Sim City Technology Ltd *v* Ng Kek Wee and others
[2013] SGHC 216

Case Number : Suit No 680 of 2009/X

Decision Date : 23 October 2013

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Lisa Sam (Lisa Sam & Company) for the plaintiff; Lim Chee San (TanLim Partnership) for the first and sixth defendants.

Parties : Sim City Technology Ltd — Ng Kek Wee and others

Companies – Oppression

Companies – Directors – Duties

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 156 of 2013 was allowed by the Court of Appeal on 9 September 2014. See [2014] SGCA 47.]

23 October 2013 Judgment reserved.

Lai Siu Chiu J:

Introduction

1 Sim City Technology Ltd ("the plaintiff"), who is a shareholder of Singalab International Private Limited ("the fourth defendant"), brought the present action under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act") to seek personal remedies for oppression and/or unfair prejudice arising from the conduct of Ng Kek Wee ("the first defendant") and/or Chan Mun Kong ("the sixth defendant") in managing the affairs of a group of companies, which were allegedly treated as one business with and/or integrally connected to the fourth defendant (hereinafter referred to as "the Singalab/Beans Group").

Background facts

2 The relevant background to the present dispute is set out below and the various disputes of fact will be resolved later in this judgment.

The background to the formation of the fourth defendant

3 Prior to 13 May 2005, the first defendant and various other third party shareholders owned Beans Fusion Pte Ltd ("Beans Fusion"), which in turn owned the following four subsidiaries:

(a) Singalab Pte Ltd ("the fifth defendant");

(b) Beans Factory Hong Kong Co Limited ("Beans Factory (HK)");

(c) Beans Factory Pte Ltd (which owned the licensing rights to "Beans Kernl", a programming tool to write software and programmes ("the Beans Kernl Licensing Rights")); and

(d) Beans Factory Co Ltd (Beijing) ("Beans Factory (Beijing)").

4 Sometime in 2003, the first defendant approached Lim Kok Eng ("LKE"), who was then the Managing Director ("MD") of the plaintiff and StarVision Information Technology Pte Ltd ("StarVision"), to consider taking an interest in the business of Beans Fusion. In the first quarter of 2004, the first defendant did a management buyout of the various third party shareholders of Beans Fusion and became the sole shareholder of that company.

5 Subsequently, from May 2004 to May 2005, StarVision provided loans and advances amounting to approximately US$500,000 to the fifth defendant and Beans Factory (HK) to help finance the business operations and cash-flow needs of those two companies ("the US$500,000 Advance/Loan"). StarVision rendered such financial assistance to the two companies with the prospect of ultimately taking up a stake in them through a holding company, and for the Beans Kernl Licensing Rights to be transferred from Beans Factory Pte Ltd to the fifth defendant. Beans Fusion, Beans Factory Pte Ltd and Beans Factory (Beijing) would then become dormant companies and/or be ultimately liquidated.

6 Sometime in the second quarter of 2004, the first defendant approached the representative of the second defendant, Huang Jun Dar ("Huang"), and obtained his confirmation to invest in the fifth defendant and Beans Factory (HK).

7 It was eventually decided that a new company would be incorporated to own the fifth defendant and Beans Factory (HK). The fourth defendant was thus incorporated on 31 August 2004 in Singapore as an investment holding company for this purpose. The plaintiff, the first defendant, Accord Perfect Investment Corporation ("the second defendant") and Atomic International Ltd ("the third defendant") became shareholders of the fourth defendant in the following proportions:

S/n	**Shareholder**	**Manner of taking up stake in fourth defendant**	**Shareholding in fourth defendant**
1	Plaintiff (as the nominee of StarVision)	Conversion of the US$500,000 Advance /Loan into 482,626 ordinary shares	53.625%
2	First defendant (in his personal capacity)	Investment	15%
3	Second defendant (as the nominee of Huang)	Investment	6.375%
4	Third defendant	Investment	25%

According to the plaintiff, the third defendant was actually the nominee of the first defendant, but the first defendant disputed that.

8 Pursuant to a Sale and Purchase Agreement dated 30 September 2004, the shares of Beans Factory (HK) and the fifth defendant were eventually transferred from Beans Fusion to the fourth defendant on 31 December 2004 and 13 May 2005 respectively at a consideration of S$630,000.Thereafter, the fifth defendant and Beans Factory (HK) became wholly owned subsidiaries of the fourth defendant. Later, by way of a Deed of Assignment dated 22 June 2005, the Beans Kernl Licensing Rights were transferred from Beans Factory Pte Ltd to the fifth defendant for a nominal consideration of S$1.

9 It was the plaintiff's case that at the time the fourth defendant was set up, there was an understanding between the parties that the business of the fourth defendant (*viz*, its subsidiaries) was to grow and expand, with the ultimate aim of the fourth defendant being listed or acquired. To that end, the first defendant was put in charge of running the business. In or around October 2004, an executive committee ("the Exco") was formed consisting of the first defendant, two of the plaintiff's representatives, namely LKE and Ng Han Kim ("Ng"), and the second defendant's representative, Huang.

The management of the fourth defendant and its subsidiaries

10 I now turn to look at the management of the fourth defendant and its subsidiaries.

The fourth defendant

11 Ng, representing the plaintiff, was appointed as a director of the fourth defendant from 1 September 2004 to 30 June 2005. The first defendant has been the Group Chief Officer ("CEO"), Chief Technical Officer ("CTO") and MD of the fourth defendant since its incorporation.

The fifth defendant

12 The first defendant became the MD of the fifth defendant on 1 November 2002 and continued to remain as such after the fourth defendant acquired the shares of the fifth defendant. Ng and Huang (but not LKE) were also initially the directors of the fifth defendant but they resigned in May/June 2005.

13 In 2005, there was a proposed merger and acquisition ("M&A") between the fifth defendant and Cyber Village Holdings Ltd ("CVHL"). One Tony Pua ("Pua") from CVHL was then appointed as the second director of the fifth defendant. It subsequently came to the parties' attention that Pua's appointment could be a potential conflict of interest as the M&A was still in the works. Therefore, on 7 October 2005, the first defendant emailed the sixth defendant (who had been an employee of Beans Factory Pte Ltd since 2 May 2000 and an employee of the fifth defendant since 1 April 2004) to ask him to consider being an "interim director" of the fifth defendant.

14 On 19 October 2005, the first defendant followed up with another email to the sixth defendant asking for an update on the status of his consideration and whether he was "ok for Nov to Dec". That same day, the sixth defendant replied asking the first defendant whether he (*ie*, the sixth defendant) would need to perform any tasks as a director. The first defendant responded that same day informing him that there were no tasks at that moment and that the directorship would "be over by Dec".

15 On 20 October 2005, the sixth defendant confirmed his agreement to "take up the director role till Dec". Thereafter, on 28 October 2005, the first defendant appointed the sixth defendant as a director of the fifth defendant. Sometime in November 2005, the proposed M&A deal with CVPL fell through. It is not disputed that the sixth defendant was never a signatory to the fifth defendant's accounts during the time that he was a director of the fifth defendant.

16 The sixth defendant's resignation from his directorship of the fifth defendant was filed with the Accounting and Corporate Regulatory Authority of Singapore ("ACRA") on 27 May 2009. The sixth defendant claimed that he had actually resigned earlier on 1 January 2008 as indicated in a letter dated 3 December 2007, but his resignation was only lodged later due to an oversight. The plaintiff disputed that. It was the plaintiff's case that the sixth defendant continued as a director of the fifth

defendant and only resigned on 27 May 2009.

Beans Factory (HK)

17 The first defendant was the Chairman of Beans Factory (HK) from 2004 until the sale of Beans Factory (HK) to its local manager, Fong Ho Wan ("Fong") on 14 April 2008 (see [21]–[22] below).

