Dovechem Holdings Pte Ltd (in liquidation) and others *v* Ng Joo Soon (alias Nga Ju Soon) [2011] SGCA 35

Case Number	: Civil Appeal No 164 of 2010
Decision Date	: 19 July 2011
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Rajah Chelva Retnam SC and Chandra Mohan K Nair (Tan Rajah & Cheah) for the appellants; Adrian Tan Gim Hai, Blossom Hing Shan Shan, Ong Pei Ching and Nurul Aziah Hussin (Drew & Napier LLC) for the respondent.
Parties	: Dovechem Holdings Pte Ltd (in liquidation) and others — Ng Joo Soon (alias Nga Ju Soon)

Companies

Contract

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2011] 1 SLR 1155.]

19 July 2011 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 This appeal arises from the decision of the High Court judge ("the Judge") in *Ng Joo Soon (alias Nga Ju Soon) v Dovechem Holdings Pte Ltd and another suit* [2011] 1 SLR 1155 ("the Judgment"), where he gave judgment for Ng Joo Soon alias Nga Ju Soon ("NJS"), the plaintiff in Suit No 59 of 2009 ("S 59/2009") consolidated with Suit No 140 of 2009 ("S 140/2009"), against Dovechem Holdings Pte Ltd ("DHPL"), the sole defendant in S 59/2009 and the first defendant in S 140/2009. *Vis-à-vis* S 59/2009, the Judge's decision ("the Directorship Decision") was that the purported removal of NJS as a director of DHPL was invalid and void, and that (*inter alia*): (a) DHPL was to rectify its records with the Accounting and Corporate Regulatory Authority ("ACRA") within five days of the court's order to reflect that NJS remained a director of DHPL; and (b) NJS was to be allowed to inspect the accounting and other records of DHPL. *Vis-à-vis* S 140/2009, the Judge's decision ("the Payment Decision") was that DHPL was liable to NJS for breaching various agreements to pay him certain monthly sums ("the Payment Agreements"), but NJS was not entitled to the further reliefs sought against the second to the fifth defendants in that suit (namely, Andrew Ng Iet Pew ("Andrew"), Anta Ng ("Anta"), Ng Ju Aik alias Ng Ju Goh ("Ju Aik") and Ng Ju Lak alias Ng Joo Tian ("Joo Tian"), who will hereafter be referred to collectively as "the Other Directors") for inducing DHPL to breach its contractual obligations to NJS and for conspiring with each other to cause DHPL to commit such breach. (The Other Directors are all family members of NJS. They are, along with NJS, the sole directors and shareholders of DHPL.)

2 Dissatisfied with the Judge's decision in these two consolidated suits, DHPL and the Other Directors (collectively, "the Appellants") filed the present appeal. At the hearing of the appeal, the Appellants' counsel informed the court that the Appellants were no longer pursuing the Payment Decision. Accordingly, this judgment will deal with only the Directorship Decision.

Background facts

3 Despite coming from a humble background and receiving little formal education, NJS founded a business which eventually grew to become a successful conglomerate ("the Group"). Over the years, he invited several members of his family ("the Ng Family"), including the Other Directors, to join him in the business. DHPL is the holding company of the Group's Singapore subsidiaries and associated companies in Indonesia and China. (The Group also has a number of associated companies in Malaysia (see [12]–[14] below).) Until 2002, NJS was the managing director and chairman of DHPL, holding 52% of the shares in the company. He was the leader and public face of DHPL, with the Other Directors each holding less than 17% of the shares in the company.

4 When the Asian financial crisis struck in 1997, DHPL encountered financial difficulties. NJS advanced a total of S$6.1m (using credit facilities which he obtained from his banks) to DHPL to rescue it. That amount ("the S$6.1m advance") was the largest contribution from among all the directors of DHPL.

5 As at 14 January 2002, out of the S$6.1m advance, a sum of S$5,050,001.55 ("the Outstanding Loan") remained due to NJS. In order to repay the Outstanding Loan, DHPL entered into the Payment Agreements with NJS, under which various monthly sums were to be paid to the latter, including:

(a) a monthly sum of S$25,000 ("the Monthly Interest Reimbursement"), representing the interest incurred by NJS on the credit facilities which he took out in order to extend the S$6.1m advance to DHPL;

(b) a monthly allowance of US$20,000 or S$35,000 ("the Monthly Life Allowance"), which was based on the agreed exchange rate of US$1 to S$1.75;

(c) beginning in December 2007, a monthly instalment of S$13,750 for 24 months ("the Deduction Repayment Instalment"), representing the balance of a sum of S$429,998.45 ("the Mistaken Deduction") which DHPL had wrongfully deducted and omitted in calculating the quantum of the Outstanding Loan; and

(d) also beginning in December 2007, a monthly instalment of S$140,278 for 36 months ("the Loan Repayment Instalment") in respect of repayment of the Outstanding Loan.

The Monthly Interest Reimbursement and the Loan Repayment Instalment were to be paid by DHPL until the Outstanding Loan had been fully repaid to NJS, while the Deduction Repayment Instalment was to be paid until the Mistaken Deduction had been fully accounted for. As for the Monthly Life Allowance, it was to be paid to NJS for the rest of his life.

6 In the aftermath of the Asian financial crisis, DHPL was pressured by its banks to enter into schemes of arrangement which would require a personal guarantee from each of the Other Directors. As the Other Directors were not prepared to provide personal guarantees on the basis of their then shareholdings in DHPL, NJS was obliged and agreed to dilute his shareholding in the company and effect generational management succession. The following changes (among others) were reflected in a restructuring agreement dated 8 July 2002 between NJS and the Other Directors ("the 2002 Restructuring Agreement"):

(a) NJS would give up his 52% majority shareholding in DHPL for a diluted stake of 24%, with Andrew having a 25% shareholding and Ju Aik, Joo Tian and Anta each having a 17%

shareholding.

