her solicitors wrote to offer to subscribe to sufficient shares to restore her percentage shareholding to 18.18%, but that offer was rejected.

Vincent Ling Wong King

44 Ling was an important witness because KLC's case relied heavily on Ling's evidence. KLC deposed that Ling handled her affairs in MDG, and that he had represented her at the various meetings. Ling deposed that he discovered an opportunity to manage and develop the Property. He gave Seeto the contact details of Lim Chong Poon of SRPL, which was the owner of the Property at the time. Ling was under the impression that the Project would be run by MDG; he did not know of TR's existence until September 2006 when he saw a copy of an executed option to purchase the Property.

45 On 11 January 2008, at about 5pm in the evening, Ling went down to MDG's office and submitted the plaintiffs' response slips on their behalf. Both LHC and KLC indicated that they wished to subscribe to their full entitlement to the new shares, *ie*, 1,254,546 shares each. No cashier's order was attached to either response slip. Instead, the plaintiffs stated in their response slips that they would provide a cashier's order for the requisite amount within 14 days from that date.

Seeto Keong and Sebastian Wong Cheen Pong

46 Seeto was involved in MDG from the start, although he withdrew somewhat from the day to day management after selling his stake to Rodney Tan. He portrayed LHC as a manipulative woman who tried to scupper the company's financing efforts when it became clear that the value of the Property

had appreciated significantly after the Sentosa Integrated Resort was announced. Seeto claimed that he initially thought LHC was part of the wealthy Lien family. He further claimed that he did not know that CUL was owned and controlled by LHC, and that the CUL loan was arranged by Kusni. According to him, he was responsible for meeting with SRPL to arrange the deal to acquire the Property. A subsidiary company, TR, was set up for the Project. TR was originally incorporated by Chiang but 100,000 shares were allotted to MDG. Seeto, Sebastian Wong and Chiang approached Shen and one Tan Eck Hong who agreed to finance the purchase of the Property from SRPL.

47 Sebastian Wong and Seeto engaged in meetings with SDC's representatives regarding TR's redevelopment plans for the Property. Approval for TR to buy and redevelop the Property was given in May 2006. In November 2006, MDG drew down on its $2.5m facility with Maybank to pay SDC as well as to disburse money into MDG's OCBC and Maybank current accounts. The Deed of Novation and Supplemental Agreement with SDC and SRPL were signed on 14 November 2006. However, Seeto continued to meet with potential investors throughout this period as MDG/TR still faced a funding shortfall for repayment obligations under the various loans and also under the Deed of Novation and Supplemental Agreement. MDG/TR also required money for renovations and refurbishment of the Project. Seeto obtained an additional $2.5m in credit facilities from Maybank (this formed the Maybank loan together with the first tranche of $2.5m) secured by the SHC Insurance Guarantee Bonds and a personal guarantee from him and LHC.

48 Seeto, however, claimed that LHC attempted to create a divide between himself and Sebastian Wong through false representations and that she also jeopardised the company's fund-raising activities by sending letters to Maybank, VTB Bank and OCBC. For those reasons, Seeto requisitioned an EGM on 15 March 2007. At the EGM, Seeto gave the shareholders a detailed brief of MDG's financial position then and its projected cash flow analysis for 2007 to 2009. LHC and Ling did not arrive in time for the EGM. The resolution to remove LHC as a director was passed and she was replaced by Chen Siok Chan. LHC lodged a police report against Seeto and Sebastian Wong, prompting the Commercial Affairs Department ("CAD") to commence investigations but nothing further came of it. Shortly after this EGM, Seeto and Gwendolyn Wong sold their shares in MDG to Rodney Tan in May 2007. From that point on, Rodney Tan became the controlling director of MDG.

49 Both Seeto and Sebastian Wong denied misappropriating MDG's funds. They gave the following explanations in their affidavits of evidence-in-chief:

(a) $18,992.84 was cashed out and deposited to MDG's account to meet a shortfall in its payment to VTB Bank;

(b) $8,100 was payment of outstanding staff salaries;

(c) the cash cheques for the sums of $10,000 and $49,977.74 were part repayments of loans that Seeto had extended to MDG; $10,000 was part repayment of a loan advanced by Seeto to MDG;

(d) $172,656.25 was paid to one Tan Chin Heng for his brokerage and service fees;

(e) $5,000 was paid to Tan Eck Hong; and

(f) $378,000 was in repayment of an initial loan of $250,000 from one Wong Nam Sin.

Rodney Tan

50 Rodney Tan denied knowledge of what had happened in MDG prior to his initial involvement in the company in May 2007. He accused the plaintiffs of seeking to take full benefit from his injection of funds without giving any of the requisite financial support MDG sought from its shareholders. According to him, the Project was in a crisis when he was approached to invest in MDG and required "tens of millions" in fresh capital. MDG/TR had not commenced any construction or refurbishment work on the Project in breach of its contractual obligations to SDC, and was in critical financial difficulty. Around April to May 2007, MDG ran into problems servicing its loans. It did not have the funds to repay a loan of $500,000 it took from Shen to secure the SHC Insurance Guarantee Bonds; the default in payment could have adversely affected its shareholding in TR. MDG had also defaulted on a scheduled instalment payment of $83,000 to VTB Bank and had no means of meeting future payments. At the same time, CUL had served a statutory demand for repayment to MDG.

51 Seeto had initially approached Rodney Tan for financing help in March and August 2005 without success. It was only in May 2007 that Rodney Tan's corporate vehicle Roscent agreed to acquire 678,000 shares (or 54.54%) of the total shareholding in MDG from Seeto and Gwendolyn Wong, after Rodney Tan's solicitors, Stamford Law Corporation, had conducted the customary due diligence checks. In exchange, Seeto acquired 18,544 (or 30%) of the total shareholding in Roscent. However, Seeto's shareholding was eventually reduced to 1% after he failed to subscribe for shares in Roscent during its subsequent rights issues. The rest of the shares were held by Rodney Tan, who was Roscent's only director.

52 Rodney Tan explained that he would not have taken the risk of investing in the Project if he had not been given a majority stake. After his entry, he extended a series of loans from May 2007 to August 2007, *viz*:

(a) $83,792.83 on 28 May 2007, for the payment of arrears due to VTB Bank;

(b) $29,000 on 1 June 2007, for payment to VTB Bank;

(c) $82,832.81 on 27 June 2007, for payment to VTB Bank;

(d) $500,000 on 28 June 2007, for payment to Shen Yixuan;

(e) $82,842.41 on 27 July 2007, for payment to VTB Bank; and

(f) $1.2m to CUL on 3 August 2007 to settle Suit 316/2007.

On 27 July 2007, MDG entered into the CLA with Rodney Tan, which entitled him to convert the advances made, amounting to $1,978,468.05, into shares in MDG for $1 per share. Rodney Tan also gave evidence that SDC's solicitors had threatened to take legal action against TR because it was substantially behind the construction schedule agreed to under the Building Agreement and the Supplemental Agreement. The Project was originally due to obtain its Temporary Occupation Permit on 30 June 2008 but Rodney Tan obtained an extension of time to 1 January 2010 after negotiations with SDC.

53 Rodney Tan procured a $105.3m facility from Maybank secured by a mortgage over the Property. In exchange for SDC's approval of this mortgage, Rodney Tan agreed to:

(a) transfer the shares in MDG held by Roscent to CTI;

(b) not to recognise any trust of MDG shares; and

(c) not to sell his majority stake in MDG for a five year period.

In spite of the $105.3m in financing, MDG still faced a shortfall of $40m. Against this backdrop, MDG had to repay the Maybank loan as well as the advances amounting to $1.9m made by him. Further, Rodney Tan asserted that it was important that the Maybank loan be repaid on time to inspire confidence in MDG/TR's financial capabilities. This would have made it easier to approach Maybank for further financing in the future. Maybank had informed Rodney Tan that the provision of the $105.3m facility would be endangered if MDG failed to repay the $5m loan. In addition, Rodney Tan acted as guarantor to a credit facility worth $26.1m, extended by Maybank to TR ("the TR Facility") arranged on 2 August 2007, of which $5m was earmarked to pay off the Maybank loan on behalf of MDG. However, Rodney Tan gave instructions to Maybank to make payment for the Maybank loan on behalf of MDG from his personal line of credit on 19 November 2007 (and in the process reduced the TR Facility by $5m). The transaction was carried out "shortly before 26 December 2007", after the EGM held for the passing of the First Rights Issue Resolution. Rodney Tan testified that it was only fair for MDG to repay him the sum he had advanced.

54 At 9.30pm on 11 January 2008, Rodney Tan submitted the response slips for his own subscription of 627,272 new shares in MDG and Roscent's subscription for 3,763,636 new shares respectively in the First Rights Issue. Roscent requested MDG to set off the amount due for its new shares against the money MDG owed to Rodney Tan. Rodney Tan also requested that MDG set off the amount due for his new shares against the money owed by MDG to it. He claimed Seeto and Wong Choon Hoy met on 14 January 2008 to consider the response slips and they resolved that the plaintiffs' subscription was invalid because they had failed to make payment by 11 January 2008 in accordance with the terms of offer set out. According to him, he did not take part in the voting on the directors' resolution of 14 January 2008.

55 Rodney Tan denied that he had run MDG under a shroud of complete secrecy. He claimed that many of the letters sent by the plaintiffs involved matters that were not within his personal knowledge. It was also apparent from those letters that the plaintiffs had embarked on a campaign to bombard MDG with all manner of requests for information. According to Rodney Tan, at the 24 October 2007 AGM, the plaintiffs were briefed on the status of the various law suits involving MDG and he also gave the plaintiffs a tour of the existing 64 rooms in the Project to show them the refurbishment work carried out. Notwithstanding the plaintiffs' behaviour, MDG, through its solicitors, did its best to provide the plaintiffs with information. For example, D&N wrote to A&G (LHC's solicitors) on 1 February 2008 with the audited accounts of TR attached, although it stated that LHC was not entitled to the other information sought.