The background to the formation of Beans Factory (Malaysia)

18 In June 2006, Lim Beng Cheang ("LBC"), a Malaysian working for StarVision's sister company in Malaysia, was instructed by the plaintiff to assist the first defendant in expanding the fourth defendant's business (*viz*, its subsidiaries) to Malaysia. To this end, a Malaysian private limited company known as Beans Factory Solutions Sdn Bhd ("Beans Factory (Malaysia)") was incorporated. LBC held one of two subscriber shares in Beans Factory (Malaysia), while the first defendant held the other share. It was the plaintiff's case that those shares were held on trust for the Singalab/Beans Group.

19 LBC and his sister were appointed as the two requisite local directors of Beans Factory (Malaysia), while the first defendant was appointed as the third director. LBC and the first defendant were the two signatories to the bank account of Beans Factory (Malaysia).

The disposal of the fourth defendant's subsidiaries

The transfer of the fourth defendant's interest in the fifth defendant to the first defendant

20 The first defendant claimed that at a meeting with the shareholders of the fourth defendant on 12 June 2006 ("the 12 June 2006 Meeting"), he told them that the fifth defendant was not doing well and asked them to inject more capital into the fifth defendant. The shareholders allegedly declined to do so. The first defendant then proposed that he obtain bank loans in the name of the fifth defendant and put up a personal guarantee for the loans. According to the first defendant, the shareholders agreed. The first defendant then proceeded to arrange for the fourth defendant's interest in the fifth defendant to be transferred to him ("the Transfer"). Those shares were vested in the first defendant on 28 July 2006. As we shall see at [46] below, the first defendant's account of the 12 June 2006 Meeting kept changing over the course of the proceedings.

The transfer of the fourth defendant's interest in Beans Factory (HK) to Fong

21 According to the first defendant, because Beans Factory (HK) was making a loss, he had also sought and obtained the plaintiff's and the second defendant's authorisation for the disposal of the fourth defendant's interest in Beans Factory (HK) at the 12 June 2006 Meeting. On 15 April 2008, the first defendant caused the fourth defendant's interest in Beans Factory (HK) to be transferred to Fong for a nominal consideration of HK$1 ("the Beans Factory (HK) Transfer"). Four months later, on 5 August 2008, Fong on-sold Beans Factory (HK) to Integrated Wealth Technology. The consideration for this subsequent sale is not known.

22 The first defendant's version of events was disputed by both the plaintiff and the second defendant. They claimed that the 12 June 2006 Meeting never took place and that they did not, at any time, consent to the Beans Factory (HK) Transfer. According to the plaintiff, the first defendant made no mention about the Beans Factory (HK) Transfer at all. On the contrary, the first defendant continued to update the plaintiff on the status of Beans Factory (HK). After the plaintiff made repeated requests for records and accounts of Beans Factory (HK) in January 2008, the first

defendant told the plaintiff on 20 April 2009 that he had "closed" the Beans Factory (HK) operations. The plaintiff only found out about the Beans Factory (HK) Transfer on 18 May 2009 after conducting its own searches (see [26] below).

The transactions that were not accounted for

23 Meanwhile, according to the plaintiff, the first defendant was behind many transactions within the Singalab/Beans Group that were not accounted for. These transactions included:

(a) Authorising the withdrawal of over RM1.4m in cash from Beans Factory (Malaysia) from August 2006 to February 2009 to pay the invoices issued by the fifth defendant in respect of labour and skills supplied by the fifth defendant for Malaysian projects ("the Malaysian Cash Withdrawals"). In relation to which,

(i) The fifth defendant's invoices issued to Beans Factory (Malaysia) mentioned in (a) were not taken up in the fifth defendant's accounts; and

(ii) The Malaysian Cash Withdrawals were not accounted for.

(b) Authorising the net total withdrawal of over S$4.2m in cash from the fifth defendant's DBS bank account from January 2008 to June 2010 ("the fifth defendant Cash Withdrawals"). These cash withdrawals were not accounted for.

(c) Authorising payments amounting to over S$495,000 from the fifth defendant to third parties and himself from July 2005 to August 2009 ("the fifth defendant Payments"). These payments were not accounted for.

It was the plaintiff's case that the above transactions were all part of the first defendant's plan to bleed the fifth defendant and Beans Factory (Malaysia) and give the impression that the two entities were not doing well.

The events leading to the commencement of the present action

24 Sometime in February 2009, the plaintiff, prompted by the inability of Beans Factory (Malaysia) to pay staff salaries, got wind of the Malaysian Cash Withdrawals. After repeated requests, demands and offers to help the first defendant draw up and audit the accounts, the first defendant agreed to a meeting with representatives of the plaintiff on 18 May 2009 ("the 18 May 2009 Meeting"). At this meeting, the state of the accounts of the fifth defendant and Beans Factory (Malaysia) were raised. The irregularities pertaining to the Malaysian Cash Withdrawals (see [23(a)] above) and the fifth defendant Payments (see [23(c)] above) started to unravel.

25 The plaintiff also discovered at this meeting that the first defendant was holding on to all the issued share capital of the fifth defendant. According to the plaintiff, when asked to explain how this came to be, the first defendant responded by blaming Ng for not following up on the transfer of the shares in the fifth defendant to the fourth defendant during the earlier restructuring exercise in 2004 to 2005 (see [8] above).

26 Having found out all the irregularities, the plaintiff asked the first defendant to make an offer to buy its shares in the fourth defendant. The first defendant indicated that he would give a response shortly. After the meeting ended, the plaintiff conducted its own searches and discovered the truth about the Transfer (see [20] above) and the Beans Factory (HK) Transfer (see [21]–[22] above).

27 On 20 May 2009, the first defendant sent a letter of apology ("the Apology Letter") to the plaintiff's representatives making certain admissions of fault and offered to purchase the plaintiff's shares in the fourth defendant for US$400,000. What followed thereafter was a series of attempts by the plaintiff to meet with the first defendant to review the source documents and accounts of the fourth and fifth defendants. On 29 May 2009, the first defendant sent to the plaintiff copies of some, but not all, of those documents. From the documents available, the plaintiff discovered even more irregularities pertaining to the fifth defendant Cash Withdrawals and the fifth defendant Payments (see [23(b)] and [23(c)] above).

28 After several failed attempts to come to a consensus for the buy-out of the plaintiff's interest in the fourth defendant, the plaintiff commenced the present action on 4 August 2009. It should be noted that the plaintiff's claims are against the first and sixth defendants only. The second, third, fourth and fifth defendants are only nominal defendants.

The setting up of Beans Group (SG)

29 More problems arose after the plaintiff filed the present action on 4 August 2009. An Extraordinary General Meeting ("EGM") of the fourth defendant was eventually held on 28 August 2009 to appoint two of the plaintiff's representatives to the board of directors. Thereafter, several directors' meetings of the fourth defendant were held but the first defendant failed to properly account for what had happened. It was only at a meeting on 2 September 2009 that the first defendant said for the first time that the fourth defendant had no subsidiaries and that he had transferred the fourth defendant's interest in the fifth defendant to himself as security for a personal guarantee that he gave so as to obtain bank loans for the fifth defendant. The plaintiff also filed a complaint against the first defendant with the Commercial Affairs Department.

30 In the midst of the problems in [29], an entity known as Beans Group Pte Ltd ("Beans Group (SG)") was incorporated in Singapore on 26 August 2009. The plaintiff subsequently found out that the sole director and shareholder of this company was actually the first defendant's 71 year old mother, Swa Soo Eng ("Mdm Swa"). Beans Group (SG) also established a presence in Malaysia and Taiwan, *viz*, Beans Group Sdn Bhd and Beans Group Taiwan Limited. It was the plaintiff's case that the first defendant was a shadow director of Beans Group (SG) and had wrongfully diverted the resources and business of the fifth defendant to Beans Group (SG) in breach of his fiduciary duties to the fifth defendant.