(b) Andrew was to manage DHPL and the Group, while NJS was to become the non-executive chairman of DHPL.

7 In December 2002, schemes of arrangement acceptable to the Group's creditors were approved by the court. NJS was appointed as the non-executive chairman of DHPL on 6 January 2003, and Andrew was appointed as its managing director and chief executive officer on 3 February 2003.

8 On 11 March 2003, at a meeting between NJS and the Other Directors to discuss the affairs of the Group, Andrew suggested drawing up a remuneration and benefits scheme to regulate the pay and other benefits given to members of the Ng Family who worked in the Group. This was recorded on pp 7–8 of the minutes of that meeting ("the 11 March 2003 meeting") as follows: [note: 1]

> **4. Any Other Matters**
>
> ***Remuneration and Benefits for Family Members***
>
> In order to set [up] a continuous remuneration and benefits system for the [Ng] Family, AN [Andrew] proposed to the Members [*ie*, NJS and the Other Directors] the need to list down and match all working family members to the rewards and benefits. [The] Members agreed and *GN [Anta] is* [*sic*] *charged to coordinate and to come out with some suggestion[s] for the Members to meet and decide again on April 14, 2003*. [emphasis added]

These minutes of meeting were "[c]onfirmed, [a]ccepted & [a]cknowledged" [note: 2] by all the Other Directors as well as NJS.

9 On 17 March 2003, Anta sent an e-mail entitled "Benefits proposal for board to consider" ("Anta's 17 March 2003 e-mail") to Andrew and two other employees of DHPL (*viz*, Edward Wong and Alison Chua). The relevant portions of that e-mail are set out below: [note: 3]

> As per last board meeting dated 11/3/03, the following is a draft benefits, limits and guidelines proposal for member [*ie*, NJS and the Other Directors] to consider[.]
>
> A) Ruling members, maximum no[.] 5 persons. Qualification minimum 10 years of working experience, minimum 33 years old. *All members above 70 years old must retire*.
>
> …
>
> B) Working member
>
> Qualification. More than 45 years old, work within the [G]roup for more than 20 years, have served as board member for subsidiaries for more than 10 years and hold position of vice[-]president and above.
>
> …
>
> C) Founding member
>
> *Qualification. H[a]v[e] joined the [G]roup in [or] before 1980 and above 70 years old or work in the [G]roup for more than 30 years. They will be paid Sin$2,000/month for life*.

Pls add your points. *We need an upper limits* [*sic*]*, as we do not want to make the same mistakes as Ming and Qing Dynasties, the benefits for royal members bankrupted the countries as the number of offspring grows*.

Alison, pls print for Mr Soon [*ie*, NJS]*, [Ju] Aik and [Joo] Tian to comments* [*sic*].

[emphasis added]

10 Pursuant to the 11 March 2003 meeting and Anta's 17 March 2003 e-mail, a remuneration and benefits plan ("the Remuneration Plan") was presented by Anta on 27 May 2003 at a meeting between NJS and the Other Directors (the Remuneration Plan is set out in full at [30]–[33] below). The notes of that meeting ("the 27 May 2003 meeting") recorded the presentation, discussion and adoption of the Remuneration Plan as follows: [note: 4]

6. Any Other Matters

Ng Family Remuneration & Benefits Plan

AN [Andrew] presented and explained the [Remuneration Plan] to the Members [*ie*, NJS and the Other Directors].

As there was no objection, [the] Members unanimously adopted and signed on the hard copy of the plan.

All [the] Members agreed to retrospect the effective date of the plan to 1st May 2003, and to hold meeting [*sic*] should there be any changes to the agreed plan in the future.

Immediately above NJS's and the Other Directors' signatures on the Remuneration Plan were the following handwritten words: [note: 5]

- ACCEPTED & APPROVED BY THE BOARD OF DIRECTORS OF DHPL
- PLAN WILL BE EFFECTIVE ON MAY 1ST, 2003

11 NJS turned 70 on 4 March 2008. However, as before, he attended a meeting of the board of directors (the "Board") of the Group on 7 April 2008, and the notes of that meeting did not disclose any questions having been raised by any Board member as to his entitlement to attend the meeting or his retirement from either the Board of DHPL or that of any other company in the Group. However, the meeting notes disclosed that there was a heated discussion over NJS's request for a 13th month payment, which led to NJS walking out of the meeting. [note: 6]

12 The tension and acrimony between NJS and the Other Directors escalated to such an extent that on 11 June 2008, NJS sent a letter to Thiam Joo (Malaysia) Sdn Bhd ("TJ Malaysia"), one of the Group's associated companies in Malaysia, stating that he wished to exercise his right as a director of the company to appoint a public accountant to inspect the accounting and other records of TJ Malaysia. He explained that he had discovered in May 2008 that TJ Malaysia's funds had been misused. He said that Andrew had purported to purchase shares in another company using those funds, while disguising the payment as being made to a supplier. On the same day (*ie*, 11 June 2008), NJS also sent a letter to DHPL stating his intention to similarly exercise his right to appoint a public accountant to inspect DHPL's records. Further, NJS filed police reports against Andrew in Malaysia,

and against Andrew and Anta in Indonesia.

13 On 19 June 2008, NJS received a letter from Dovechem Holdings (M) Sdn Bhd ("Dovechem Malaysia"), the holding company of the Group's associated companies in Malaysia, signed by the Other Directors, notifying him of his removal as a director of TJ Malaysia and another of the Group's associated Malaysian companies, Dovechem Terminals Sdn Bhd ("Dovechem Terminals"), with immediate effect. The letter also stated that since NJS had been removed as a director of TJ Malaysia, TJ Malaysia would not be responding to his letter of 11 June 2008 requesting for inspection of its records.