Tan Chin Ren

56 Tan Chin Ren gave evidence on why MDG's audited accounts for the financial year ended 31 December 2005 were qualified. He was an accountant with Tan, Chan & Partners, which had been appointed by MDG to prepare its audited accounts. Tan Chin Ren's team of accountants discovered that MDG had a subsidiary company, TR, which did not have any business operations in 2005. Under the Companies Act, TR was required to prepare consolidated accounts for the holding company MDG. However, Sebastian Wong, on behalf of MDG, instructed Tan Chin Ren to prepare only one set of accounts (that were to be qualified) instead of consolidated accounts. Under cross-examination, Tan Chin Ren admitted that the accounts should have been consolidated.

57 Tan Chin Ren also prepared a due diligence report for Rodney Tan prior to his purchase of shares in MDG in May 2007. Although there was no specific mention of the large amounts of cash cheque withdrawals, Tan Chin Ren included information on the company's financial situation and

significantly highlighted to Rodney Tan that, *inter alia*, a sum of $60,000 had been paid to Sebastian Wong as "administrative expenses" which required explanation.

The law

58 Section 216 of the Companies Act provides minority members of a company relief against majority conduct oppressive to their interests. The provision states:

> **Personal remedies in cases of oppression or injustice**
>
> **216**. —(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister may apply to the Court for an order under this section on the ground —
>
> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or
>
> (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).
>
> (2) If on such application the Court is of the opinion that either of such grounds is established the Court may, with a view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and, without prejudice to the generality of the foregoing, the order may —
>
> (a) direct or prohibit any act or cancel or vary any transaction or resolution;
>
> …
>
> (d) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

The provision gives the court broad and flexible powers in deciding whether to provide relief. The Court of Appeal recently observed in *Over & Over Ltd v Bonvests Holdings Ltd* [2010] 2 SLR 776 ("*Over & Over – CA*") at [70] that the common thread underpinning the four limbs of s 216 is some element of unfairness.

59 Not every dispute between shareholders gives rise to a right to relief under s 216. In particular, it is not the role of the court to act as arbiter of management decisions by the directors unless there is evidence of their voting power being exercised for an improper purpose or in bad faith (*Re Tri-Circle Investment Pte Ltd* [1993] 1 SLR(R) 441 at [4]). Minority shareholders generally participate in a commercial enterprise in the knowledge that they will be subject to majority rule, although this does not give the majority carte blanche to do whatever they like (*Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] 4 SLR(R) 745 ("*Borden*") at [80]–[82]). 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" would attract the court's intervention to grant relief against oppression (*Elder v Elder & Watson Ltd* 1952 SC 49, cited in *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227 at 229 and *Borden* at [80]).

60 Beyond rights established by the Companies Act and under general law, shareholders' rights are ordinarily encapsulated in their shareholders' agreements and the company's memorandum and articles. However, not every breach of directors' duties or the terms of shareholders' agreements amounts to oppressive conduct (*Kumagai Gumi Co Ltd v Zenecon Pte Ltd* [1995] 2 SLR(R) 304 at [38]). The court should also consider whether the breach was deliberate, whether the breach was significant and whether any detriment was caused (*Ng Sing King v PSA International Pte Ltd* [2005] 2 SLR(R) 56 ("*Ng Sing King*") at [95]). In the same vein, breaches of the Companies Act would attract separate sanctions, and would not necessarily be labelled as oppression of the minority unless something more was shown. For instance, the Court of Appeal held in *Thio Keng Poon v Thio Syn Pyn* [2010] SGCA 16 (unreported) that a resolution removing a minority shareholder from directorship was void because of the substantial injustice caused by the board of directors' failure to give due notice. Nevertheless, the minority shareholder's alternative claim for minority oppression was dismissed because there was no understanding that he would not be removed as director.

61 On the other hand, oppressive conduct need not be conduct in breach of the company's articles or the shareholders' agreement. The Court of Appeal espoused in *Over & Over – CA* (in the context of discussion on quasi-partnerships) at [85] that:

> The inquiry as to the equities of the situation ultimately calls for a textured approach, rather than a technical one that is concerned only with the strict rights of parties. *Thus, a majority shareholder may be within his strict legal rights but the manner in which he exploits his legal rights ma0y call for the court's intervention. In particular, it is trite law that conduct can be unfair without even being unlawful*. On the other hand, there appears to be something to be said against the post-hoc judicial imposition of a quasi-partnership where the parties concerned are savvy, experienced investors – like JL and HN here – who have chosen the vehicle of a joint-venture company for a specific and capital-intensive purpose, see *eg*, the recent Malaysian case of *Dato Ting Check Sii v Datuk Haji Mohamad Tufail bin Mahmud* [2007] 7 MLJ 618 at [15]. In cases of this nature, the facts must clearly point towards an understanding that the parties would have to jointly make important decisions and that the substratum of trust had broken down because of the defendant's unfair conduct.
>
> [emphasis in original]

I do not think that the Court of Appeal's comments were meant to apply narrowly to situations where quasi-partnerships can be found. It seems to me that courts should always take into consideration all the circumstances surrounding the parties' relationships and any understanding or expectations between them.

62 There is no general expectation that the shareholding of a company will remain constant, and the dilution of a minority shareholder is not in itself oppressive conduct. For instance, Hoffmann J in *Re a Company (No 007623 of 1986)* [1986] BCLC 362 at 366 observed that a minority shareholder who was impecunious or who did not wish to protect his shareholding could sell out if the company held a rights issue to raise funds. Conversely, in *Re Cumana Ltd* [1986] BCLC 430, a rights issue conducted with the purpose of diluting an impecunious shareholder was found to be unfairly prejudicial because the dilution attempt was in breach of the informal understanding between the parties that there would be no such attempt. Likewise, the Court of Appeal in *Over & Over – CA* ([58] *supra*) observed at [122] that a collateral purpose behind a rights issue could amount to oppression of the minority:

> Admittedly, there was nothing inherently wrong in trying to repay the 2002 Loan, even if it was a year in advance of the deadline. But, as held in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974]

AC 821, the issue of shares for any reason other than to raise capital – for instance, to dilute the voting power of others – amounts to a breach of fiduciary duties by the directors of the company and may be set aside by the court. Further, if directors representing majority shareholders abuse voting powers by voting in bad faith or for a collateral purpose, oppression can be said to have been established: see *Polybuilding (S) Pte Ltd v Lim Heng Lee*[2001] 2 SLR(R) 12. In this regard, we are in agreement with Mr Menon's contention that the lack of urgency for new funds – especially when contrasted with the speed at which the issue of new shares is carried out – is often a good indication of what the true objective of the rights issue is. The raising of capital for a company is always a serious matter that merits careful consideration. This is particularly so if it could have consequences that might affect the proportion of shareholdings in a quasi-partnership type company.

63 In *Lim Cheng Huat Raymond v Teoh Siang Teik* [1996] 3 SLR(R) 371, the Court of Appeal reversed the trial judge's finding that a minority shareholder and director had been oppressed by the majority's denial of information and documents because there was insufficient evidence to support the allegation. However, the Court of Appeal made no comment on the correctness of the trial judge's approach in relying on denial of information and documents as a basis for finding minority oppression. In *Ng Sing King* ([61] *supra*), the minority shareholders (holding directorships) alleged that they had been excluded from negotiations to form an alliance with a rival company and that information about the negotiations were wrongfully concealed from them. MPH Rubin J held that the concealment of information was wrongful only if the minority shareholders had a legitimate expectation of receiving such information and the information had been hidden with an improper purpose (at [102]). On the facts, there was nothing to suggest that the minority shareholders, who had detailed their rights extensively in the shareholder agreements, had a legitimate expectation to such information, nor was there proof of an improper collateral motive.

64 The outcome would be otherwise if there was an understanding between the shareholders that they were entitled to a reasonable flow of management information concerning the company. In *Re Regional Airports* [1999] 2 BCLC 30, the court found, based on prior drafts of the shareholders' agreement, that the shareholders had a common assumption that (at 80):

> ... each of the shareholders was to be on the board, and (whether or not on the board) entitled to a reasonable flow of management information concerning the company and any trading subsidiaries and to be consulted on broad strategic issues. ...

The court in that case concluded that the minority shareholders had been unfairly prejudiced based on the majority shareholders' failure to comply with that legitimate expectation, as well as on other instances of unfair conduct.

This court's findings

Credibility of witnesses

65 Before dealing with the issues, I should state that I generally found Seeto, Sebastian Wong and Rodney Tan to lack credibility. They were evasive during cross-examination and took inconsistent positions. When Sebastian Wong was asked if he was the beneficial owner of MDG shares, he refused to answer counsel's questions straight on. He likewise refused to reveal his intention for giving half the money he received from MDG to Seeto. Rodney Tan prevaricated many times during cross-examination and concealed the fact that he was paid interest under the CLA. He hesitated and tried to avoid answering even simple questions, *eg*, as to the identity of the bankers for his companies. He first claimed that the directors were concerned that the banks might recall loans when he sought to

justify spending some $60,000 in entertaining bankers over a two-month period in April and May 2009. However, when he was asked to explain why the entertainment expenses incurred by CGH were reimbursed by TR, he changed tack and said that the bankers from a certain local bank ("Bank A") whom he had entertained were in fact keen to take over TR's loan portfolio from Maybank. Further, he repeatedly attempted to distance himself totally from the conduct of Seeto and Sebastian Wong. As a result of the due diligence conducted by Tan Chin Ren for him, he must have been aware of Seeto's and Sebastian Wong's dishonest dealings *vis-a-vis* MDG. For example, Tan Chin Ren had highlighted to him the unexplained "administrative expenses" drawn out by Sebastian Wong. Similarly, the report called for verification of the minutes of meetings by directors and shareholders to approve the director's fees paid out to Seeto. Yet, according to Tan Chin Ren, there was no such verification even as at the 24 October 2007 AGM. Instead, Rodney Tan retained Seeto and Sebastian Wong's services and rewarded them for it. Seeto continued to draw his allowance and Sebastian Wong's allowance was even increased to $13,000. It was not surprising that they would have done his bidding. Seeto was, however, the worst of the lot. He persisted in avoiding giving answers to questions as to his withdrawals of the company's funds and invented fanciful explanations for what clearly constituted misconduct. His evidence that he had given the shareholders detailed financial information during the EGM held on 15 March 2007 was directly contradicted by Sebastian Wong who revealed that the company's accounts had not been prepared then, thereby (unwittingly) exposing Seeto's lie.