The sale of Beans Group (SG)

31 Beans Group (SG) was subsequently sold to HiSoft Singapore Pte Ltd ("HiSoft") pursuant to a Sale and Purchase Agreement dated 17 January 2011 ("the S&P Agreement").

The terms of the sale

32 Clause 3 of the S&P Agreement provided that the estimated total purchase price of S$5,460,046.00 was to be paid in two tranches as follows:

(a) Payment of Tranche 1 of S$1,638,014 was to be made upon completion of the sale in the following manner:

(i) 45% of Tranche 1 amounting to S$737,106 by way of a cashier's order ("the Tranche 1 Cashier's Order") in favour of Beans Group (SG); and

(ii) 55% of Tranche 1 amounting to S$900,907 by way of restricted shares in HiSoft Technology International Limited ("HiSoft Tech") (a company listed on the Nasdaq Stock Exchange) which have a vesting period of three years from the date of issue ("the HiSoft Tech Restricted Shares").

(b) Payment of Tranche 2 amounting to S$3,822,032 was in the following manner:

(i) after the release of HiSoft's audited accounts for 2011, 40% of Tranche 2 amounting to S$1,528,813 (subject to the adjustment based on the Performance Earn-out) was to be paid by way of HiSoft Tech Restricted Shares issued on 1 January 2012; and

(ii) after the release of HiSoft's audited accounts for 2012, 60% of Tranche 2 amounting to S$2,293,219 (subject to the adjustment based on the Performance Earn-out) was to be paid in cash.

33 Clauses 3.5 to 3.13 of the S&P Agreement spelt out how the Performance Earn-out for Tranche 2 in [32(b)] above was to be calculated. A brief summary of this is set out in the table below:

Governing clause in the S&P Agreement	**Percentage of actual performance compared to the target performance**	**Amount payable under Tranche 2**
3.7	< 81%	Nothing would be payable
3.8	100% to 101%	Normal Tranche 2 payment of S$1,528,813 for 2011 and S$2,293,219 for 2012 (*ie*, no adjustments would be necessary)
3.9	81% to 100%	5% of the corresponding Tranche 2 payment (*ie*, S$1,528,813 for 2011 and S$2,293,219 for 2012), increasing at the rate of 5% for every 1 percentage point increase from 81%, thereby achieving a possible total of 95% of the respective Tranche 2 payments.
3.10 to 3.13	For 2011 101% to 130%	Over-Performance Earn-out (of S$39,960, increasing at the rate of S$39,960 for every 1 percentage point from 101%, up to the maximum of S$1,200,000) in addition to S$1,528,813.
	For 2012 101% to 120%	Over-Performance Earn-out (of S$33,500, increasing at the rate of S$33,500 for every 1 percentage point from 101%, up to the maximum of S$670,000) in addition to S$2,293,219.

34 On 9 November 2012, HiSoft Tech completed its merger with another company, called Pactera Technology International ("Pactera Tech"). The Restricted Shares were accordingly converted at the ratio of about 14 HiSoft Tech Restricted Shares to 1 Pactera Tech share. HiSoft also changed its name to Pactera Singapore Pte Ltd ("Pactera").

The proceeds of the sale

35 Pursuant to a Deed of Assignment dated 17 January 2011 ("the Deed of Assignment"), Beans Group (SG) assigned all its "rights, entitlement, title and interest whatsoever" that it had under the S&P Agreement to the first defendant ("the Deed of Assignment"). On 20 April 2011, the first defendant deposited the Tranche 1 Cashier's Order of S$747,106 which was issued in his name into an account with Oversea-Chinese Banking Corporation Limited ("the OCBC bank account") that he held jointly with his wife. From this OCBC bank account, S$280,000 was transferred to Beans Group (SG) in various tranches. According to the first defendant, this was used to pay Beans Group (SG)'s creditors and staff's salaries.

36 From the limited evidence that was adduced by the first defendant at trial, it seems that the events that subsequently transpired are as follows. The first defendant instructed his wife to withdraw S$100,000 from her POSB bank account, S$25,000 from her own United Overseas Bank ("UOB") bank account and S$160,000 from another UOB account that she held jointly with the first defendant's mother. The S$160,000 was then deposited into the first defendant's UOB account. The total sum of S$285,000 was then transferred to a Standard Chartered Bank ("SCB") bank account held jointly by the first defendant's sister-in-law and her husband. The first defendant then effectively borrowed a sum of money (it was unclear whether it was S$100,000 or S$115,000) from his sister-in-law and her husband, as he made arrangements for S$400,000 to be paid to HiSoft from that SCB bank account. According to the first defendant, another cheque of S$80,000 was paid to HiSoft, bringing the total to S$480,000. The first defendant claimed that the total of S$480,000 was paid to HiSoft to discharge the legitimate debts of Beans Group (SG) that were owing to HiSoft (SG). It was the plaintiff's case that all these monies were not properly accounted for.

37 As for the proceeds of the sale in the form of HiSoft Tech Restricted Shares (which were eventually converted to Pactera Tech shares), it was the first defendant's evidence that pursuant to the Deed of Assignment and an undated Restricted Share Award Side Letter, he identified eight persons to receive the shares. HiSoft Tech eventually entered into Restricted Stock Award Agreements with five of the eight persons identified, in the following proportions:

Name	**Proportion**
Sixth defendant	1.5%
Jiang Jin Hui	1.5%
Ghe Peng Koon Eugene	1.0%
Chong Poh	3.0%
First defendant	93%

38 The first defendant acknowledged that he received the shares payable under Tranche 1. He also acknowledged that he had received the shares payable under Tranche 2 for the financial year of 2011. However, he denied receiving any shares under Tranche 2 for the financial year of 2012. It was the plaintiff's case that the maximum Over-Performance Earn-out was payable for *both* financial years 2011 and 2012. The first defendant currently holds 153,375 Pactera Tech shares while the sixth defendant currently holds 3,218 Pactera Tech shares. It was the plaintiff's case that those shares were tantamount to secret profits being made by the first and sixth defendants.

The Issues

39 The plaintiff proceeded on both limbs of s 216(1) of the Companies Act in this claim. The

section provides as follows:

> **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).

40 In *Over & Over Ltd v Bonvests Holdings Ltd and another* [2010] 2 SLR 776 ("*Over & Over*"), the Court of Appeal noted at [70] that s 216(1)(a) and (b) of the Companies Act actually straddles four alternative limbs under which relief may be granted – (a) oppression; (b) disregard of a member's interest; (c) unfair discrimination; or (d) otherwise prejudicial conduct. It went on to observe that "the four limbs are not to be read disjunctively" and that "[t]he common thread underpinning the entire section is the element of unfairness." It also affirmed (at [77]) the test of whether there had been "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". The Court of Appeal went on to explain that *both* the legal rights and the legitimate expectations of members must be taken into account in determining whether the test of commercial unfairness has been met (at [78]).

41 In the present case, the plaintiff was essentially claiming that it had been a victim of commercial unfairness arising from:

(a) The first defendant's breaches of his duties to the fourth and/or fifth defendants under the Companies Act and on the common law in relation to the following:

(i) the alleged unlawful disposals of the fourth defendant's property;

(ii) the alleged misappropriation of funds and mismanagement of the fifth defendant's accounts; and

(iii) the alleged unlawful formation of Beans Group (SG).

(b) The sixth defendant's breaches of his duties to the fourth and/or fifth defendants under the Companies Act and the common law in relation to the following:

(i) deliberately turning a blind eye to the Transfer by the first defendant;

(ii) deliberately turning a blind eye to the alleged misappropriation of funds and mismanagement of the fifth defendant's accounts by the first defendant; and

(iii) facilitating the alleged unlawful formation of Beans Group (SG).