14 On 20 June 2008, NJS received a further letter from Dovechem Malaysia informing him that he had been removed as a director of yet another of the Group's associated Malaysian companies, Imperial Steel Drum Manufacturers Sdn Bhd ("Imperial Steel"), with immediate effect. Apparently in retort, NJS wrote to the aforesaid Malaysian companies' bankers demanding his release from the personal guarantees which he had given in respect of the companies, an act which allegedly caused several bankers to reduce their credit lines to the companies.

15 On 24 June 2008, NJS instituted Originating Summons No 841 of 2008 ("OS 841/2008") seeking an order that he be allowed to inspect DHPL's accounting and other records. OS 841/2008 was converted to a writ action (*ie*, S 59/2009) by a court order made on 20 January 2009. Subsequently, NJS commenced S 140/2009 on 16 February 2009, claiming that DHPL had breached the Payment Agreements, and that the Other Directors had induced and/or had conspired with each other to induce DHPL to commit such breach. S 59/2009 and S 140/2009 were consolidated by a court order made on 3 June 2009, and were heard by the Judge, who granted to NJS substantially the reliefs which he had prayed for (see [1] above).

16 In the meantime, no action was taken by DHPL to exclude NJS from its Board until 14 July 2008, when the other members of its Board excluding NJS (*ie*, the Other Directors) passed a Board resolution in writing to the following effect: [note: 7]

> **FILING WITH ACCOUNTING AND CORPORATE REGULATORY AUTHORITY ("ACRA")**
>
> That since Mr. Ng Joo Soon @ Nga Ju Soon, who is over the age of 70 years, has automatically retired from [DHPL] on March 05, 2008 in accordance with the [Remuneration Plan], Mr Anta Ng be and is hereby authorized to file the appropriate returns with ACRA.

17 The following day (*viz*, 15 July 2008), DHPL notified ACRA that NJS had ceased to be a director of DHPL with effect from 5 March 2008.

18 On 4 August 2008, NJS wrote to ACRA disputing DHPL's notification. As a result, ACRA wrote to DHPL on 20 August 2008 requesting for the following information: [note: 8]

> (a) Were any meetings held and/or resolutions passed to effect the removal of Ng Joo Soon @ Nga Ju Soon as a director of [DHPL]? If so, please forward us a copy of [the] said minutes of the meeting and resolutions.
>
> (b) Did Ng Joo Soon @ Nga Ju Soon give any consent to be removed as a director of [DHPL]? If yes, please forward documentary proof showing that Ng Joo Soon @ Nga Ju Soon had consented to be removed as a director of [DHPL].

19 Also on 4 August 2008, NJS's lawyers wrote to the Appellants' lawyers on a "without prejudice"

basis proposing, pursuant to cl 4.1 of the 2002 Restructuring Agreement, the appointment of a new director in NJS's place on the Boards of various companies in the Group, including DHPL. Under this proposal, NJS would immediately resign from his directorships in the companies concerned and would deliver a letter to appoint a director of his choice for each of the companies. Thereafter, the other shareholders of each of the companies would in turn appoint directors of their choice to the companies' Boards. The letter from NJS's lawyers included a request for confirmation that the new director appointed by NJS to DHPL's Board could exercise his right to inspect the financial records of DHPL. This proposal by NJS was rejected by the Other Directors on the grounds that NJS's intention was to inspect the records of DHPL through the new director nominated by him.

20 As for ACRA's queries, the Appellants' lawyers responded to ACRA on 26 August 2008 as follows: [note: 9]

> In reply to paragraph 3(a) of your said letter, please be informed that Ng Joo Soon @ Nga Ju Soon ("Joo Soon") was not removed as a director of [DHPL]. Based on the [Remuneration Plan] signed by Joo Soon as well as all the other directors of [DHPL], Joo Soon automatically retired as a director of [DHPL] with effect from 5/3/2008 after attaining the age of 70 on 4/3/2008. Enclosed herewith is a photocopy each of the [Remuneration Plan] and the directors' resolution of [DHPL] dated 14/7/2008 [*ie*, the Board resolution mentioned at [16] above] for your easy reference. As Joo Soon automatically retired as a director of [DHPL] with effect from 5/3/2008 pursuant to the [Remuneration Plan], there was no necessity in law to hold any meeting or pass any resolution to effect the automatic retirement of Joo Soon as a director of [DHPL].
>
> In reply to paragraph 3(b) of your said letter, we reiterate paragraph 3 hereof and state that by signing the [Remuneration Plan], Joo Soon ha[d] already agreed and consented to automatically retire as a director of [DHPL] with effect from 5/3/2008 after attaining the age of 70 on 4/3/2008.

The decision below

21 With respect to S 59/2009, the Judge's decision (*ie*, the Directorship Decision mentioned at [1] above) was that NJS remained a director of DHPL even after he turned 70, and was thus entitled to inspect DHPL's records pursuant to s 199 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act"). Further, ACRA's records should be rectified to reflect NJS's status as a director of DHPL. The Judge made the Directorship Decision on the following bases:

(a) NJS had neither resigned from his office of director by notice in writing, nor had he been removed from office by a shareholders' resolution, which was the proper mechanism for the removal of directors as set out in DHPL's memorandum and articles of association ("DHPL's Articles"). There were also no Board or shareholders' resolutions or minutes of Board or shareholders' meetings which showed that DHPL's Articles had been amended to provide for directors to automatically retire upon reaching the age of 70.

(b) None of the landmark contracts between the parties (*ie*, the 2002 Restructuring Agreement and the Payment Agreements) provided that NJS was obliged to retire as a director upon reaching the age of 70.

(c) The express language of the Remuneration Plan meant that NJS was to remain as a Ruling Member and a member of both DHPL's Board as well as the Group's Board until he reached the age of 70, following which he would automatically be converted to a Founding Member and take on a non-executive role. There was no retirement age for Founding Members.