66 On the other hand, although LHC was somewhat difficult, prevaricated at times and probably understood English better than she cared to admit, I believed her testimony on essential points. She was consistent in her recollection of how she had been taken advantage of by the defendants and their abuse of their position as the controlling faction within MDG. The defendants attempted to smear the credibility of Gary Koh (see [74] below), pointing to the fact that he had a personal vendetta against Rodney Tan, Seeto and Sebastian Wong. However, his version of the events was either corroborated or was objectively more believable than the explanation spun by the defendants.

Preliminary findings

67 First of all, I did not think that the plaintiffs were tardy in seeking relief or that they lacked good faith in bringing the present complaints. LHC and KLC, through Ling, had sent letters requesting an explanation of MDG's affairs several times, and LHC was forced into approaching Maybank directly to obtain information about MDG. The plaintiffs had sought to block both the First and Second Rights Issues, albeit unsuccessfully. Those actions could not have indicated of acquiescence to the defendants' conduct.

68 Second, I found that Sebastian Wong was a *de facto* director and the beneficial owner of the shares held in Loke's and Gwendolyn Wong's names. Both Loke and Gwendolyn Wong confirmed that they held shares that Seeto had promised Sebastian Wong (although they maintained that the shares would only change hands upon the conclusion of the TR deal). Under cross-examination, Sebastian Wong acknowledged that the TR deal was as good as concluded but maintained that the shares still belonged to Seeto. This, however, was contradicted by the evidence of Seeto who testified that he was no longer the beneficial owner of the shares. On the totality of the evidence, I found that Sebastian Wong was the beneficial owner of the shares that were held by Loke and then by Gwendolyn Wong before they were sold to Roscent.

69 Further, both Loke and Gwendolyn Wong testified that, at all times, they took instructions from Sebastian Wong and had no contact with Seeto. Gwendolyn Wong's vote to expel LHC from the board of directors was therefore on Sebastian Wong's directions. Moreover, it was not disputed that Sebastian Wong was in charge of all MDG's financial affairs, including the decision not to consolidate MDG's accounts with TR's accounts. Thus, it was fairly obvious to me that Sebastian Wong was a *de*

facto director of MDG who controlled the company together with Seeto in the period prior to Rodney Tan's investment in May 2007.

70 Following from this conclusion, Gwendolyn Wong and Loke were marginal actors in the events that transpired. They had merely held shares and acted on the instructions of Sebastian Wong. The plaintiffs' original case against them was premised on their involvement in an alleged conspiracy. Given that the plaintiffs subsequently abandoned that cause of action, I did not think the evidence supported the plaintiffs' claim that they had engaged in conduct that was oppressive towards the plaintiffs, even though Gwendolyn Wong had voted against the plaintiffs on the instructions of Sebastian Wong.

Whether Seeto and Sebastian Wong had misappropriated MDG's funds

71 The plaintiffs argued that Seeto and Sebastian Wong misused their access to MDG's main operating bank account with OCBC to help themselves to MDG's funds, although the dearth of information provided to the plaintiffs prior to trial meant that the extent of their actions could not be detailed. According to the plaintiffs, much of the information only surfaced belatedly during the trial pursuant to further discovery. Therefore the defendants' objections that the plaintiffs had failed to plead specific instances of misappropriation rang hollow in the light of their feet-dragging in providing discovery. Based on facts belatedly discovered, the plaintiffs pointed to several unusual cash cheque withdrawals which they alleged were a misappropriation of the company's funds. I shall go into each in turn.

72 The plaintiffs argued that they had asked Seeto, Sebastian Wong and Rodney Tan about the sums paid out to Tan Chin Heng in their letter sent on 22 October 2007, two days before the 24 October 2007 AGM. However, no proper response was given. Seeto and Sebastian Wong then took the position that Tan Chin Heng was paid for his services in procuring the SHC Insurance Guarantee Bonds. Unfortunately, Tan Chin Heng's testimony was not before the court. Neither side took it upon themselves to call him as a witness. However, the burden of proving misappropriation lay with the plaintiffs. It was not sufficient to show that MDG and its directors had refused to answer their questions pertaining to those payments. I did not think they had discharged that burden from the lack of evidence before me.

73 The plaintiffs' other complaint related to two cheques made out by Seeto from MDG's OCBC account for $10,000 to Performance Motors and another for $49,977.74 to Performance Premium Selection Ltd. Both were for the purchase of two BMW cars for Seeto and Sebastian Wong respectively, who submitted that these payments were in reality "part repayments" to Seeto for loans that Seeto had extended to MDG previously. There was, however, no documentation of the loans beyond the MDG ledger entries and no explanation as to the circumstances giving rise to the loan. Moreover, I disbelieved the testimony of Sebastian Wong and Seeto. Given Seeto's personal financial situation, I thought it was unlikely that he could have advanced such sums of money to MDG. There were no details as to when and for what purpose this loan was given. More significantly, I did not think that Seeto would contribute to the purchase of Sebastian Wong's new car. It seemed to me that Seeto and Sebastian Wong had simply rewarded themselves from the coffers of MDG after it had obtained a hefty new loan from Maybank.

74 I accepted Gary Koh's evidence that Sebastian Wong and Seeto asked him to raise three fictitious invoices. The first invoice from Gary Koh for $50,000 was supposedly for "concept drawing". Seeto, in his affidavit of evidence-in-chief, stated that the $50,000 paid out in a cash cheque was actually a referral fee made to Gary Koh for his aid in procuring finance from Tan Eck Hong. He later added that another reason for the payment was the design services provided by Gary Koh. However,

Gary Koh testified that although he did some design work for the company, there was never a sum of $50,000 owed to him. It soon became clear from the cheque imprint that it was actually made out to Seeto. Seeto maintained that the payment was to Gary Koh. I found this difficult to believe. There was no reason to conceal this referral fee behind a claim for "concept drawing". Seeto admitted to taking the payments for the other two invoices for $190,000 and $188,888 respectively. He claimed that they were to repay loans from Wong Nam Sin and Tan Eck Hong that he had obtained on behalf of MDG in order to draw down on its credit facility with MNB. Again, I saw no reason for his taking such a circuitous route to secure financing for MDG. I had serious doubts that Seeto's actions were really for the benefit of the company. I disagreed with Seeto's argument that the plaintiffs had the burden of calling Tan Eck Hong to testify. The plaintiffs had shown that Seeto was the recipient of the money withdrawn under false pretenses from MDG. It was then for Seeto to show how this money was in repayment of a loan extended to MDG from Tan Eck Hong, contrary to the documentary trail that Seeto and Sebastian Wong themselves had created.

75 What was also clear to me was that Seeto and Sebastian Wong had failed to keep proper accounts during the time they were in control of MDG. While I agreed with the plaintiffs that there was no satisfactory explanation given by Seeto or Sebastian Wong concerning the large sums withdrawn through cash cheques from MDG, I did not think that was sufficient in itself to establish oppression. The plaintiffs succeeded only in showing that there were some unexplained withdrawals, namely, the payments to Performance Motors and the fictitious invoices. However, that was not oppression *per se*. It was for the company to take action against Seeto and Sebastian Wong for their misconduct, and the plaintiffs to take out a derivative action if the company was not minded to do so.

The related party transactions and Rodney Tan's remuneration

76 The plaintiffs sought to impugn the transactions TR entered into with companies related to Rodney Tan, namely, Glo-Fabrics House Pte Ltd ("Glo"), CGH and CHI, as well as the remuneration paid to Rodney Tan. Glo was a company operated by Rodney Tan's wife, Poh Ban Leng, while CGH and CHI were part of the Cairnhill Group controlled by Rodney Tan. Essentially, the plaintiffs' case was that Rodney Tan had abused his control of TR/MDG to withdraw large sums of money and caused TR/MDG to incur unnecessary debt. However, while there were several discrepancies in the manner in which the transactions were conducted, I did not think that the plaintiffs proved their case that those transactions were prejudicial to their interests or the interests of the company.

77 First, Rodney Tan's failure to make formal disclosure to the board that he was interested in those transactions was not, in my view, indicative of an intention to do wrong because it was common knowledge that he was the person controlling the Cairnhill Group. Second, there was no evidence, nor did the plaintiffs argue, that those related or associated companies failed to provide the services contracted for, or that they were overpaid for their services. Given that there is no general bar against related party transactions, the plaintiffs had to show *more* than just the relationship between Rodney Tan and the companies involved. They had to explain how the procurement of contracts was unjustified or in some way prejudicial to their interests. Rodney Tan had without doubt played some part in TR/MDG's decision to hire companies related to him, but all that the plaintiffs did was to show that payments were made very quickly after invoices were issued. The plaintiffs made submissions on the large sums of money paid out but they did not show that those payments were inordinately large. There was no comparison drawn between the price that TR paid for the services against the market price. Without the evidence, I could not make a finding that those payments were excessive.

78 With respect to Rodney Tan's remuneration, all that the plaintiffs could show was that Rodney

Tan had been paid $15,000 a month by TR since he became a director and the majority shareholder through Roscent. There was nothing further to show *how* that was excessive remuneration. No doubt the remuneration paid to a director and majority shareholder was relevant to any allegation of minority oppression since this was a common method of realising gains from a company without dividends, but there was no evidence to suggest that Rodney Tan was overpaid. Thus, I did not regard the related party transactions or the remuneration paid to Rodney Tan as indicators of oppressive conduct.

79 However, I did notice discrepancies in the evidence of the defendants' witnesses. For instance, there were false representations made by Alex Low Chee Kin who, under cross-examination, revealed that a document that he exhibited as an "invoice" was in fact a "quotation", contradicting his initial testimony that TR/MDG had not paid Glo promptly. It was also curious that $450,062 was paid out to CGH on 4 January 2008, in the midst of MDG's ostensible attempt to secure fresh funds to repay the Maybank loan. Further, as I alluded to earlier, Rodney Tan did not give a satisfactory explanation as to why his company CGH was entitled to be reimbursed by TR for its entertainment expenses. Those were apparently incurred in entertaining several bankers from Bank A whom he claimed were keen on taking over TR's loan portfolio from Maybank. However, that explanation appeared to contradict his testimony of the previous day that the directors were very concerned that the banks might recall loans. I was not satisfied with his explanation. There was no evidence that Bank A did lend any money to TR. Neither was his explanation corroborated. A director who wears more than one hat, has to be scrupulously careful not to burden one company over which he has control with expenses incurred for the benefit of another in which he is also interested.