42 I will first proceed to set out my findings of fact on the three key issues in dispute, namely: (a) whether the disposals of the fourth defendant's property were unlawful; (b) whether the first defendant had misappropriated the funds of and mismanaged the accounts of the fifth defendant; and (c) whether the formation of Beans Group (SG) was unlawful.

Findings of fact

Whether the disposals of the fourth defendant's property were unlawful

43 As a director of the fourth defendant, the first defendant was under a statutory duty under s 160 of the Companies Act to seek the approval of the fourth defendant in general meetings before disposing of the whole or substantially the whole of its property. The said provision reads:

> **Approval of company required for disposal by directors of company's undertaking or property**
>
> **160.**—(1) Notwithstanding anything in a company's memorandum or articles, the directors shall not carry into effect any proposals for disposing of the whole or substantially the whole of the company's undertaking or property unless those proposals have been approved by the company in general meeting.

44 In the present case, the fourth defendant was just a holding company of the fifth defendant and Beans Factory (HK). Put another way, the latter two entities effectively constituted the whole of the fourth defendant's assets. The consent of the fourth defendant's shareholders was therefore required for the lawful disposal of the fifth defendant and Beans Factory (HK). This much was not disputed by the first defendant. Indeed it was the first defendant's case that the necessary shareholders' consent for the Transfer and the Beans Factory (HK) Transfer was obtained at the 12 June 2006 Meeting.

45 Having seen and heard the parties, I have every reason to disbelieve the first defendant's evidence that the 12 June 2006 Meeting took place and that the consent of the plaintiff and the second defendant was obtained. I set out my reasons below.

46 First, the first defendant's evidence as to who attended the 12 June 2006 Meeting was unsatisfactory and inconsistent:

(a) In the Defence of the first and fifth defendants dated 4 September 2009, the first defendant pleaded (at para 17(b)) that Ng (representing the plaintiff), the second defendant and the third defendant all attended the meeting.

(b) In the plaintiff's Reply to the Defence of the first and fifth defendants dated 22 September 2009, the plaintiff pointed out (at para 8(3)) that Ng had resigned from his directorship of the plaintiff in June 2005, one year *before* the 12 June 2006 Meeting.

(c) In the Further and Better Particulars dated 11 May 2010 (which was filed pursuant to an Order of Court dated 26 April 2010), the first defendant's account changed. He then asserted (at para (f)) that: (i) it was another representative of the plaintiff, Lai Chee Kong ("Lai"), who attended on behalf of the plaintiff; (ii) the second defendant did *not* attend the meeting but the first defendant had spoken to Huang prior to the meeting; and (iii) the third defendant's representative was the first defendant.

(d) In the Defence of the first and fifth defendants (Amendment No 1) dated 16 November 2010, the first defendant's account differed *again* in that he said (at para 18(b)) that it was *Ng* who attended on behalf of the plaintiff.

(e) The version of events as mentioned in (d) above then remained the same in the Defence of the first and fifth defendants (Amendment No 2) dated 23 February 2011 (at para 18(b)) and the Defence of the first and fifth defendants (Amendment No 3) dated 26 September 2012 (at para 16(b)(b)).

(f) However, when it came to the trial, the first defendant's evidence changed yet again. He claimed in court that it was *Lai* who attended the meeting on behalf of the plaintiff. When asked to explain the various discrepancies, the first defendant said that he made a mistake in identifying the correct individual. I noted that he admitted that Ng and Lai did not look alike.

47 In contrast, the clear and consistent evidence of the plaintiff and the second defendant was that the 12 June 2006 Meeting never took place. The second defendant's representative, Huang, provided evidence that he was not in Singapore at that time. He also emphatically denied having any conversation with the first defendant regarding a request for more capital injection and/or the Transfer. It seems to me that the numerous changes in the first defendant's evidence as set out in the preceding paragraph were simply an attempt to patch up the gaps in his fabricated account of events. My conclusion is fortified by the fact that there was no hint or any reference to such a meeting or consent in any of the voluminous documents tendered before the court.

48 Next, I had great difficulty accepting the veracity of the first defendant's underlying basis for the Transfer. The first defendant claimed that the fifth defendant was in financial difficulties at the material time and needed fresh funds to stay afloat. But this situation, even if true, would have been caused at least in part by the first defendant himself. He had caused substantial sums of monies to be paid out of the fifth defendant (amounting to over S$105,126.40 as at 12 June 2006) without any proper justification. Even at the trial, the first defendant was unable to provide the source documents to justify those payments. I am therefore obliged to draw an adverse inference against him. I am unable to place any weight at all on the evidence of the first defendant's expert Chung Siang Joon ("Chung"). In cross-examination Chung conceded that he did not have sight of the relevant source documents to independently verify the payments received by the first defendant.

49 I am also unable to accept the first defendant's assertion that he had asked for a capital injection but was rejected. On the evidence, the first defendant had always made his many requests for corporate loans by way of emails. Yet, there was not even a single reference to such a request in the voluminous documents before the court. The first defendant sought to distinguish this particular occasion from the rest on the basis that the urgency of the need and the magnitude of the loan required a face-to-face meeting. I found this difficult to believe given the absence of any independent supporting evidence and weighed against the first defendant's overall lack of credibility (as will become even more apparent later). I also find it difficult to believe that the plaintiff would have totally turned down the first defendant's request for a loan if he had asked for one. In fact, on or about 21 July 2006, the first defendant made a request for a S$35,000 loan on behalf of Beans Factory (Malaysia) which the plaintiff granted. The evidence also showed that the plaintiff had almost always provided financial assistance to the Singalab/Beans Group whenever the first defendant made a request. If the fifth defendant was genuinely in need of funds (and this was in fact communicated to the plaintiff), the plaintiff would, as an investor with direct interest in the Singalab/Beans Group, have every reason to help the fifth defendant to the extent that it was able to.

50 I further noticed that the first defendant's evidence was inconsistent on the loans that were

allegedly taken up by the fifth defendant pursuant to the 12 June 2006 Meeting. In all four versions of the Defence of the first and fifth defendants, the first defendant stated that he had procured: (a) a Business Instalment Loan for S$124,000 from SCB which was disbursed into the fifth defendant's account on 5 September 2006 and which was repayable by 48 monthly instalments commencing 1 October 2006 ("the first SCB Loan"); and (b) another Business Instalment Loan for S$100,000 from SCB which was disbursed into the fifth defendant's account on 17 September 2007 and which was repayable by 36 monthly instalments commencing 1 November 2007 ("the second SCB Loan"). At the trial, the first defendant for the *first* time said that there was a *third* loan from OCBC Bank ("the OCBC Loan"). I did not accept his explanation of the discrepancy when he said that he treated the first and second SCB Loans as one loan in his pleadings. The fact remains that the OCBC Loan was not pleaded at all and it seems to me to be a belated attempt on the first defendant's part to justify some of the fifth defendant's Payments.

51 Further, the first defendant's explanation that he held the shares of the fifth defendant as security for the personal guarantees of the bank loans did not stand up to scrutiny. According to him, he needed the shares of the fifth defendant as "security" in the sense that he wanted to prevent the other shareholders of the fourth defendant from exercising their voting rights to remove him as a director of the fifth defendant and impede his ability to ensure that the fifth defendant duly made good the repayment of the bank loans. He did not mean "security" in the sense of possessing the ability to sell or liquidate those shares should the need arose. The first defendant consequently took the position that in his view the fourth defendant remained the beneficial owner of the fifth defendant shares, and this was consistent with his continuing to inform the plaintiff about the status of the Singalab/Beans Group. His explanation turned out to be inconsistent with other evidence. In an undated disclosure document signed by the first defendant in the financial statements of the fifth defendant for the financial year ending 31 March 2008, the first defendant declared that all the shares in the fifth defendant were held beneficially by *him*. It seems to me that first defendant kept the plaintiff informed of the status of the Singalab/Beans Group only to give it the false assurance that nothing was amiss.