(d) Although NJS had reached the age of 70 on 4 March 2008, no action was taken by DHPL to notify ACRA of the purported cessation of his directorship until 15 July 2008, and that was only after NJS had written to DHPL to request for inspection of its records under s 199 of the Act.

(e) Even after turning 70, NJS continued to attend Board meetings of both DHPL and the Group as before, and none of the Other Directors raised any questions as to his continued attendance at or the capacity in which he attended those meetings.

(f) Nothing in the express contents of the Remuneration Plan, as authenticated and assented to by all the parties, provided that NJS was to retire as a non-executive director of DHPL upon reaching the age of 70. Accordingly, NJS remained a director of DHPL, and as a director, he had a statutory right to inspect DHPL's records under s 199 of the Act.

(g) There was no evidence that NJS's request for inspection of DHPL's records was detrimental to DHPL's interests or was made *mala fide*.

The arguments on appeal

The Appellants' arguments

22 The Appellants' submission before this court is that an objective and straightforward reading of the Remuneration Plan shows that directors of companies in the Group are to retire as directors upon attaining the age of 70.

23 According to the Appellants, the fact that the Remuneration Plan states that Ruling Members may become Founding Members does not undermine the aforesaid contention because a Founding Member is not a director. Instead, a Founding Member is a special type of member who assumes a non-executive role, *ie*, he is a member who is not active in any of the companies in the Group, whether as a director or as a Working Member. The Appellants submit that since NJS has attained the age of 70, he has, under the Remuneration Plan, become a Founding Member, and as a Founding Member, he can no longer be a director.

24 The Appellants further contend that NJS is bound by the Remuneration Plan because he voluntarily and expressly consented to its terms, and there is no proof of misrepresentation or fraud. Accordingly, there ought to be little difficulty in applying the principle laid down in *In re Duomatic Ltd* [1969] 2 Ch 365 ("the *Duomatic* principle"), *viz*, the principle that "where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be" (at 373). Applying the *Duomatic* principle, the Appellants submit that the unanimous assent of the signatories to the Remuneration Plan (*ie*, NJS and the Other Directors, who, as mentioned at [1] above, are the sole directors and shareholders of DHPL) would essentially be equivalent to the unanimous assent of all the shareholders of DHPL, and such assent would be as binding as a resolution passed at a general meeting of DHPL's shareholders.

NJS's arguments

25 In contrast, NJS's position in this appeal (just as in the court below) is that he remains a director of DHPL as his purported removal was not in accordance with DHPL's Articles.

26 With respect to the Remuneration Plan, NJS argues that its express words do not provide that he was to retire as a director upon turning 70. Moreover, the context and the factual matrix

surrounding the Remuneration Plan support the Judge's interpretation that he (NJS) did not agree to automatically retire as a director upon turning 70. Accordingly, the Judge did not err in finding that the *Duomatic* principle did not apply to the facts of the present case.

27 NJS submits that even if the Remuneration Plan did provide that he was to retire as a director at the age of 70, he is not bound by that provision by virtue of the doctrine of *non est factum*.

The issues before this court

28 There are two issues before this court, namely:

(a) whether NJS remains a director of DHPL; and

(b) whether NJS is entitled to inspect DHPL's records.

We will deal with these issues in turn in the discussion which follows.

Whether NJS remains a director of DHPL

The Remuneration Plan

29 The central document upon which the issue of whether NJS remains a director of DHPL turns is the Remuneration Plan. It is thus pivotal to have a proper appreciation of that document and, in turn, determine its proper construction. The Appellants' position is that the Judge erred in fact and in law in his interpretation of that document. They contend that:

(a) the Remuneration Plan provides for the automatic retirement of all directors of companies in the Group at the age of 70;

(b) the terms of the Remuneration Plan are binding on NJS; and

(c) the said terms are automatically enforceable even in the absence of any further "activation" steps.

The provisions of the Remuneration Plan

30 We will now set out the Remuneration Plan, which is a four-page document. Page 1 is as follows: [note: 10]

DEFINITIONS

Working Members

Converted when nominated and qualify

Ruling Members Other Members

Converted when nominated and qualify

Automatic [*sic*] converted if qualify

Founding Members

Note: All members are limited to immediate family of the first generation of the Ng Family only[.] Immediate family is defined as brother, sister, son, daughter, and the registered wife. This Plan is also applicable for the member who is currently servicing the … Group.

[emphasis in original]

31 Page 2 is as follows: [note: 11]

DEFINITIONS

	Level	**Min Age**	**Join[ed] Dovechem (min)**	**Board Experience (min)**	**Retired**	**Others**
Working Members	VP or Board/ Subsidiaries	45 y/o	20 yrs	10 yrs	60	Service can be extended subject to majority approval from the Ruling Members
Ruling Members	Board/ Group	33 y/o	10 yrs	Not Necessary	70	Must be 5 members at all time[s] Service cannot be extended To be appointed director of DHPL (subject to requirements of [the] Act)
Founding Members	***Non-Executive***	70 y/o	30 yrs or Before 1980	Not Applicable		

Notes: – Any changes and modification of the above require full [B]oard approval of the Ruling Members[.]

[emphasis in original in italics; emphasis added in bold italics]

32 Page 3 is as follows: [note: 12]

REMUNERATION PLAN

	Monthly Salary	**Monthly Allowance**	**Medical Insurance**	**… 13th Month Salary**	**Others**
Working Members	S$6,000 or Payroll	As per HR Policy			Not Available
Ruling Members	S$11,000	S$1,000	Yes	Yes plus Incentive Bonus (if any)	Not applicable to Mr. Soon [*ie*, N J S] (current Chairman) Future Chairman with additional S$5,000 mthly CEO as per Agreement
Founding Members	Life time monthly remuneration of S$2,000				Not applicable t o Mr. Soon (S$35,000 mthly for life)

Notes:

– Monthly Allowance includes mobile phones, car, travel[l]ing, etc[.]