Whether the plaintiffs were unfairly denied access to information

80 The plaintiffs' main grievance may be summed up simply: they were kept in the dark by the directors and majority shareholders of MDG about the financial affairs of the company. There were two threads to this grievance. First, the affairs of MDG were generally conducted under a shroud of secrecy that concealed any meaningful information about the state of MDG's finances, its true shareholding in TR and its assets. Related to this was the second element that the directors had failed to keep proper accounts and refused to provide a proper explanation even up to the 24 October 2007 AGM. I will deal with the latter issue first.

The failure to keep proper accounts

81 It was not seriously disputed that the accounts of MDG from 2004 to 2006 were in disarray. Seeto claimed that he ought not to be held to strict accounting standards because he was not trained in accounting practices and procedures. Sebastian Wong argued that MDG was under-staffed and unable to spare the time and resources to maintain proper records. Both, essentially, sought to characterise the various departures from proper accounting as innocent and inadvertent. However, that was not borne out by an examination of the various errors.

82 First, the cash flow record of the company was unusual given its lack of business operations. The general ledger for MDG produced just before the trial began revealed that large sums of money had been withdrawn through cash cheques: $325,663.09 in 2005, $486,404.68 in 2006 and $779,781.91 in 2007. Confronted with these statements, Tan Chin Ren agreed that it was unusual for the company to issue cash cheques for such large amounts in 2005:

Cross-examination of Tan Chin Ren

Q Mr Tan---

A Yes, Sir.

Q ---now, we have done a quick computation, okay? Now, for the---and you can take my figures, right, on---at face value, if you want you can go and verify it---for the year 2005, cash cheque withdrawals, okay, cash cheque withdrawals---sorry, let me rephrase that---cash cheque payments to Sebastian Wong was to the tune of $52,500, okay? Cash cheque payments to Seeto Keong was a sum of $62,500. And the total cash cheques for that year was $540,233, total amount of cash cheques issued for that year. Now, before we go into the specifics. Mr Tan, you will agree with me that it is unusual for a company to issue cash cheques for such a large amount, an aggregate total of $540,000 in 1 year?

A Yes, Sir.

Q You agree with me?

A Yes.

However, the entries did not specify the purpose behind the withdrawals. Whilst there was no concrete evidence that those cash withdrawals were for improper purposes, the egregious lack of record keeping for such large withdrawals lent itself to suspicion to say the least.

83 Another false entry was the deliberate misclassification of $720,000 paid by Tan Eck Hong to purchase 60,000 of MDG's shares in TR as a "loan". This was not an innocent error. Under cross-examination, Tan Chin Ren agreed that this was an incorrect entry and that, crucially, it was an irregular transaction. He testified that he had asked for an explanation from Sebastian Wong who said that the company was taking a loan from Tan Eck Hong for the existing shareholders to purchase shares in MDG:

Cross-examination of Tan Chin Ren

Q Now, did you know that this entry was wrong when you were auditing the accounts in 2007?

A Yes, Sir.

Q You knew about it?

A Yes, Sir.

Q Did you highlight this mistake to the management?

A Yes, Sir.

Q Who did you highlight the mistake to?

A Sebastian Wong.

…

Q So? We have to be very clear about this. Sebastian Wong told you that the company was taking a loan from Tan Eck Hong for the existing shareholders to purchase shares in MDG?

A Yes, Sir.

…

Q Do you now find that this is an irregular transaction?

A Yes, Sir.

Q So do you agree that if you had then found that this was an irregular transaction, it should have been highlighted to the management---

A Yes, Sir.

Q ---as an irregular transaction?

A Yes, Sir.

From this evidence, it could be seen quite clearly that Sebastian Wong's conduct went beyond mere negligence; he had hidden the true nature of Tan Eck Hong's payment as a loan and told Tan Chin Ren that it was for the shareholders to purchase shares in MDG. (That itself would have been a breach of s 76(1) of the Companies Act, which prohibits the granting of financial assistance by a company for the purpose of acquiring its own shares.)

84 Moreover, there was an active concealment of the remuneration paid to Sebastian Wong and Seeto. Seeto drew directors' fees amounting to $28,000 for 2004, $108,000 for 2005 and $106,000 for 2006, but it was only during the 24 October 2007 AGM that MDG's shareholders were asked to approve his remuneration. Sebastian Wong affirmed in his affidavit of 8 June 2009 that he did not receive regular income from MDG but this was exposed as a lie when MDG's general ledger was produced during trial. In fact, he had drawn an allowance that was classified as an "administrative expense" for consultant's fees in the accounts. This was clearly deceitful and there must have been a deliberate decision to characterise what was clearly his income misleadingly as an administrative expense. Tan Chin Ren confirmed that he knew and was suspicious of those payments when he gave the following evidence:

Cross-examination of Tan Chin Ren

Q Yes? Under "expenses", you go to the---one, two, three---fourth paragraph. Other expenses observed from general ledger descriptions, administrative charge of 70,167. You say here: [Reads] "Based on"---the---"General Ledger, we observed that the administrative expenses were paid to Sebastian Wong of $60,000, Foo Kim Fah of 4,166.87 and"---Kusni---"of $6,000. We need explanations for the purpose of these payments." Do you see that?

A Yes, Sir.

Q Mr Tan, did you seek explanations on these payments?

A We need ex---explanation first. At that point of time, no explanation was given.

Q No, my question, two parts, I say, did you seek an explanation, did you ask for an explanation?

A Of course.

…

Q Now, notwithstanding the explanation, your report states that you need explanation, so am I right to say that the explanations were unsatisfactory?

A Oh, yah. Pausing this question now, there must be some form of written understanding of this payment. So we are not sure why there is a payment of lump sum of $60,000 to a person.

85 From the above evidence, it could be seen that Sebastian Wong's actions constituted deliberate concealment of the truth. His false characterisation of Tan Eck Hong's money for the purchase of shares in TR as purely a loan was anything but innocent. Similarly, there was no basis for him to classify Seeto's and his remuneration as an "administrative expense". This was not an error born out of carelessness. Although Sebastian Wong was the primary person in charge of the accounts, Seeto was principally responsible for the decision to conceal the information contained therein from LHC.

The concealment of information from LHC

86 The threshold question is this: what was the scope of the plaintiffs' right to information concerning MDG? Walter Woon on *Company Law* (Sweet & Maxwell, Rev 3rd Ed, 2009) ("*Walter Woon*") at para 5.25 states that a member of a company has a statutory right under the Companies Act to inspect the following registers:

(a) register of members (s 192(2));

(b) register of directors, secretaries, managers and auditors (s 173(5));

(c) register of directors' shareholdings (s 164(8));

(d) register of substantial shareholders (s 88(2));

(e) register of debenture holders (s 93(3); and

(f) register of charges (s 138(3).

Paul L David on *Gower and Davies' Principles of Modern Company Law* (Sweet & Maxwell, 7th Ed, 2003) at p 537:

> … a member, even of a private company, *unless he is also a director*, is not entitled, as he would be if he were a member of a partnership, to inspect the books and records of the company except to the extent that the Act specifically provides. … [emphasis added]

87 Apart from the annual audited accounts and accompanying reports, a member has no access to the accounting records of the company. The annual audited accounts and accompanying reports are the primary means by which the directors of a company account for their stewardship (see *Walter Woon* at para 10.53). Hence, the requirement that the accounts present a true and fair view of the company's financial affairs.

88 The Australian position in general is that since there is no express statutory provision allowing shareholders access to the company's financial records, shareholders will not have the right to inspect financial records *unless it has been expressly provided for in the articles of association of the*

company; this is the position in *Re Dernacourt Investments Pty Ltd* (1990) 20 NSWLR 588 and *Burn v The London and South Wales Coal Co* [1890] 7 TLR 118. However, an old decision in *Edman v Ross* (1922) 22 SR (NSW) 351 suggests (at 358) that shareholders may be allowed access if "sufficient cause" can be shown that the documents to be inspected are necessary with reference to a specific dispute:

> … as a shareholder he is not entitled as of right to range at will through the company's affairs. No statutory right to inspect the affairs of a company is given to shareholders by the Companies Act, and no such right is conferred upon the shareholders of this company by the articles of association. His right as a shareholder was merely the common law right of a member of a corporation to inspect its documents upon some *sufficient cause* shown, and the authorities establish that it must be shown that inspection is *necessary with reference to some specific dispute or question in which the party applying is interested, and that it is only then granted to such an extent as may be necessary for the particular occasion*. … [emphasis added]

89 The above proposition has support in a more recent House of Lords decision. Lord Diplock made further clarifications on this point in *Lonrho Ltd v Shell Petroleum Co Ltd* [1980] 1 WLR 627 at 634:

> The articles of association of all the subsidiaries vest the management of the company in its board of directors. It is the board that has control of the company's documents on its behalf; the shareholders as such have no legal right to inspect or to take copies of them. If requested to allow inspection of the company's documents, whether by a shareholder or by a third party, it is *the duty of the board to consider whether to accede to the request would be in the best interests of the company*. These are not exclusively those of its shareholders but may include those of its creditors. Needless to say, if the local law of the country in which the company is resident forbids disclosure, the company through its board must comply with that local law. [emphasis added]

In my view, it could not be said that directors have an *absolute* right to deny financial information to shareholders *in all circumstances*. There is neither statutory nor common law authority to justify such an absolute position. As can be seen from the authorities above, it is clear that there is in principle no *absolute bar* against granting shareholders, in limited circumstances, access to specified financial information. Against this backdrop, we consider the facts of this case. There was *prima facie* no understanding between either of the plaintiffs and the other shareholders/ directors of MDG that they would be provided management information about the day to day running of the company. KLC had inherited her MDG shares from Ling, the founder of the company, who then handed the running of the company over to Seeto and Gary Koh. LHC had invested on the invitation of Kusni. Counsel for LHC admitted that she was, at first, a passive investor. In my view the initial arrangements between the various shareholders were quite informal in nature, and there was also no suggestion that any sort of quasi-partnership arose on the facts.