52 Finally, I took into account the fact that the first defendant's very first reaction upon being confronted at the 18 May 2009 Meeting was to give the (false) impression that the shares of the fifth defendant were in his name because they were not transferred to the fourth defendant in the first place back in 2004/2005 (see [25] above). The plaintiff's assertion of the first defendant's reaction at this meeting is independently supported by the Apology Letter. The material portions of that letter state:

> Dear Jason et. al.
>
> I sincerely apologize for the way things turned out at the meeting on Mon 18th May 2009 at 2:00pm. What brought on to the outcome I believe is my incompetence to present with a reasonable set of financial data as executive director *and in failing to do the ownership transfer*. In a nutshell, as a managing director, I've been unable to:-
>
> a. Present a set of financial data and account for them since the last date of official filing with IRAS was submitted in 2006. From 2007-to-date, the information hadn't been properly furnished.
>
> b. *Failed to transfer ownership for Singalab Pte Ltd to Singalab International Pte Ltd since the inception of the latter*.
>
> c. Didn't submit annual returns to ACRA since 2005.

[emphasis added]

When confronted with this during cross-examination, the first defendant was deliberately obtuse before stating that he had "written it incorrectly in English", giving the excuse that he was under "extreme duress". It is my view, that his excuses were untrue. Apart from the fact that those excuses came up for the first time during cross-examination, what was more telling was that there was no independent contemporaneous document referring to or even remotely alluding to the first defendant's account of events.

53 For these reasons, I find that the requisite consent for the Transfer and the Beans Factory (HK) Transfer was not sought and obtained at the 12 June 2006 Meeting or at any other time. Accordingly, those transfers were unlawful.

Whether the first defendant had misappropriated the funds of and mismanaged the accounts of the fifth defendant

54 Next, as a director of the fifth defendant, the first defendant owed a duty at common law and under s 157(1) of the Companies Act to act honestly in the interests of the fifth defendant. It goes without saying that such a duty naturally extends to the management of the fifth defendant's accounts.

Adverse inference for failure to disclose

55 Before going into the specifics of the plaintiff's allegations of the first defendant's mismanagement of the fifth defendant's accounts, I should make some general observations on the first defendant's conduct when it came to disclosure.

56 On the evidence before me, it was plain that the first defendant had dug in his heels and dragged his feet when it came to providing the accounts of the Singalab/Beans Group. Between January 2008 and May 2009, the Plaintiff made no less than 27 requests and reminders to the first defendant to provide the necessary documents. In response, the first defendant gave excuses, false assurances and employed delayed tactics. He had even gone to the extent of making false declarations that the fourth and fifth defendants were dormant and private exempt companies to avoid having to file audited accounts. Eventually the first defendant admitted his failure to furnish the necessary accounts in the Apology Letter (see [52] above).

57 Even after legal proceedings had started, the first defendant continued to be difficult. The plaintiff was compelled to take up one discovery application after another, even up to the last few days of the trial. The first defendant disclosed limited documents in dribs and drabs. Even so, it was evident therefrom that the first defendant blatantly disregarded his disclosure obligations. In relation to the documents of the fifth defendant pre-dating 29 May 2009 which the plaintiff contended had not been disclosed (such as: (a) the payment vouchers for 2008; (b) the invoices for 2005 and 2008; (c) the receipts for 2006, 2007, 2008; and (d) the bank statements for 2008), the first defendant maintained that he had already provided them to the plaintiff. This was difficult to believe since the plaintiff would have no reason to ask for the documents if it already had them.

58 As for documents dated after 29 May 2009, the first defendant's excuse was that he left it at the old office premises of the fifth defendant. This was equally absurd. In an acknowledgment slip dated 9 April 2010, the first defendant had agreed with the landlord of the old office premises to retrieve the remaining items there in good order. The first defendant also admitted that he had returned to the premises to retrieve the remaining items. Yet, according to him, he nevertheless

decided to leave the relevant documents and databases at the old premises because he had no new premises at which to store them. It was unbelievable that the first defendant would not have been able to secure temporary storage space. He did not even attempt to do so. At this juncture, I should highlight that the first defendant is not the clueless and simple lay person that he attempted to portray himself to be. On the contrary, he holds a doctorate in information systems.

59 Overall, I find that the first defendant was dishonest in his disclosure obligations in a manner that could only be reasonably explained as an attempt to suppress the truth. As such, I draw an adverse inference against him that the documents that have not been disclosed would have corroborated the plaintiff's claim against him.

60 I will now turn to consider the various aspects of the plaintiff's allegations of the first defendant's mismanagement of the fifth defendant's accounts, which allegations were based on the limited documents that the first defendant had disclosed.

The Malaysian Cash Withdrawals

61 First, I address the Malaysian Cash Withdrawals. The first defendant and LBC were the signatories to Beans Factory (Malaysia)'s bank account and all the cheques were already pre-signed by the first defendant. According to LBC, the local director of Beans Factory (Malaysia), the first defendant often gave him instructions to facilitate the advance transfer of funds to the first defendant, purportedly for the cash flow needs of the fifth defendant. The first defendant also assured LBC that the fifth defendant would raise the necessary invoices to Beans Factory (Malaysia) to account for those withdrawals. LBC then made arrangements for the cash cheques to be encashed and the funds to be remitted to the first defendant either by way of telegraphic transfer or through a designated money changer in Kuala Lumpur. On the occasions where the first defendant happened to be in Malaysia, the first defendant would sometimes encash the cash cheques himself or the staff would do so for him and hand the funds to the first defendant in person. Over time, this manner of withdrawals caused problems in the accounts of Beans Factory (Malaysia). After repeated requests by LBC, the first defendant finally provided the fifth defendant's invoices. However, to date, the first defendant has failed to provide the official receipts of the fifth defendant to confirm that the funds had indeed been received by the fifth defendant. He has also failed to confirm that the invoices were taken up in the fifth defendant's books.

62 The first defendant's explanation during cross-examination was that there was actually no monetary movement between the two entities. Further, according to the first defendant, it was LKE who advised him to raise the fifth defendant's invoices for the benefit of Beans Factory (Malaysia)'s tax deduction purposes. The monies that were withdrawn were then purportedly returned to LBC to pay for the expenses of Beans Factory (Malaysia).

63 I am unable to accept the first defendant's account for the following reasons. First, there was no supporting evidence from LKE or from anyone else giving the first defendant instructions to raise the fifth defendant's invoices for the benefit of Beans Factory (Malaysia)'s tax deduction purposes. That said, in the first defendant's favour, I have also considered that for obvious reasons, those involved in tax deduction arrangements would naturally seek to minimise any paper trail. I should mention that at the tail end of the trial, the first defendant attempted to introduce a document which purportedly supported his case on the tax deduction. I disallowed the admission as the document should have been properly disclosed and discovered much earlier and the first defendant had not given any good reason for not doing so. Given his record of disregarding his disclosure obligations (see [55]–[59] above), I saw no reason to grant him any indulgence at such a late stage. Secondly, on the one hand, the first defendant claimed that he saw no need to account to LKE about the

Malaysian Cash Withdrawals because the plaintiff was neither a shareholder nor a director of Beans Factory (Malaysia). Yet, on the other hand, the first defendant claimed to be content to follow LKE's alleged advice to raise the fifth defendant's invoices for Beans Factory (Malaysia)'s tax deduction purposes. Thirdly, the tax deduction explanation came up belatedly at the trial. Despite knowing that in late 2009 LBC was contemplating lodging a report against him with the Malaysian police for misappropriation of funds (which LBC in fact did in January 2010), the first defendant was not forthcoming with this explanation. More importantly, there was no independent evidence to support his claim that the Malaysian Cash Withdrawals had been returned to Beans Factory (Malaysia) for the payment of legitimate expenses. The first defendant's defence was unsustainable against the overwhelming contrary evidence before the court.