– Any changes and modification of the above require full [B]oard approval of the Ruling Members[.]

[emphasis in original]

33 Page 4 is as follows: [note: 13]

Members Listing

(as at April 2003)

Working Members	**Ruling Members**	**Founding Members**
– Ng Gek Pah	– Ng Joo Soon	Ju – Ng ~~Joo~~ Chin
– Ng Aik Leng	– Ng Joo Tian	Wei – Wong ~~Joo~~ Wai
– Ng Ek Cheong	– Ng Ju Aik	– Ng Yik Lai
	– Andrew Ng	
	– Anta Ng	

[deletions in original]

The Judge's interpretation of the Remuneration Plan

34 In the Judgment, the Judge set out the way in which he construed the Remuneration Plan as follows:

> 57 The … Remuneration Plan reveals several critical features. … *Critically, the Remuneration Plan expressly states that for Founding Members, the Retirement age is "Not Applicable" (see p 2). What this means*, ex facie*, is that NJS was to remain a Ruling Member and member of [DHPL's] Board and [the] Group until he reached the age of 70, following which, in accordance with p 1 …, he would be automatically converted to a Founding Member and would take on a non-executive role for which there was no retirement age. NJS would have automatically qualified by virtue of his having joined the Group for 30 years or before 1980*. Whilst NJS is not here classified as a Founding Member but rather as a Ruling Member, the retirement age of Ruling Members is set out as 70[,] whereupon he is automatically converted to a Founding Member and retains his personal life entitlements. All other Ruling Members are to retire at 70 and do not become Founding Members unless they qualify as having worked with the Group for 30 years or before 1980.
>
> 58 Notwithstanding the express language of the Remuneration Plan to the contrary, [Joo] Tian explained his view that "Non-Executive" in the Remuneration Plan means that they [*ie*, Founding Members] are no longer involved in any capacity (be it as director, employee or otherwise). He is of this view because he notes that none of the members described as Founding Members in the Remuneration Plan were currently directors of [DHPL]. *In essence he is of the view that "Non-Executive" means no position, whether executive or non-executive corporate position. However, his view is at variance with what the Remuneration Plan sets out expressly. "Non-Executive" as used in the Remuneration Plan has no meaning save in relation to employment and remuneration arising out of executive or non-executive corporate positions*.
>
> [emphasis added]

35 The Appellants claim that the Judge's approach was wrong as it is clear from what is stated on p 2 of the Remuneration Plan that Ruling Members – *ie*, directors – are to retire as directors at the age of 70 without exception and there is no provision for extending a director's service. In essence, the point which the Appellants seek to make is that upon NJS attaining the age of 70 and being converted from a Ruling Member to a Founding Member, he ceased to be a director of DHPL. The rationale of the Appellants' argument is that: [note: 14]

> … Founding Members are merely a special category given to the relatives of the Ng Family who never really took part in the management of [DHPL], and who require some honorary role as a sign of respect for elders and a form of 'pension' for life under the [r]emuneration [s]cheme envisaged by the [Remuneration] Plan. The [Remuneration] Plan however required all directors to retire on attaining 70 years of age.

In this regard, the Appellants reiterate the point that all parties to the Remuneration Plan had agreed that, moving forward, DHPL should be led by the younger generations of the Ng Family. It would, the Appellants submit, be inconsistent with that objective to have an arrangement whereby directors can continue in office in perpetuity until they decide to quit on their own volition as this will preclude the younger generations of the Ng Family from filling up vacancies in DHPL's Board.

Principles governing documentary construction

36 It is a settled principle of documentary construction that in construing a document, it is permissible for the court to take into account the surrounding circumstances and the factual matrix which constitute the background in which the document was prepared and executed (see this court's decision in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [131]).

37 In *Straits Advisors Pte Ltd v Behringer Holdings (Pte) Ltd and another and another application* [2010] 1 SLR 760, this court emphasised the importance of construing contractual terms in the light of the context in which those terms were drafted (at [8]):

> … [W]e must first emphasise that contractual terms must be construed in the light of the *context* in which they were drafted (see generally the decision of this court in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029). Narrow and technical constructions which are inconsistent with the whole scheme of a given contract and the circumstances in which it was concluded must be eschewed. We would also add that a contextual understanding is especially important in the instant case, where the relevant agreements can, with respect, hardly be said to be models of precise – let alone exemplary – draftsmanship. [emphasis in original]

It is clear from the aforesaid authorities that in this case, the court is entitled, in construing the Remuneration Plan, to examine the background leading to it, including the rationale for the 2002 Restructuring Agreement. This, the Judge did in the proceedings below.

Our interpretation of the Remuneration Plan

38 As we see it, there are a number of difficulties with the interpretation which the Appellants seek to place on the Remuneration Plan. First, it is plain that nowhere in the Remuneration Plan is it expressly provided that NJS was to retire as a director of DHPL upon reaching the age of 70. The Remuneration Plan also does not contain a provision stating that all directors of DHPL (as well as all directors of the other companies in the Group) are to retire as directors upon turning 70. The table on p 2 of the Remuneration Plan appears to indicate that a Ruling Member (and at p 4, NJS is listed as a Ruling Member since the Remuneration Plan was drawn up when he was still under the age of 70) is to retire as a Ruling Member upon reaching the age of 70. Such a Ruling Member can then become a Founding Member if he either: (a) has worked in the Group for at least 30 years; or (b) started to work in the Group before 1980. Significantly, as the Judge pointed out at [57] of the Judgment (reproduced at [34] above), no retirement age is prescribed for a Founding Member.