90 However, LHC's position *vis-a-vis* MDG went beyond that of a mere shareholder. LHC's involvement with MDG increased substantially in May 2006 when she joined MDG's board of directors and, two weeks later, provided a SBLC for $1m in favour of MDG. Apart from being its director and shareholder, LHC became MDG's then largest creditor aside from the financial institutions. At that stage LHC was no longer just a passive shareholder without rights to MDG's financial information beyond those available to an ordinary shareholder. LHC testified that she was persuaded by Seeto to extend the further SBLC after she was made a director. She had substantially increased her financial contribution to the company after she had joined the board of directors. I accept that the understanding must have been that she was to play a larger part in the management of the company or that she was given a bigger role to safeguard her interests. Yet, during this period, Seeto and

Sebastian Wong concealed the fact that they were receiving remuneration from the company. During cross-examination, Sebastian Wong admitted this:

> **Cross-examination of Sebastian Wong**
>
> Q So come back to my---my question. You will agree with me that the shareholders have no idea that Seeto Keong was being paid directors' fees.
>
> A Agree.
>
> Q The shareholders likewise did not have any idea that you were receiving consultant fees. I use the word "consultant fees". Please listen carefully before you just shoot off your mouth.
>
> A Agree.

Arguably, LHC could not reasonably have expected them to work without receiving some compensation, but the manner in which Sebastian Wong had concealed the remuneration suggested a conscious decision to deceive LHC in blatant disregard of the fact that LHC was now a director and was entitled to management information.

91 More significantly, LHC was left in the dark about the use of the money which she had secured for MDG through the SBLCs. It is pertinent to note that even the initial requests for financial information made when LHC was a *director* of MDG (by the letters dated 22 and 30 January 2007) went unsatisfied. Her requests for information were stonewalled by Seeto and Sebastian Wong when they gave the lame excuse that the requests should have been directed to the company secretary; and when it was misrepresented that MDG's accounts were being finalised for audit and would be presented to shareholders at the next AGM "in accordance with the statutory time frame". It was only when those attempts failed that LHC approached MDG's bankers to ask for information in January and February 2007. Sebastian Wong defended his actions on the basis that MDG was under-staffed and could not spare the manpower or the time to prepare updated accounts. Seeto took the same line and told LHC the accounts were being prepared for the upcoming AGM. However, that did not answer the more fundamental objection that LHC was not given *any* information about how the money secured on her SBLCs was being used (even though she eventually obtained some of MDG's statements from Maybank).

92 To my mind, LHC had acted entirely within her rights in pressing Seeto and Sebastian Wong for information on MDG's finances in relation to the money she had guaranteed. LHC was not in the position of an ordinary creditor otherwise unrelated to the company or a mere shareholder. It was clear to me that Seeto and Sebastian Wong's denial of information to LHC, at that point in time, constituted oppressive conduct.

Rodney Tan's conduct

93 LHC was subsequently removed as a director at the EGM on 15 March 2007. In my view, LHC's removal as a director was partly, at least, a tactical move to deny her access to information which she legitimately sought. Sebastian Wong and Seeto then arranged to sell their shares to Rodney Tan. The situation did not improve when Rodney Tan came into the picture as the new majority shareholder and controlling director. As stated above at [65], Rodney Tan knew of Seeto and Sebastian Wong's misconduct but nevertheless chose to keep them on board MDG.

94 Further, Rodney Tan's conduct during the 24 October 2007 AGM was telling. As LHC had been

removed as a director, her access to the company's financial information had been tactically reduced to what a shareholder could ordinarily obtain from the accounts and accompanying reports presented at the AGM. However, even this very *basic* access to information was denied her. The accounts for 2005 and 2006 (called "draft" accounts) contained a qualification from the auditor that the "*unconsolidated financial statements do not give a true and fair view of the state of affairs of [MDG]*". Prior to the AGM, LHC and KLC had submitted a list of questions to the directors concerning the directors' interests in Roscent, their withdrawals from MDG's bank account and related party transactions. The minutes of the meeting recorded that Rodney Tan as chairman, and Mr Harpreet Singh told the plaintiffs that responses to their questions would be given in writing, but none were given. This is significant because during cross-examination, Sebastian Wong admitted that he had actually prepared answers to those questions:

Cross-examination of Sebastian Wong

Q Mr Wong, you will agree with me that if you were concerned about the questions asked by the shareholders, you would have either ---okay, let me take it one step at a time. If you were bothered about the questions asked by the shareholders, you could have prepared the answers on your own accord, you could have?

A Yes.

Q Right?

A Yes.

Q Did you do it?

A Yes.

Q You prepared the answers?

A Yes.

He later informed Seeto of the prepared answers but he claimed that he could not remember if he had told Rodney Tan. However, I found it difficult to believe that Rodney Tan was not apprised either by him or Seeto of this matter. In any case, neither Rodney Tan nor Mr Harpreet Singh asked him to provide answers to the plaintiffs. Neither was he asked to prepare answers to the plaintiffs' list of questions which had been sent to MDG to be tabled at the AGM. On 1 February 2008, D&N wrote to the plaintiffs' solicitors to provide them belatedly with a copy of TR's audited accounts but maintained that the plaintiffs were *not entitled* to the other information sought. However, this did not cure the original issue caused by the omission of TR's accounts for purposes of the AGM because the plaintiffs had been denied the opportunity at such meeting to seek clarification of both the TR and the MDG accounts as is the convention. (It will be noted from the minutes of the AGM that Rodney Tan paid lip service to such convention by inviting questions on the accounts.)

95 Moreover, Seeto, Sebastian Wong and Rodney Tan no longer deny that the accounts of TR ought to have been consolidated with MDG's. The Companies Act clearly requires consolidation of accounts unless the approval of the Registrar of Companies has been obtained to dispense with it. Without consolidation, financial information regarding TR would not be disclosed. They argued (speciously, in my view) that this was a reasonable decision to make at the time and that they should not be faulted for it when the auditor, Tan Chin Ren, had reached the same conclusion. However, it

should be remembered that in reality it was Sebastian Wong's decision to separate TR's and MDG's accounts. The directors should not have approved the unconsolidated accounts. Blame should not rest entirely on Tan Chin Ren who explained that in such a situation he would abide by the instructions of the company (covered, as he was, by his disclaimer that the "unconsolidated financial statements did not present a true and fair view of the state of affairs of [MDG]").This refusal to consolidate accounts was clear evidence of a deliberate attempt by the directors, as a whole, to withhold pertinent information on the financial affairs of MDG.

96 Ordinarily, the denial of a company's financial information to a shareholder may not, in and of itself, suggest oppression. The present circumstances, however, are quite egregious. When one considers in totality the circumstances which drove the plaintiffs to press for answers to their questions at the 24 October 2007 AGM, one would be hard put to say that the directors were acting in the best interests of the company when they denied the plaintiffs honest answers to their questions. When LHC was a director, her requests for information were met with stonewalling tactics and she was assured the accounts were being prepared for the AGM. Before the AGM arrived, LHC had been conveniently removed from directorship so that her formal entitlement to the company's information was essentially reduced to what a shareholder could ordinarily obtain from the AGM. Yet at the time of the AGM, the MDG accounts furnished were only "draft" unconsolidated accounts which the auditor was obliged to report "*did not present a true and fair view of the state of affairs of [MDG]*". If the accounts could not be relied upon, how else were the directors to account to the members for their stewardship of the company? Given that the directors had failed provide a complete set of accounts presenting a true and fair view of MDG's state of affairs, it did not lie in the directors' mouths to insist that the plaintiffs were precluded from having answers to their specific questions. The case for disclosure was even more compelling when the factual matrix, taking the totality of the directors' actions into account, suggested strongly that the non-disclosure had collateral and self-serving motives. There was no indication whatsoever that the withholding of information was for genuine commercial reasons in the best interests of the company.

97 The refusal by Seeto, Sebastian Wong and Rodney Tan to provide the plaintiffs with information caused the latter detriment. As I will elaborate further below, Rodney Tan's intention to deceive the plaintiffs was also demonstrated by the fact that LHC and KLC were never given a truthful explanation of MDG's apparent need of capital which led to the First Rights Issue Resolution. The plaintiffs were put between a rock and a hard place. Their lack of access to MDG's financial information made it very difficult for them to make an informed decision. Clearly, it would not have been prudent to take up the shares under the First Rights Issue in the absence of sufficient financial information. On the other hand, their shareholdings would be diluted if they chose not to subscribe for the shares. I found that Seeto, Sebastian Wong and Rodney Tan had unfairly disregarded the plaintiffs' requests for information on MDG. It was not necessary to examine individually each item of information sought. As shareholders, the plaintiffs were denied meaningful answers to their queries raised before and at the AGM. Suffice it to say that the combined conduct of Seeto, Sebastian and Rodney Tan revealed a pattern of behaviour that was dismissive of the plaintiffs' concerns and marginalised their participation once they began probing into suspicious transactions. In other words, the denial of information formed a *key element* in the overall oppression and unfair treatment of the plaintiffs.

Whether the First Rights Issue was oppressive

98 The First Rights Issue was ostensibly made to meet MDG's obligations towards Rodney Tan under the CLA as well as to raise money to repay Maybank. The plaintiffs' counsel argued that the CLA was oppressive because it contained terms that were unfair to the company and to the minority shareholders. The conversion rate was fixed at an undervalue of $1 per share and Rodney Tan could convert his loan into equity at his discretion, allowing him to put pressure on the minority

shareholders. He was also given control over MDG's debt-raising because, under the terms of the CLA, MDG could not raise debt without his permission. Further, LHC was not given the opportunity to capitalise or convert the amounts owed to CLU on the same terms.

99 On the other hand, counsel for Rodney Tan denied that the CLA was oppressive because any reasonable director would have entered into such an agreement when MDG was in a crisis and required urgent funding. LHC was not offered the same terms as the CLA because she was a guarantor for MDG's loan and not its creditor *per se*. Moreover, there was no prejudice to the plaintiffs because they were given the opportunity to subscribe to shares in the Rights Issue pursuant to their pre-emption rights.