64 Consequently, I find that the first defendant had misappropriated the Malaysian Cash Withdrawals which were meant to be disbursed to the fifth defendant. In so doing, he had clearly mismanaged the fifth defendant's accounts.

The fifth defendant Cash Withdrawals and the fifth defendant Payments

65 The first defendant claimed that a portion of the fifth defendant Cash Withdrawals were necessary because the fifth defendant's accounts had previously been frozen by the Inland Revenue Authority of Singapore ("IRAS") and he needed to ensure that he had funds to pay staff's salaries and creditors. He testified that he and/or his administrative manager would keep the cash and disburse the funds for such legitimate purposes. After much prevarication on the stand, the first defendant finally admitted that he did *not* keep an account of the ins and outs of all the cash that he withdrew.

66 To-date, the first defendant has failed to provide the necessary source documents to account for the whereabouts of the cash and the purpose. He has also failed to satisfactorily account for the fifth defendant Payments. It bears reiterating that no weight can be placed on Chung's opinion on the legitimacy of the withdrawals and payments because Chung was not provided with the necessary source documents to independently and properly verify the transactions.

67 In the absence of any credible evidence that the first defendant had duly applied the fifth defendant Cash Withdrawals and the fifth defendant Payments for the legitimate purposes of the fifth defendant, I find that he had misappropriated those funds and mismanaged the fifth defendant's accounts.

Whether the formation of Beans Group (SG) was unlawful

68 As a director of the fourth and fifth defendants, the first defendant owed a duty at common law and under the Companies Act to act honestly in the best interests of the company and avoid any conflict of interests. Section 157 of the Companies Act reads as follows:

> **As to the duty and liability of officers**
>
> 157.—(1) A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.
>
> (2) An officer or agent of a company shall not make improper use of any information acquired by virtue of his position as an officer or agent of the company to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the company.

It was the Plaintiff's case that the setting up of Beans Group (SG) was unlawful in that it was in

breach of the above duties that the first defendant owed to the fifth defendant. I agree for the reasons set out below.

69 Undoubtedly, the first defendant was the controlling mind behind Beans Group (SG). The first defendant did not disclose the fact that the sole shareholder and director of Beans Group (SG) was his 71 year-old mother. The plaintiff only discovered this after conducting its own searches. Indeed, the first defendant had tried to conceal the true extent of his control of Beans Group (SG). In the first defendant's affidavit dated 3 February 2012 filed in response to the plaintiff's application for specific discovery, the first defendant claimed that he was "just an employee" of Beans Group (SG) and was therefore not in a position to provide discovery. Yet, the first defendant had held himself out to others that he was the Group Chief Executive of Beans Group (SG). In affidavits filed in other legal proceedings relating to Beans Group (SG), he claimed to be the "general manager" and "managing director" of Beans Group (SG). The first defendant claimed that those inconsistencies arose out of honest mistakes. This was untrue. I note that in cross-examination the first defendant eventually admitted to giving directions to his mother for matters pertaining to Beans Group (SG). All these truths that emerged during the trial gave me additional cause to doubt the overall credibility of the first defendant.

70 Next, it was also clear that the first defendant had diverted the resources of the fifth defendant to Beans Group (SG). It was established during his cross-examination that 12 out of 36 employees of the fifth defendant (of which 3 were acknowledged by the first defendant to be key employees) crossed over to Beans Group (SG). Evidence of the diversion of the Beans Kernl Licensing Rights was also adduced.

71 In addition, the plaintiff provided evidence that the first defendant had previously marketed the fifth defendant as part of "Beans Group" and had also represented Beans Group (SG) as being formerly known as the fifth defendant. Several clients of Beans Group (SG) were also found to be the same as the fifth defendant's. Evidence was also adduced showing that Beans Group (SG) used the same technology as that protected under the Beans Kernl Licensing Rights owned by the fifth defendant. Beans Group (SG) had also stepped into the fifth defendant's shoes by the novation of certain contracts.

72 Having considered all the evidence, it was clear to me that the first defendant had breached his duties to the fifth defendant in setting up and driving the business of Beans Group (SG). The law is clear that whether the fifth defendant would or could have taken the business opportunities that eventually went to Beans Group (SG) is immaterial (see the English High Court case of *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162, which was applied by the Singapore High Court in *Hytech Builders Pte Ltd v Tan Eng Leong and another* [1995] 1 SLR(R) 576 ("*Hytech*") at [48] and affirmed by the English Court of Appeal in *Bhullar v Bhullar* [2003] EWCA Civ 424 at [41]).

The first defendant's liability

73 It follows therefore from my findings that the first defendant had breached the duties that he owed to both the fourth and fifth defendants at common law and under the Companies Act.

74 The remaining issue to address is whether this court should exercise its discretion to grant the first defendant relief under s 391 of the Companies Act, which provides as follows:

> **Power to grant relief**
>
> **391.**—(1) If in any proceedings for negligence, default, breach of duty or breach of trust against

a person to whom this section applies it appears to the court before which the proceedings are taken that he is or may be liable in respect thereof but that he has *acted honestly and reasonably* and that, *having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused* for the negligence, default or breach the court may relieve him either wholly or partly from his liability on such terms as the court thinks fit.

(1A) For the avoidance of doubt and without prejudice to the generality of subsection (1), "liability" includes the liability of a person to whom this section applies to account for profits made or received.

…

(3) The persons to whom this section applies are —

(a) officers of a corporation

…

[emphasis added]

75 In *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (a firm)* [2007] 4 SLR(R) 460 at [166], the Singapore Court of Appeal affirmed the principle enunciated in *Hytech* that the paramount consideration in the court's discretion under s 391 of the Companies Act is whether the person who seeks the court's indulgence has "acted honestly and in good faith". It highlighted (at [167]) that based on the wording of s 391, the relief "must be underpinned by the presence of the three elements of honesty, reasonableness and fairness".

76 Applying these legal principles, I find that there is no basis to grant relief to the first defendant. First, the first defendant's conduct of the affairs of the companies entrusted to his management was far from honest. He avoided disclosure for as long as he could, lied to the fourth defendant's shareholders, manipulated the companies' accounts, and even made false declaration to the authorities. His justification that he was looking out for the welfare of the fifth defendant's employees by withdrawing hard cash from the fifth defendant to pay staff's salaries and setting up Beans Group (SG) to save them from the sinking ship that was the fifth defendant can hardly be said to be reasonable. This is because the fifth defendant would not have been in the red and the present litigation which further drained the resources of the fifth defendant would not have been necessary if the first defendant had discharged his duties properly in the first place. Further, the fact that the first defendant did not receive remuneration for his directorship is not a redeeming factor as he had clearly benefited from the misappropriation of funds from the fifth defendant and the later sale of Beans Group (SG) to HiSoft. On this point I fully agree with the following sentiment expressed by the High Court in *Hytech* (at [62]):

On the face of it, [s 391] of the Act appears to be more applicable to a case where the misfeasance has resulted in a loss to the company. It would be meaningful then to speak of exoneration, or 'excusing'. *It seems far-fetched and unreal to speak of exoneration when the result of it would be to let the offending director keep gains which should not have gone to him in the first place.*

[emphasis added]

The sixth defendant's liability

The sixth defendant's liability

77 It is evident that the sixth defendant's liability is dependent upon the first defendant's liability. The sixth defendant's overall liability turns on the determination of the following further factual issues:

(a) The sixth defendant's resignation from directorship of the fifth defendant;

(b) The sixth defendant's role in:

(i) the Transfer;

(ii) the first defendant's misappropriation of funds and mismanagement of the fifth defendant's accounts; and

(iii) the setting up of Beans Group (SG).