39 Our second difficulty with the Appellants' interpretation of the Remuneration Plan lies with the word "[n]on-[e]xecutive" [note: 15] in the table on p 2 of the plan. This was touched on by the Judge at [58] of the Judgment (likewise reproduced at [34] above). One of the common business meanings of the word "executive", as used in respect of an officer of a company, is an officer who has an active day-to-day role in the management of the company. The term "non-executive" would, accordingly, mean an officer who has a relatively "back seat" role (so to speak) in the management of the company. From this perspective, being a director of a company is not tantamount to holding an executive position – in other words, a person may be a director of a company even if his position in the company is said to be a "non-executive" one. Thus, when NJS became a Founding Member upon turning 70, the fact that his position in DHPL became "non-executive" in nature does not entail that he therefore automatically ceased to be a director of the company.

40 Third, given the exceptional and unique role of NJS in DHPL and the Group as a whole, the Appellants' contention that pursuant to the Remuneration Plan, NJS was automatically retired as a director upon turning 70 is, in our view, not at all credible. NJS was undoubtedly the real founder of both DHPL and the Group. Although he is not among the Founding Members listed on p 4 of the Remuneration Plan, that is because (as we pointed out at [38] above) the Remuneration Plan was drawn up at a time when NJS had yet to reach the age of 70 (the minimum age prescribed for Founding Members). There is no question that NJS's contributions to DHPL and the Group far surpass those of the three persons listed on p 4 of the Remuneration Plan as Founding Members (namely, Ng Ju Chin, Wong Wei Wai and Ng Yik Lai): the latter are, in the Appellants' words, merely "elders" [note: 16] who "never really took part in the management of [DHPL]". [note: 17] The special position of NJS in DHPL and the Group is also evidenced by the remuneration provisions on p 3 of the Remuneration Plan. Under those provisions, Ruling Members are entitled to a monthly salary of S$11,000 and a monthly allowance of S$1,000, whilst Founding Members are entitled to a lifetime monthly payment of S$2,000. Those provisions are, however, expressly stated to be "[n]ot applicable" [note: 18] to NJS, who is to receive a monthly payment of S$35,000 for life instead. In view of the special status accorded to NJS by the express terms of the Remuneration Plan, it flies in the face of reason to construe that document as requiring NJS to automatically retire as a director of DHPL and all the other companies in the Group upon reaching the age of 70.

41 The fourth flaw in the Appellants' interpretation of the Remuneration Plan relates to a basic principle on the contruction of documents, namely: since the Remuneration Plan was drawn up by the Appellants (specifically by Anta, so it appears (see [8]–[9] above)), any reasonable doubt as to its scope or meaning should, applying the *contra proferentem* rule, be resolved in favour of the other party, *ie*, in favour of NJS (see *Chitty on Contracts* (H G Beale gen ed) (Sweet & Maxwell, 30th Ed, 2008) ("*Chitty*") at vol 1, paras 12-083–12-085). In this regard, there can be no doubt that the Remuneration Plan lacks clarity in so far as the retirement of directors (*ie*, whether they are indeed obliged to retire as directors at the age of 70 as the Appellants contend) is concerned.

42 Fifth, the Remuneration Plan is, to say the least, informal and cryptic. Yet, if the Appellants' contention is correct, this document has a serious impact as it requires all directors of DHPL (and, indeed, all directors of the other companies in the Group) – including its very founder, NJS – to retire as directors on attaining the age of 70. There is, however, no requirement in DHPL's Articles that a director must retire at the age of 70. Instead, Art 71 of DHPL's Articles provides (*vis-à-vis* the removal of directors) that "[DHPL] may by ordinary resolution remove any director before the expiration of his period of office and may by … ordinary resolution appoint another person in his stead". [note: 19] If NJS and the Other Directors intended to amend this Article by signing the Remuneration Plan at the 27 May 2003 meeting (and for the purposes of this paragraph as well as [43] below, we will assume that the Remuneration Plan does indeed require all directors of DHPL and the other companies in the Group to retire as directors upon turning 70), that proposed amendment was clearly ineffectual in law. This is because s 37(1) of the Act states that "[s]ubject to [the] Act … and to any conditions in its memorandum, a company may by *special resolution* alter or add to its articles" [emphasis added]. There is nothing in DHPL's memorandum of association which dispenses with the need for a special resolution where amendment of DHPL's Articles is concerned. Thus, since no special resolution to amend Art 71 of DHPL's Articles was passed either at the 27 May 2003 meeting or at any time thereafter, the Remuneration Plan cannot be read as overriding that Article so as to require NJS to retire as a director upon turning 70. We should add that the absence of a special resolution amending Art 71 of DHPL's Articles *cannot* be "cured" (so to speak) by applying the *Duomatic* principle – *ie*, it *cannot* be said that although no special resolution was passed to amend Art 71 of DHPL's Articles, based on the *Duomatic* principle, that Article was nonetheless amended at the 27 May 2003 meeting when NJS and the Other Directors, who are the sole shareholders of DHPL,

unanimously assented to the Remuneration Plan. It bears emphasis that the facts in the present case are far removed from those in *In re Duomatic Ltd*, where the irregularity to which the *Duomatic* principle was applied was relatively minor (the irregularity there concerned the payment of salaries to the directors of a company, who were also its sole shareholders, without the prior passing of the requisite resolution by the company in general meeting). What the Appellants are attempting to do in the present case is to rely on the *Duomatic* principle to enforce an alleged agreement relating to directors' retirement which is contrary to the express provisions of DHPL's Articles.

43 In the light of the provisions of the Act and DHPL's Articles, it is, to our minds, an utter exaggeration to say that when NJS and the Other Directors signed the Remuneration Plan on 27 May 2003 (assuming the plan does indeed require all directors of companies in the Group to retire as directors upon turning 70, as the Appellants contend), they intended it to constitute a definitive agreement between them which was to be given effect forthwith without further ado. The fact that the Remuneration Plan was expressed to have retrospective effect from 1 May 2003 onwards does not necessarily entail that no further steps were required to implement it, especially given that it has the serious impact (based on the Appellants' interpretation) of requiring all directors of DHPL and the other companies in the Group – including the founder, NJS – to retire as directors on attaining the age of 70 and, furthermore, is inconsistent with the express provisions of DHPL's Articles. To construe the Remuneration Plan as having the definitive and immediate effect contended for by the Appellants is unwarranted. In our view, this extremely informal document was obviously presented merely for discussion purposes at the 27 May 2003 meeting, even though it was signed by NJS and the Other Directors at the meeting itself and was stated as operating retrospectively from 1 May 2003 onwards. It constitutes, at most, an in-principle agreement, with further steps required to implement it, including, in particular, making the necessary amendments to DHPL's Articles.