The CLA

100 I did not think the CLA was of itself evidence of oppression. The terms of the CLA were indeed favourable to Rodney Tan but I did not think that the terms were unusual given that MDG was indeed in need of financing. It was not surprising that the plaintiffs were not approached to provide funding because the relationship between them and the directors had deteriorated to animosity by that time. On the face of it, the terms of the CLA did not take into account the plaintiffs' pre-emption rights. The plaintiffs also pointed out that the shares had previously been transacted at a higher price. Had the rights under the CLA been exercised to convert debt into equity, it might have been open to challenge. However, the plaintiffs' interests could not be said to have been disregarded because on the advice of MDG's lawyers the shares were first offered to the shareholders by way of a rights issue; only if they were not taken up would the conversion take place. The fact of the matter was that there was never a conversion of debt to equity pursuant to the CLA. Nevertheless, the CLA allowed Rodney Tan to put pressure on the minority shareholders at any time he considered opportune to increase share capital. It was to become a tool that Rodney Tan eventually used to pursue the dilution of the plaintiffs' shareholdings.

The pricing of the shares

101 I agreed that the pricing of the shares was not unfair in itself because the shares were offered to all the shareholders, but it could and did enable Rodney Tan to dilute the plaintiffs' shareholding. Counsel for Rodney Tan again relied on the fact that the First Rights Issue was subject to the plaintiffs' pre-emption rights and that the shares were offered pro rata to all the existing shareholders. There is no general obligation on directors to price a rights issue at or near the market value of the shares. In fact, the discount may very well act as an incentive to shareholders to subscribe. Even if the shares were offered at a discount, it was not a private placement to Rodney Tan. Therefore, at first blush, there was no prejudice to the plaintiffs who were entitled to take advantage of this discount by virtue of their pre-emption rights. However, in this case where the directors Seeto and Rodney Tan were concurrently the company's majority shareholders, it was obvious that pricing the shares at an undervalue would allow Roscent and Rodney Tan to pick up *more shares* than if the shares were priced at their true value in the event that the minority shareholders were unable or unwilling to subscribe for their allotment (as was the case in *Over & Over – CA* ([58] *supra*)). In other words, by keeping the price per share to a minimum, the majority shareholders would have the ability to inflict maximum dilution of the minority's shareholdings if the latter did not subscribe to the rights issue, a prospect that was not unlikely given the continued withholding of information regarding the company's true financial status from the minority.

Rodney Tan's calling for the First Rights Issue Resolution

102 I formed the view that the MDG directors had conducted the First Rights Issue with unseemly

haste and deception. Rodney Tan deliberately misrepresented the urgency of MDG's need for fresh capital. He gave the impression that MDG was in urgent need of money to repay the Maybank loan. He told the shareholders at the EGM on 13 December 2007 that Maybank was "chasing" for repayment of the Maybank loan and that MDG could not rely on TR to repay this loan because it had not generated enough revenue. To buttress his case, he referred to a letter dated 10 December 2007 from Maybank that demanded payment by 19 December 2007. However, he failed to disclose that there was never any danger of the company defaulting on the loan. Rodney Tan had already instructed Maybank that he would repay on MDG's behalf the Maybank loan on 19 November 2007 with facilities available to him at Maybank. This was well before the 13 December 2007 EGM. As a consequence, the TR Facility, which had been arranged earlier, in August 2007, and of which $5m had been earmarked to pay off the Maybank loan (see above at [53]), was reduced by $5m. MDG was therefore prevented by Rodney Tan's actions from relying upon this sum which had originally been earmarked to pay off the Maybank loan. Lest it be thought that Rodney Tan was beneficent in arranging to be personally responsible for repayment of the $5m, it should be noted that he was already a guarantor for the TR Facility in any case. So far as Rodney Tan was concerned, there was little difference between his being liable to Maybank as guarantor for the TR Facility or under this new arrangement which he had surreptitiously made with Maybank. Either way, he was liable for $5m to Maybank. However, to others unaware of this arrangement, it would have appeared that Maybank had decided not to allow TR (and MDG) to draw on the TR Facility to repay the Maybank loan and, on top of that, was demanding repayment from MDG. This created an illusion of urgency which required MDG to raise fresh capital immediately. Rodney Tan had difficulty denying this under cross-examination:

Cross-examination of Rodney Tan

Q Now you have already made arrangements on 19th of November---

A Mm.

Q ---for payment, am I right?

A That's correct.

Q So it would appear that Maybank need not worry about payment being made because the 19th of November, you have already given instructions for full payment by 19th of December. Am I right?

A Yes, but I didn't decide.

Q So this letter, on the other hand, if anybody were to ask you "Hey, why all this urgency to raise 5 million?" you could produce this letter and show and say there is a demand by Maybank. Am I right?

A Not correct.

Q But at the EGM, you did say that there was a demand by Maybank. Am I right?

A EGM, yes.

Q And you didn't say that arrangements had already been made to pay Maybank. Am I right?

A I say I will---it---I will pay if we can't, er, get it on time.

Through this exchange, Rodney Tan was shown to have concocted a half-truth and created the illusion that fresh funds were urgently needed lest MDG default in repayment of the Maybank loan and thereby jeopardise its future financing prospects.

103 This showed that, contrary to his counsel's submission, Rodney Tan had not "assisted [MDG] and enabled [MDG] to avoid being in default of its repayment obligation to Maybank". There was initially no danger of MDG being in default of its repayment obligation to Maybank because provision for repayment had already been made through the TR Facility. This "danger" appeared to arise only because Rodney Tan chose to instruct Maybank to apply his own personal line of credit towards repayment, on MDG's behalf, of the Maybank loan, with the result that the TR Facility was reduced by $5m and could no longer be used for repayment of the Maybank loan.

104 During cross-examination, Rodney Tan explained that his repayment of the Maybank loan was "just a standby" and that he always had the option of cancelling his instructions. He had also informed the shareholders at the 13 December 2007 EGM that he would be willing to pay in advance should the First Rights Issue not be held in time. However, contrary to his assertions, the TR Facility had already been reduced by $5m; this was a "done" deal and not "just a standby". Moreover, I did not think the plaintiffs' argument was simplistically that MDG had no obligation to repay the Maybank loan once Rodney Tan had provided an advance, or that he should be bound to provide a personal guarantee for the TR Facility. Rather, what was objectionable was the way in which Rodney Tan had gone about conjuring a sense of urgency.

105 Counsel for Rodney Tan made several arguments to suggest that he did not intend to manipulate matters. He pointed out that Rodney Tan could have let the original facility lapse at the end of September 2007, which would have resulted in an even earlier need for MDG to raise capital. I did not think this argument was particularly persuasive. The fact that MDG persuaded Maybank to extend its loan by a few months was par for the course; it would have been strange if no such attempt had been made given his majority stake in MDG. It did not explain or exonerate Rodney Tan's later conduct. Next, it was argued that the reduction of the TR Facility was an innocent side-effect of Rodney Tan's decision to secure repayment of the Maybank loan through his personal line of credit, which meant the full sum of the TR Facility was "no longer required". The simple answer is that Rodney Tan's failure to disclose the reason why the TR Facility had been reduced made all the difference in the face of a demand by Maybank for the repayment.

106 Another argument raised was that MDG/TR could not count on unqualified access to the $5m within the TR Facility in any event because Rodney Tan was always free to withdraw his personal guarantee without being said to be acting oppressively. I did not think that made any difference to the analysis. The fact remains that he exchanged his liability as a guarantor for liability as a debtor to Maybank and hid this from all others. In so doing, he conjured the illusion of urgency for MDG to raise funds to meet Maybank's demand for repayment. This was obviously not a decision driven by legitimate commercial considerations; it revealed his design to precipitate the First Rights Issue. I did not see the need to address Rodney Tan's self-serving arguments that it would benefit MDG to remain on good terms with him for the extension of future credit.

107 Additionally, I disagreed with the submission by Rodney Tan/CTI that the plaintiffs had failed to plead their case on this point. Paragraph 121(1) of the plaintiffs' statement of claim stated that the "[r]epayment of the Maybank Loan was not urgent" and that "repayment of the Maybank Loan by [Rodney Tan] was a strategy to enable [Rodney Tan] and Roscent to … dilute the shareholding of the Plaintiffs". This, in my view, was sufficient to establish their case that Rodney Tan had indeed set in motion a string of events that created the illusion that the Cash Call was necessary and urgent, when in fact it was not.

108 What could have explained Rodney Tan's actions? I found it difficult to believe that there was a genuine commercial purpose to let part of the TR Facility lapse. The plain inference from the manner in which he proceeded to call for the First Rights Issue was that he intended to dilute the plaintiffs' shareholding, which he eventually succeeded in doing. This was reinforced by the fact that MDG's financial position *vis-à-vis* Maybank had not really been in jeopardy and, contrary to the assertion by counsel for Rodney Tan that MDG required an injection of fresh capital, there was never additional cash injected into the company. I should add that I am not suggesting that *any* attempt to dilute the shareholding of a minority shareholder constitutes oppression. In this case I found that Rodney Tan's actions were oppressive because he had acted deceitfully.

The directors' decision to issue all 6.9 million shares to Rodney Tan and CTI

109 I turn now to consider the directors meeting of 14 January 2008 where they decided to reject the plaintiffs' subscription for the First Rights Issue and instead allot Rodney Tan and CTI all the new MDG shares. As a preliminary point, I should say that I do not accept the contention that the plaintiffs failed to plead that the directors had acted in bad faith or in breach of their duty by failing to properly exercise their discretion during this meeting. This assertion was clearly raised in para 134(8) of the statement of claim in which the plaintiffs alleged that Seeto and Rodney Tan were motivated by their desire to dilute the plaintiffs' shareholding to benefit themselves.

110 The minutes of that meeting recorded that only Seeto and Wong Choon Hoy were present. This was found to be untrue during the cross-examination of Nita Sim who prepared the minutes. It turned out that Rodney Tan was present and participated in the meeting. From the draft minutes produced by Nita Sim, Rodney Tan had even threatened to take legal action if the sums owed to him were not repaid. To me, this was inconsistent with Rodney Tan's insistence in his affidavit of evidence-in-chief that only Seeto and Wong Choon Hoy were at the directors' meeting and that he took no part in the voting on the directors' resolution. He had intentionally concealed the extent of his involvement so as to avoid any allegation of impropriety.