The sixth defendant's resignation from the directorship of the fifth defendant

78 I turn first to the issue of the sixth defendant's resignation. The circumstances leading to the appointment of the sixth defendant as a director of the fifth defendant has already been set out earlier in the factual narrative at [13]–[15] above. According to the sixth defendant, he had assumed that his directorship had automatically lapsed in December 2005 based on his understanding that his appointment was a temporary and/or an interim one. About a year later in late 2007, he read about a director resigning on the internet, which then prompted him to find out more about whether a formal letter of resignation was necessary to resign as a director. It was only then that he became aware that he had to formally resign from his directorship. He then instructed the fifth defendant's administrative officer to date his resignation to be effective from 1 January 2008 for convenience and easier administration. Due to an administrative oversight, his resignation was not lodged with ACRA until 27 May 2009.

79 The plaintiff disputed the sixth defendant's account of events. It was the plaintiff's case that the sixth defendant had resigned only on 27 May 2009 and that his letter of resignation was conveniently backdated to 1 January 2008 because that was *before* the fifth defendant Cash Withdrawals started. The plaintiff further pointed out that the sixth defendant's defence was inconsistent with his signing of the following documents in the capacity of a *director* of the fifth defendant *after* 1 January 2008:

(a) on 27 March 2008, he signed a resolution to amend Arts 101 and 102 of the fifth defendant's Articles of Association;

(b) on 1 April 2008, he signed a resolution to amend Art 81 of the fifth defendant's Articles of Association;

(c) on 18 March 2009, he signed the Directors' Report and Unaudited Financial Statements of the fifth defendant for the year ending 31 March 2006; and

(d) on 8 May 2009, he signed the Directors' Report and Unaudited Financial Statements of the fifth defendant for the year ending 31 March 2005.

80 When he was confronted with the above documents, the sixth defendant explained that he felt obliged to sign them because: (a) some of the documents pertained to the period of time in which he was a director of the fifth defendant; (b) he was still an employee of the fifth defendant; (c) there

was no director appointed to succeed him; and (d) the signature of two directors was needed for company documents. When he signed those documents, they were undated and he did not fill in the dates. He had expected the administrative manager to backdate those documents to their respective years. The plaintiff in turn relied on his concession to bolster its case that the sixth defendant had backdated his resignation to 1 January 2008.

81 I find that the sixth defendant's resignation is invalid regardless of whether it was made on 1 January 2008 or 27 May 2009. If the sixth defendant had tendered his resignation on 1 January 2008, it would be inconsistent with Art 81 of the fifth defendant's Articles of Association dated 20 May 1992 which provides that the number of directors shall not be less than eight. And if the sixth defendant had tendered his resignation on 27 May 2009, this would *also* be inconsistent with the amended Art 81 which then provided that the number of directors shall not be less than two. In either event, the resignation was *invalid*. This effectively meant that the sixth defendant continued to be a director during the period that the first defendant breached his duties. I should add, however, that in my assessment it was more likely than not that the sixth defendant had in reality falsely backdated his resignation. However, little turns on the sixth defendant's actual resignation because he can still be held liable for dishonest assistance regardless of whether he is still a director of the fifth defendant.

The sixth defendant's role in the various schemes

The Transfer

82 I now turn to consider the sixth defendant's role in, first, the Transfer. The sixth defendant claimed that he did not approve of it and that he only became aware of the Transfer when the plaintiff's representatives told him about it on 28 May 2009. The first defendant's position was that there was a resolution by the board of directors of the fifth defendant approving the Transfer, but it was (conveniently, in my view) found to be missing in December 2009. It is obvious that either the sixth defendant was lying or the first defendant had created a false resolution. This is where their cases diverge. I pause here to observe that counsel for the first and sixth defendants, Lim Chee San, should *not* have acted for *both* the first and sixth defendants as there was quite clearly a conflict of interests. Coming back to the main issue, I am of the view that the evidence of the sixth defendant is to be preferred over that of the first defendant. While there is cause to doubt the credibility of both, the first defendant struck me as being less truthful. The evidence adduced suggested that he was quite capable of creating false documents. I will elaborate on the false documents below.

83 The first category of false documents pertained to an alleged annual general meeting ("the AGM") of the fourth defendant held on 2 July 2009 and attended by the first defendant in his personal capacity and as a proxy for both the second and third defendants. At the AGM, it was resolved that the fourth defendant had been dormant for the financial years ending 31 March 2005 to 2009. The plaintiff and the second defendant's position was that they were not given due notice of the AGM. In particular, Huang said that he did not give the first defendant a proxy form ("the Disputed Proxy Form") for the first defendant to represent the second defendant at the AGM, and he was not sure how the first defendant managed to produce the document. The first defendant was unable to produce any supporting evidence to show that the notice for the AGM was indeed duly sent to the plaintiff and the second defendant. It stood to reason that given the dire situation at the material time, the plaintiff would have every reason to attend the AGM if notice of it was duly given. In addition, I note that the address of the second defendant on the Disputed Proxy Form was wrong. These factors and my assessment of the first defendant's credibility lead me to conclude that the AGM was wholly fictitious and the documents pertaining to the same were fabricated by the first defendant.

84 The second category of false documents related to the underlying documents of three Certificates of Stamp Duties dated 12 July 2006 which were produced by the first defendant. Those certificates showed that stamp duty was paid for the transfer of the shares of the plaintiff, the second defendant and the third defendant *in the fourth defendant*, to the first defendant. The evidence of the plaintiff and the second defendant was that they did not, at any time, execute any document to transfer their shares in the fourth defendant. The first defendant's evidence was that the transfers were eventually not carried out even though stamp duty was paid. In my view, since: (a) there was no reason for the plaintiff and the second defendant to transfer their shares in the fourth defendant to the first defendant; and (b) the first defendant was unable to produce the underlying documents in court (a failure for which I again draw an adverse inference against him (see [55]–[59] above)), the inexorable conclusion must be that the first defendant had obtained the three certificates on the basis of *false* underlying documents.

85 There was another reason why I preferred the evidence of the sixth defendant to that of the first defendant. Upon finding out about the plaintiff's grievances on 28 May 2009, the sixth defendant called and emailed the first defendant the very same day to inquire as to what had happened. The email reads as follows:

> Kek Wee,
>
> This morning I am in Starvision office meeting with Jason and Kelvin. They talked about the situation in [Beans Factory (Malaysia)] and wanted to know where the funds go. They also mentioned that you transfer the ownership of [the 5th Defendant] to your name without their knowledge. They told me that [Beans Factory (HK)] was closed (dormant), I was surprised as I still communicated with Jeffrey a couple of days ago.
>
> They told me that I will be implicated. I told them I had resigned as a director since 1 Jan 2008. They said I will still be implicated unless my director resignation is 3 years ago.
>
> Regards
>
> Mun Kong

In my view, the sixth defendant's act of contacting the first defendant immediately and the contents of the above email suggested that he did not know, amongst other things, of the Transfer.

86 Consequently, I believe that the sixth defendant did not turn a blind eye to the unlawful Transfer.

The first defendant's misappropriation of funds and mismanagement of the fifth defendant's accounts

87 In my assessment, the sixth defendant generally had a sense of loyalty to the first defendant. Consistent with my assessment of him, he had blindly signed off on the financial documents mentioned in [79] above. I also note that the sixth defendant had tried to backdate his resignation to 1 January 2008, before the fifth defendant Cash Withdrawals took place. The sixth defendant had also failed to assist the plaintiff in obtaining the documents of the fifth defendant when the plaintiff requested for his assistance on 28 May 2009.