44 We would further add that the evidence shows that the Remuneration Plan was originally intended to address the issue of remuneration only (see [8] above). It appears that it was Anta who decided to include provisions on directors' retirement in his proposed draft of the Remuneration Plan, and that none of the Other Directors or NJS asked him to come up with such provisions. The only evidence which shows that there might have been an intention on the part of the Other Directors and NJS for Anta to also make provision for directors' retirement in the Remuneration Plan is Anta's 17 March 2003 e-mail, which stated, *vis-à-vis* Ruling Members, that "[a]ll members above 70 years old must retire". [note: 20] However, the problems with adopting this view of that e-mail are twofold. First, the e-mail did not say that Ruling Members would also have to retire as members (whether executive or non-executive) of DHPL's Board on reaching the age of 70. Second, there is no evidence that the e-mail was circulated to the Other Directors and NJS and that all of them knew about its contents (although we note from the last sentence of the e-mail that it was to be printed out for NJS, Ju Aik and Joo Tian to comment on); there is also no evidence of what each of them had in mind in asking Anta, at the 11 March 2003 meeting, to come up with "a continuous remuneration and benefits scheme for the [Ng] Family". [note: 21] Accordingly, Anta's 17 March 2003 e-mail can only represent Anta's subjective viewpoint or intention, and cannot form part of the factual background relevant to the interpretation of the Remuneration Plan. In any case, it is questionable whether Anta's subjective intention in coming up with the Remuneration Plan was indeed to also make provision for directors' retirement (in addition to making provision for the remuneration of those members of the Ng Family who worked in the Group). It would appear from the tenor of Anta's 17 March 2003 e-mail, which referred to how, during the Ming and the Qing dynasties in China, "the benefits for royal members bankrupted the countr[y] as the number of offspring grows [*sic*]", [note: 22] that Anta's concern at the material time was limited to putting in place a standard regime for remunerating those members of the Ng Family who worked in the Group so as to avoid the Group being similarly "bankrupted" [note: 23] by unlimited payments to an increasing number of family members.

45 The sixth flaw in the Appellants' interpretation of the Remuneration Plan is that, interestingly, the Other Directors, like NJS, took the position that NJS could continue as a director of DHPL after he attained the age of 70. This was highlighted by the Judge at [22] and [50] of the Judgment, where the following circumstances were alluded to:

(a) NJS attended the Group's Board meeting on 7 April 2008, and the notes of that meeting did not disclose any questions having been raised as to his attendance at that meeting or his retirement from either DHPL's Board or the Board of any other company in the Group (see also [11] above);

(b) NJS did not tender a written notice of resignation (which was required of directors resigning from DHPL's Board (see Art 74(e) of DHPL's Articles)) when he reached the age of 70, and this was not merely an oversight of a formality; and

(c) DHPL's Articles were not amended to insert a new provision that upon a director reaching the age of 70, he would automatically be retired or his directorship would automatically become vacant.

46 In this regard, it is equally pertinent that on 19 June 2008, well after NJS turned 70, Dovechem Malaysia purported to terminate NJS's directorships in TJ Malaysia and Dovechem Terminals on the basis that (*inter alia*) NJS's request to inspect TJ Malaysia's records "[would] be the beginning of internal strife and infighting among members of the Ng Family". [note: 24] Dovechem Malaysia's termination letter, which was signed by all the Other Directors, made no reference to the fact that NJS had already automatically retired as a director of TJ Malaysia and Dovechem Terminals upon turning 70 on 4 March 2008 (which would be the position based on the Appellants' interpretation of the Remuneration Plan). Indeed, if NJS had already automatically retired as a director of those two Malaysian companies on 4 March 2008, there would have been no need to terminate him as a director.

47 For all these reasons, we agree with the Judge that the Remuneration Plan did not require NJS to retire as a director of DHPL (or as a director of any other company in the Group) upon attaining the age of 70, nor did it mean that NJS was automatically deemed to have retired as a director on reaching that age. In other words, NJS is currently still a director of DHPL.

Whether NJS consented to retire from DHPL's Board at the age of 70: The issue of non est factum

48 Even if we were to hold that the Remuneration Plan does (as the Appellants contend) require every Ruling Member, including NJS, to retire as a director upon attaining the age of 70, a corollary question to consider would be whether NJS signified that a concluded agreement to that effect came into being when he signed the Remuneration Plan. In this regard, NJS has raised, *inter alia*, the plea of *non est factum*, contending that he was misled by Anta, who drew up the document, into thinking that what was set out therein only related to the remuneration to be paid to the various categories of family members who were involved in or working for the Group.

49 A party can plead *non est factum* in respect of a deed executed or a document signed by him where he "has been misled into executing a deed or signing a document essentially different from that which he intended to execute or sign" (see *Chitty* at vol 1, para 5-101). If this plea is successfully made out, "[t]he deed or writing is completely void in whosesoever hands it may come" (see likewise *Chitty* at vol 1, para 5-101). In the present case, the notes of the 27 May 2003 meeting (see [10] above) do not indicate that there was any mention or discussion at that meeting of the retirement of directors or of the retirement of officers of DHPL and/or the Group generally. It is not in dispute that

NJS is illiterate as far as the English language is concerned. He did not appear to be careless in signing the Remuneration Plan as he trusted Anta. The Judge did not make any ruling on NJS's plea of *non est factum* as it was not necessary for him to do so in view of his ruling on the scope and effect of the Remuneration Plan. While we can take a similar stance, we feel compelled to observe that there are certainly grounds upon which NJS can raise the plea of *non est factum*. We would therefore hold that NJS is not bound by the Remuneration Plan, at least in so far as the question of mandatory retirement as a director upon reaching the age of 70 is concerned.