111 From the minutes, Seeto and Wong Choon Hoy's decision to deny LHC and KLC their allotment could be summarised as due to:

(a) their uncertainty that the plaintiffs wished to subscribe to the shares given their initial hesitance;

(b) their uncertainty that payment would be made in 14 days;

(c) Rodney Tan's threat to sue; and

(d) their determination that it was desirable for Rodney Tan to play an increased role in MDG as well as to set off the company's outstanding debts owed to him.

I did not think their reasons withstood scrutiny. I shall examined each in turn. First, although the plaintiffs had rigorously challenged the First Rights Issue Resolution and had even sought an injunction in Sum 58/2008 against MDG to restrain it from issuing shares, this should not be taken to mean that they would choose to have their shareholdings diluted if the resolution was upheld. On the contrary, it was good evidence that the plaintiffs were not willing to cede control over the company without a fight. Even if LHC had initially expressed the view that she did not want MDG to proceed with the First Rights Issue, it would have been evident to any reasonable person that she would likely consider it beneficial to maintain her shareholding when the court ordered the First Rights Issue to proceed. Indeed, the very ferocity of the growing dispute should have alerted the directors to the need to act

fairly and impartially at all times.

112 Second, the uncertainty over the plaintiffs' ability to pay could have been easily resolved by a phone call to inform them that payment would have to be made immediately or at least on an earlier date. As it turned out, the plaintiffs did subsequently obtain cashier's orders for an amount which would have sufficed to make full payment for the shares. While ordinarily the court might not fault insistence upon strict compliance with the formal requirements for the acceptance of an offer, I was of the view that, in this instance, it was not open to the defendants to rely upon this argument given that Rodney Tan and CTI had similarly flouted with impunity the requirement for a cashier's order to be attached to the acceptance form. The Court of Appeal's observations in *Over & Over – CA* ([58] *supra*) at [120] are apropos:

> 120 The haste with which the Rights Issue was *implemented* is also highly significant. HN permitted only eight days for JL to raise over $7m to subscribe for the new shares after the vote was taken at the Rights Issue EGM. Two requests by O&O on 1 and 2 November for just *one week's* extension of the deadline were ignored (see above at [51]–[52]) despite the utter lack of urgency for the funds.

In the same vein, I concluded that the directors' failure to consider the plaintiffs' offer to make payment in 14 days was unreasonable and in unseemly haste.

113 Third, during cross-examination, Seeto admitted that he did not think Rodney Tan would sue MDG:

> **Cross-examination of Seeto**
>
> Court: I'm asking you about your answer to the question whether you thought Rodney Tan would sue the company realistically.
>
> Witness: In my opi---honest opinion, of course he won't. But realistically as a person, driven by circumstances, it's---I can't answer on his behalf.
>
> Q I see.
>
> Court: The question is not whether in his mind he would sue or not, the question is whether in your mind you thought he would sue? So you didn't think he would sue, correct?
>
> Witness: Yes.
>
> Q Yes.
>
> Court: Correct? You said "yes". "Yes", meaning it is correct?
>
> Witness: I agree, your Honour.
>
> Court: All right.

This removed one of the key reasons for requiring the immediate payment of the subscription money by the plaintiffs and also showed that the minutes of the meeting did not reflect the truth. The haste was purely to prevent the plaintiffs from taking up the shares. In any event, there was no risk to Rodney Tan. He would not be any less secure if the directors had decided to negotiate with the plaintiffs to give them more time to make payment. If the plaintiffs turned out to be unwilling or unable to pay, there was nothing to prevent him from subscribing to all the MDG shares at a slightly

later date.

114 Finally, it emerged from Seeto's cross-examination that the main reason for allotting the shares to Rodney Tan and CTI was that both directors in fact wanted Rodney Tan to increase his shareholding in MDG. I found this evidence troubling. While it would make commercial sense to secure the commitment of a wealthy investor such as Rodney Tan, it should not be at the expense of the minority shareholders. Seeto's admission that he had clearly intended to prefer Rodney Tan over the plaintiffs confirmed my view that the First Rights Issue was conducted in a manner designed to unfairly dilute the plaintiffs' shareholding. Moreover, I was not convinced that Seeto had only MDG's interests at heart when he followed Rodney Tan's wishes. He was personally invested in helping Rodney Tan and Roscent get ahead. Further, I found it difficult to believe that Rodney Tan had not influenced their decision given that he was present at the meeting. I did not think his claim that he stayed out of the voting process was credible given his attempt to conceal his presence at the meeting in the first place.

Sub-conclusion

115 From the above analysis, the predominant purpose of the First Rights Issue was in fact to dilute the plaintiffs' shareholding in MDG. CTI was an entity together with which Rodney Tan conducted his activities and was complicit in his oppressive behaviour. Seeto and Rodney Tan had also acted in disregard of the plaintiffs' interests when they pushed through the First Rights Issue to issue Rodney Tan and CTI with what should have been the plaintiffs' allotment of MDG shares. Accordingly, I found that the plaintiffs had their shareholding unfairly diluted through the First Rights Issue and I ordered that the First Rights Issue be struck down.

The Second Rights Issue

116 In contrast, I did not think there was sufficient evidence for me to conclude that the Second Rights Issue should similarly be struck down. Rodney Tan testified that MDG needed to raise money for the Project and to repay money advanced by Rodney Tan for litigation fees, contractual damages and working capital. This was not contradicted by the plaintiffs who argued that the sum of $3.5m raised corresponded closely to the sum owed by MDG/TR to Rodney Tan in June 2008. However, this was not conclusive of any wrongdoing. Even if the money raised went primarily to repaying Rodney Tan, this in itself could not constitute oppressive behaviour.

117 That is not to say that I took no issue at all with the board's conduct of the Second Rights Issue. The board of directors should have seriously considered the plaintiffs' request to be restored to their original shareholding instead of rejecting it outright. In this respect, I found that Lim participated, though certainly not as extensively as Seeto or Rodney Tan, in the continued oppression of the plaintiffs. He had obviously not put his mind to what was purported to be the directors' meeting on the Second Rights Issue on 10 June 2008. He could not even remember if there was a solicitor present and made a mistake in his original affidavit by stating that there was one when, in fact, it was an informal meeting at a restaurant without legal advisers. Lim, as a director of MDG, had a responsibility to consider the minority shareholders' requests but failed to do so. At the 11 June 2008 EGM, he left within five minutes; evidently, he did not consider it important to participate or at least find out more about the queries and concerns raised by the plaintiffs' solicitors. While he may not have actively oppressed the plaintiffs, he was guilty by omission when he ignored or neglected their legitimate concerns. Having been nominated to the board by his boss, Rodney Tan, he was content, in my view, to go along with whatever Rodney Tan wanted and did not take his responsibilities as a director of the company seriously at all.

118 I did not think the plaintiffs' decision not to subscribe for the Second Rights Issue on the terms proposed by the board of directors should be held against them. Although the plaintiffs had the assurance that MDG or Rodney Tan would return the subscription money should the Second Rights Issue be found invalid, that did not address their chief objection that they were asked to participate in the Second Rights Issue with an already diluted percentage shareholding. I did not agree with the defendants' argument that the plaintiffs' failure to subscribe indicated a lack of genuine interest or that the Second Rights Issue was fair. At that point in time, the plaintiffs had already been diluted from a substantial shareholding of 18.18% each to a paltry 2.78% each, on which their new allotment of shares would be based. They still did not know how MDG's funds were being used and they understandably felt threatened by a hostile board of directors and the majority shareholders. In such circumstances, they were faced with a Morton's Fork – they had the unenviable choice of having their shareholding further diluted or injecting more money into a commercial enterprise that was (to them at least) conducted with blatant disregard of their interests as members. Their decision not to subscribe on the terms of the Second Rights Issue was understandable.

Conclusion

119 It was clear to me that Rodney Tan, CTI, Seeto and Sebastian Wong had acted in concert. Rodney Tan had definitely known of the remuneration paid out to Seeto and Sebastian Wong when Tan Chin Ren raised the issue in his due diligence report, apart from the other irregularities that would have been communicated to him. He chose to condone what they had done, and even approved their remuneration during the 24 October 2007 AGM. He sought Seeto's assistance during the First Rights Issue when he attempted to dilute the plaintiffs' shareholdings. Despite being a director of MDG, he chose not to respond to the plaintiffs' numerous requests for access to information on Seeto and Sebastian Wong thereby continuing the oppression first started by Seeto and Sebastian Wong. Lim, while perhaps not as culpable as the other directors, had nonetheless participated in the oppression of the plaintiffs during the Second Rights Issue. As was noted in [24] above, at the material time, CTI was 99.3% owned by Rodney Tan and 0.7% owned by Seeto. Its directors were Rodney Tan and his sister, Tan Poh Swan. Even if CTI was controlled solely by Rodney Tan there was no impediment in law to holding that, as a separate legal entity, it acted in concert with Rodney Tan. Moreover, there could be no possible objection to finding that it acted in concert with the others.

120 In the circumstances, I formed the view that the appropriate relief to be granted to the plaintiffs was a buy-out of their shares by Rodney Tan and CTI at the higher of their value immediately prior to the First Rights Issue or the current value. I ordered that the valuation was to be done by a court appointed expert (the identity of which the parties have since agreed on). I further ordered that:

(a) the valuation of the shares at the time immediately prior to the First Rights Issue take into account the potential of the Project without giving weight to the uncertainties and vicissitudes of the business as we have had the benefit of hindsight; and

(b) there ought not to be a discount for lack of marketability nor for the fact that the plaintiffs hold only minority shareholdings.

(The foregoing directions in exercise of the wide powers given to the court under s 216(2) of the Companies Act were to compensate the plaintiffs for the limited relief given by way of striking down only the First Rights Issue being a blunt instrument which by itself would not otherwise adequately requite them for the oppression); and

(c) the valuer shall have liberty to apply.

121 I found no merit in the argument that the plaintiffs had obtained free shares illegally because there was no reliance in the plaintiffs' case on any illegality. Section 216 of the Companies Act gives the court broad powers to remedy or bring to an end the matters complained of. The relationship between the parties had clearly broken down and it was futile to expect the plaintiffs to retain any meaningful stake in MDG. Therefore, the most equitable solution in any case was to order a buy-out of all the plaintiffs' shares in MDG. The question that immediately arose was the appropriate percentage interest in MDG to be attributed to the plaintiffs. If both rights issues were struck down, they would each have retained 18.18% in the company. In my view, that would have overcompensated the plaintiffs for the oppression, given the amount of time and money that Rodney Tan and CTI had invested in MDG. It was for this reason that I decided to strike down only the First Rights Issue, the more egregiously oppressive of the two rights issues although that by itself would not have adequately compensated the plaintiffs. (Hence the specific directions on the valuation.) I should add that the argument on the appropriate number of shares was immaterial as the order I made was essentially for the plaintiffs' percentage interest in MDG to be bought out; that percentage remained the same with or without the alleged failure to make payment. It was Seeto, and not the plaintiffs, who proposed the issue of the "free" shares; the plaintiffs did not play an active part in it at all. Moreover, the "free" shares were distributed pro rata amongst the existing shareholders at that point in time. The appropriate measure to remedy the failure to make payment would be to order *all* current shareholders to pay for those shares which were allegedly "free". In that event, it would not make a difference to the relief sought since the plaintiffs, as well as Rodney Tan and CTI, would have to make payment to MDG (although Rodney Tan and CTI might then seek reimbursement from the other defendants who sold them the shares in the first place).

122 I now come to costs. The costs of Gwendolyn Wong and Loke are to be borne by the plaintiffs but only with respect to the allegations of conspiracy. All fees, costs, expenses and disbursements incurred by and charged to the MDG arising out of and/or in connection with the plaintiffs' complaints and this action are to be fully reimbursed by the second to sixth defendants to MDG. In my oral judgment, I ordered that the question of costs with respect to Rodney Tan and CTI be reserved until the buy-out of the plaintiffs' shares was completed. However, after hearing further arguments from the parties, I order that Seeto, Sebastian Wong, Lim, CTI and Rodney Tan are to pay costs to the plaintiffs on a joint and several basis with respect to the proceedings already concluded against them. Even though the claim of conspiracy was dropped, I was of the view that Seeto, Sebastian Wong, Lim, CTI and Rodney Tan had acted together in oppressing the plaintiffs; therefore, they should be liable for costs on a joint and several basis. While the proceedings between the plaintiffs, CTI and Rodney Tan have yet to come to a close pending the buy-out of the plaintiffs' shares, I did not think that the plaintiffs should have to wait to recover costs from CTI and Rodney Tan. Neither CTI nor Rodney Tan would be prejudiced in bearing the costs for the proceedings that have already been concluded.

Supplementary Grounds of Decision

12 November 2010

Andrew Ang J:

Introduction

123 Following the oral judgment I delivered on 1 February 2010 ("Oral Judgment") in which I held that the appropriate relief to be granted to the plaintiffs for the oppressive manner in which the company's affairs were conducted was a buy-out of their shares by the second and fifth defendants, *viz*, Tan Boon Kian ("Rodney Tan") and Cairnhill Treasure Investment (S) Pte Ltd ("CTI"), I rendered

written grounds on 8 September 2010 ("the GD"). I further held in both the Oral Judgment and the GD that the buy-out of the shares was to be at the higher of their value immediately prior to the First Rights Issue or the current value. Pursuant to my further order that the valuation was to be done by a court-appointed expert, the parties have since agreed to the appointment of Ernst & Young ("Valuer"). However, as the date of this letter, the Valuer has yet to be appointed pending the clarifications referred to below.

124 After the GD was released, counsel for Rodney Tan and CTI wrote on 6 October 2010 to the plaintiffs' counsel seeking confirmation on various points arising out of the draft judgment that the former had prepared for the latter to review. On 13 October 2010, the plaintiffs' counsel wrote in to seek clarification on certain issues regarding the orders I had made in the Oral Judgment (and expanded upon in the GD).

125 Following a hearing on 25 October 2010 ("the Hearing"), the following two issues remained for clarification: (a) the date on which "current value" of the shares should be computed by the Valuer; and (b) the proper computation of the plaintiffs' total shareholding in the first defendant ("MDG") as a result of my orders striking down the First Rights Issue and upholding the Second Rights Issue (see [121] of the GD).

Date of "current value"

126 Counsel for Rodney Tan and CTI contended that the "current value" of the shares should be computed as at the date of the Oral Judgment, *ie*, 1 February 2010. Counsel for the plaintiffs' counsel disagreed, suggesting at the Hearing that the appropriate date should be the date on which the Valuer submits his report.

127 At the Hearing, I indicated that my intention in using the expression "current value" was to preserve the position somewhat because of the inevitable delay between the date of the Oral Judgment and the date of release of the Valuer's report. During that interval, the plaintiffs remain the owners of the shares of which I had ordered a buy-out. Meanwhile, owing to the continued running of MDG's business under Rodney Tan, it is undisputed that the value of the company can only be expected to increase. It would be unfair to the plaintiffs to value the shares as of the date that the buy-out order was made because that would be a lower historical price rather than the true value of the shares at completion of the buy-out. There is, however, some difficulty with the plaintiffs' counsel's suggestion of the date on which the Valuer submits his report. This is because in the interests of certainty the valuation should be done with reference to a date in the past, rather than a prospective date.

128 In the end, I am of the view that the "current value" of the shares should be their value as of the date of appointment of the Valuer. That date would not be so far in the past as to render the value of the shares unfairly low; it would also be an objectively and historically ascertainable date, and thus unlike a prospective date such as the date of transfer of shares or the date of submission of the Valuer's report.

Proper computation of the plaintiffs' shareholding in MDG

129 The next issue that needed clarification was the proper computation of the plaintiffs' shareholding in MDG for the purposes of valuation and buy-out. At [121] of the GD, I explained that I had decided to strike down only the First Rights Issue and not the Second Rights Issue because if both rights issues had been struck down, the plaintiffs would each have retained 18.18% of the company and that would have resulted in over-compensation to the plaintiffs for the oppression. The

decision was also in recognition of the amount of time and money that Rodney Tan and CTI had invested in MDG. However, as the GD clearly stated, the decision not to strike down the Second Rights Issue did not mean that I had taken no issue at all with the board's conduct of the same.

130 As a consequence of the First Rights Issue, the plaintiffs were asked to participate in the Second Rights Issue with an already diluted percentage shareholding; their new allotment of shares proposed under the Second Rights Issue was based on a paltry 2.78% each instead of the initial substantial shareholding of 18.18% each. Indeed, I noted at [25] of the GD that the plaintiffs' then solicitors had made a counter-proposal with the intention of restoring each plaintiff's shareholding to 18.18% but that was rejected by the board of directors. Therefore, the plaintiffs' understandable refusal to accept the Second Rights Issue could not be held against them.

131 As a result of my decision, the First Rights Issue was struck down. The respective shareholdings prior to the First Rights Issue should therefore be preserved. Following the transfer of shares held by Roscent Group Ltd ("Roscent") to CTI in May 2008, the respective shareholdings in MDG immediately prior to the Second Rights Issue ought to have been the following:

Shareholder	Shares held	Percentage
Lian Hwee Choo Phebe	226,000	18.18
Kok Lan Choo	226,000	18.18
CTI	678,000	54.54
Rodney Tan	113,000	9.10
Total	**1,243,000**	**100**

At the hearing on 25 October 2010, the plaintiffs' counsel submitted that given the circumstances under which the plaintiffs declined to take up their rights under the Second Rights Issue, the majority (*ie*, Rodney and CTI) should not have subscribed for shares which properly ought to have been offered to the plaintiffs at 18.18% each of the Second Rights Issue. I agree.

132 Given that this ought to have been their respective shareholdings immediately prior to the Second Rights Issue, the plaintiffs should have been offered 18.18% each of the 6 million shares (*ie*, 1,090,800 shares each) that were issued under the Second Rights Issue. That would have been the effect of the counter-proposal made by the plaintiffs' then solicitors to the controllers of MDG. In the event, owing to the rejection of their counter-proposal, the plaintiffs did not receive any shares from the Second Rights Issue. As I had not struck down the Second Rights Issue, those shares that the plaintiff did not take up under the Second Rights Issue should not be attributed to them for the purpose of computing the value of their shares for the buy-out. But neither should Rodney Tan and CTI have been permitted to take up those shares.

133 In the end, it was Rodney Tan who subscribed to the shares which were not taken up by the plaintiffs in the Second Rights Issue. As a result, he and CTI together currently hold 6,791,000 shares (or 93.76%) of the total number of 7,243,000 shares issued by MDG after the Second Rights Issue. Even though I decided not to strike down the Second Rights Issue, the result of that rights issue will have to be altered somewhat in the light of my decision to strike down the First Rights Issue. As the First Rights Issue was struck down in its entirety, the percentage shareholding of the six million shares that Rodney Tan and CTI were entitled to subscribe for under the Second Rights Issue should have been 63.64% (*ie*, 100% less the plaintiffs' 36.36%). Thus, they were only entitled to subscribe

for 3,818,400 shares under the Second Rights Issue, and the latter should be upheld only to this extent. They were not entitled to take up the 2,181,600 shares which should have been offered to the plaintiffs for their subscription. Therefore, the total number of issued shares in MDG currently should be 5,061,400 and not 7,243,000 (*ie*, 2,181,600 fewer shares). Consequently, the parties' respective shareholdings should be as follows:

Shareholder	**Shares held**	**Percentage**
Lian Hwee Choo Phebe	226,000	8.93
Kok Lan Choo	226,000	
CTI and Rodney Tan	4,609,400	91.07
Total	**5,061,400**	**100**

134 As I see it, this result – coupled with the specific directions as to valuation at [120] of the GD – would be the appropriate means by which justice can be achieved as between the plaintiffs on one hand and, Rodney Tan and CTI on the other. The plaintiffs will not be over-compensated nor will Rodney Tan's and CTI's investment of time and money in MDG be undervalued.