Whether NJS is entitled to inspect DHPL's records

50 We now turn to the second issue outlined at [28] above, *viz*, whether NJS is entitled to inspect the accounting and other records of DHPL. Here, s 199 of the Act is germane. It reads as follows:

> (1) Every company and the directors and managers thereof shall cause to be kept such accounting and other records as will sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance-sheets and any documents required to be attached thereto to be prepared from time to time, and shall cause those records to be kept in such manner as to enable them to be conveniently and properly audited.
>
> …
>
> (3) The records referred to in subsection (1) shall be kept at the registered office of the company or at such other place as the directors think fit and shall at all times be open to inspection by the directors.
>
> …
>
> (5) The Court may in any particular case order that the accounting and other records of a company be open to inspection by a public accountant acting for a director, but only upon an undertaking in writing given to the Court that information acquired by the public accountant during his inspection shall not be disclosed by him except to that director.

51 As held by this court in *Wuu Khek Chiang George v ECRC Land Pte Ltd* [1999] 2 SLR(R) 352 ("*Wuu Khek Chiang*") at [25] and [33] *vis-à-vis* the then equivalent of s 199 of the Act (namely, s 199 of the Companies Act (Cap 50, 1994 Rev Ed)), a director of a company has an absolute right under s 199 of the Act to inspect the accounting and other records of the company so long as the right is exercised by him to enable him to discharge his duties as a director. It is clear that a director does not need to furnish any particular reason for his request for inspection (see *Wuu Khek Chiang* at [27]).

52 Given our ruling that NJS remains a director of DHPL (see [47] above), he is entitled to inspect DHPL's records pursuant to s 199 of the Act unless the Appellants are able to prove that his request for inspection lacks *bona fides*. In this regard (see *Wuu Khek Chiang* at [34]):

> It is for those who oppose [a] director's right to inspect to show "clear proof" and to satisfy the court "affirmatively" that the grant of the right of inspection would be for [a] purpose which would be detrimental to the interests of the company. There must be a "real ground" that the right would be abused and that substantial harm would be caused to the company thereby.

At the trial, the Judge noted (see [37] of the Judgment) that the Appellants had failed to adduce any

evidence to show that NJS's request for inspection of DHPL's records was made *mala fide* or that the request, if granted, would be detrimental to DHPL's interests.

53 Before this court, the Appellants argued that the following circumstances showed that NJS's request to inspect DHPL's records was made *mala fide*:

(a) The timing of NJS's request to inspect DHPL's records coincided with the period when NJS was slowly being removed as a director of several of the Group's associated companies in Malaysia (namely, TJ Malaysia, Dovechem Terminals and Imperial Steel). It also coincided with the time when he was vigorously pursuing the issue of DHPL's repaying him the amounts which he claimed he was entitled to.

(b) The above factors, compounded with the hostile legal threats and disruptive behaviour of NJS, "painted a picture of suspicion clouded with reasonable beliefs of the ill intentions of NJS". [note: 25]

(c) With the conclusion of the trial, it was clear that NJS wanted to see DHPL's records to ensure that personal payments due to him would be forthcoming.

54 In our opinion, the Appellants' allegations are without any merit. First, it is clear that the purported removal of NJS as a director of the aforesaid Malaysian companies occurred only after he requested to inspect TJ Malaysia's records. As mentioned earlier (see [12] above), on 11 June 2008, NJS wrote to TJ Malaysia setting out his inspection request. It was in response to this request that Dovechem Malaysia sent NJS letters on 19 June 2008 and 20 June 2008 removing him as a director of TJ Malaysia, Dovechem Terminals and Imperial Steel (see [13]–[14] above).

55 As for the other two points relied on by the Appellants as "evidence" of NJS's *mala fides* in requesting for inspection of DHPL's records (see sub-paras (b) and (c) of [53] above), they are, in our view, bare assertions which are not supported by any shred of evidence.

56 In the circumstances, we find that the Judge did not err in allowing NJS access to DHPL's records.

Conclusion

57 In the result, we find that there are no merits in this appeal, which we hereby dismiss with costs and the usual consequential orders.

[note: 1] See the Respondent's Supplemental Core Bundle filed on 20 December 2010 ("SCB") at pp 115–116.

[note: 2] See SCB at p 116.

[note: 3] See SCB at p 285.

[note: 4] See SCB at p 28.

[note: 5] See the Appellants' Core Bundle dated 19 November 2010 ("ACB") vol 2 at p 304.

[note: 6] See SCB at pp 252–253.

[note: 7] See ACB vol 2 at p 312.

[note: 8] See ACB vol 2 at p 315.

[note: 9] See ACB vol 2 at p 316.

[note: 10] See ACB vol 2 at p 305.

[note: 11] See ACB vol 2 at p 306.

[note: 12] See ACB vol 2 at p 307.

[note: 13] See ACB vol 2 at p 308.

[note: 14] See the Appellants' Case dated 18 November 2010 ("the Appellants' Case") at para 24.

[note: 15] See ACB vol 2 at p 306.

[note: 16] See the Appellants' Case at para 24.

[note: 17] *Ibid*.

[note: 18] See ACB vol 2 at p 307.

[note: 19] See ACB vol 2 at p 297.

[note: 20] See SCB at p 285.

[note: 21] See SCB at p 115.

[note: 22] See SCB at p 285.

[note: 23] *Ibid*.

[note: 24] See SCB at p 102.

[note: 25] See the Appellants' Case at para 73.

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