88 That said, I am not satisfied on the evidence that the sixth defendant had turned a blind eye to the first defendant's misappropriation of funds and mismanagement of the fifth defendant's accounts.

It seems to me that the first defendant was the sole mastermind who generally operated on his own accord and would only turn to the sixth defendant when necessary (*eg*, when he needed certain company documents to be signed). When it came to the management of the fifth defendant's accounts, it was quite clear that the first defendant, who was the only signatory to the fifth defendant's accounts, did not have to get the sixth defendant involved in any way. There was also no evidence that the sixth defendant was put on inquiry as to the true state of the fifth defendant's account.

89 As for the sixth defendant's act of backdating his resignation, having regard to my overall assessment of the witnesses, this seems to me to be more of a knee-jerk reaction to avoid potential legal problems rather than a true sign of guilt. And as for the sixth defendant's failure to help the plaintiff obtain the fifth defendant's documents, I accept his evidence that the sixth defendant felt that he was not in a position to obtain those documents since in his mind he had already resigned from his directorship. I also accept the sixth defendant's evidence that he did try to contact the first defendant to ask the first defendant to provide the plaintiff with the requested documents.

90 For the reasons stated earlier, I am of the view that the sixth defendant did not turn a blind eye to what was happening to the fifth defendant's accounts.

The formation of Beans Group (SG)

91 On the evidence adduced, I am not convinced on a balance of probabilities that the sixth defendant had turned a blind eye to or participated in the formation of Beans Group (SG) and the subsequent diversion of the fifth defendant's resources and business to Beans Group (SG). As alluded to earlier, I had assessed the first defendant to be the real mastermind behind all those schemes. I accept the sixth defendant's evidence that when he eventually crossed over to Beans Group (SG) in January 2010, he did so as an ordinary employee of the fifth defendant and out of a genuine necessity for survival because the fifth defendant was by then a sinking ship. Even so, in crossing over, the sixth defendant had clearly breached the non-competition clause in his employment contract and his subsisting duty as a director not to be in a position of conflict of interest.

92 However, having regard to considerations of honesty, reasonableness and fairness, in particular my assessment that the sixth defendant was not really involved in the first defendant's schemes and the fact that he was actually somewhat also an indirect victim of the first defendant's schemes, I am prepared to grant the sixth defendant relief under s 391 of the Companies Act (see [74]–[75] above).

Conclusion on the sixth defendant's liability

93 To sum up at this juncture, I find that the sixth defendant is not liable for any breach of director's duties.

Decision on commercial unfairness under s 216 of the Companies Act

94 The next key issue that arises in this case is this: was the conduct complained of by the plaintiff sufficient to establish commercial unfairness to the plaintiff in its capacity *as a member of the fourth defendant* under s 216 of the Companies Act?

95 In my view the answer to that is emphatically yes. In the course of this judgment I have made findings of fact on the three key factual issues, namely: (a) the unlawful transfers of the fourth defendant's property; (b) the misappropriation of funds and mismanagement of the fifth defendant's accounts by the first defendant; and (c) the unlawful setting up of Beans Group (SG). I would have

been content to find that commercial unfairness is made out simply on (a) alone. The Transfer and the Beans Factory (HK) Transfer by the first defendant were unlawful and clearly contrary to all notions of commercial fairness. The plaintiff has every right to feel aggrieved. Its investment had effectively gone down the drain since the fourth defendant is now nothing but an empty and worthless shell.

96 As for the other two issues which I have found against the first defendant, they in my view they were the proverbial icing on the cake in the determination of commercial unfairness. While those two matters pertained to the conduct of the affairs of the *fifth defendant*, I am still entitled as a matter of law to take them into account in the assessment of the conduct of the affairs of the *fourth defendant* in the present action under s 216 of the Companies Act.

97 Where it is proven that the affairs of a subsidiary actually affects the affairs of the holding company, the conduct of the affairs of that subsidiary can be taken into account in determining whether there has been commercial unfairness to a member of the holding company, and so too in a *vice versa* situation (see the decision of the Singapore Court of Appeal in *Kumagai Gumi Co Ltd v Zenecon Pte Ltd and others and other appeals* [1995] 2 SLR(R) 304 ("*Kumagai*"), the decisions of the English Court of Appeal in *Nicholas v Soundcraft Electronics Ltd* [1993] BCLC 360 and *Gross v Rackind, Re Citybranch Group Ltd* [2004] 4 All ER 735, and the decision of the New South Wales Supreme Court in *Re Dernacourt Investments Pty Ltd* [1990] 2 ACSR 553). In fact, this principle applies not just to vertical corporate structures, but also to horizontal corporate structures (see *Lim Chee Twang v Chan Shuk Kuen, Helina* [2010] 2 SLR 209 ("*Lim Chee Twang"*) on "horizontal" associated companies). The following extracts from *Lim Chee Twang* are instructive in understanding the rationale and therefore the scope of s 216 (at [96]–[99]):

> 96 The question to be asked is: what is the mischief that the courts set out to remedy in s 216 action? The obvious case is where the majority shareholder(s) are guilty of unfairly prejudicial conduct in the affairs of a company to the detriment of the minority shareholder(s). In *Kumagai* our Courts, like the English and Australian courts, are willing to intervene where the unfairly prejudicial conduct in one company, a subsidiary, affects the affairs of the holding company and thereby also becomes the affairs of the holding company. The converse also holds true where the facts warrant it. …
>
> …
>
> The English (save for the *Grandactual* case) and Australian judgments cited say that *the phrase "the affairs of the company" are extremely wide and should be construed liberally, the courts look at the business realities of a situation and do not confine them to a narrow legalistic view.* The use of such phrases indicates that the courts should not be straight jacketed when it comes to dealing with issues like those in s 216. … But I accept there are limits in adjudicating s 216 actions, the courts have to stay within the powers conferred by that section …
>
> 97 *In the final analysis, under s 216, why are the affairs of one company, the subsidiary, also the affairs of another company, the holding company? The answer must be because the plaintiff was able to show, on the facts, that the affairs of the subsidiary actually affected or impacted the holding company. It is based on purpose of the section, the mischief it intends to address and why on certain facts, the separate legal entity principle must give way but only in so far as it is necessary, to fulfil the purpose of and policy behind that provision.* Margaret Chew, *Minority Shareholders' Rights and Remedies* (LexisNexis, 2nd Ed, 2007), which has been cited with approval in a number of cases, argues at p 122 that a compendious interpretative approach with an emphasis on the rationale and purpose of s 216 should be adopted. The starting point must be

that the onus of proof is on the party alleging the affairs of Company A are also the affairs of Company B. If a party can show it does, then in my view, the courts can intervene on that basis, but subject to the limitations of s 216. … The complainant must be able to show something more, including how the conduct of the affairs of Company A are affecting the affairs of Company B.

98 If the position were otherwise, there will be a serious gap in the remedies available to an aggrieved minority shareholder. …

99 The artificial nature of a company as a separate person or legal entity in the eyes of the law has to be remembered and decisions for and actions by it have to be taken for it by natural persons: see *Gower & Davies: Principles of Modern Company Law* at para 7-1. A company acts through its board of directors or its managing director or its officers or employees. In the words of Lord Denning MR in *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159 at 172, we look to the "directing mind and will of the company"; see also *New Line Productions, Inc v Aglow Video Pte Ltd* [2005] 3 SLR(R) 660 below. …

[emphasis added]

98 In the present case, the evidence showed that the affairs of all the entities in the Singalab/Beans Group were linked to the affairs of the fifth defendant. Evidence was adduced showing that the fifth defendant had given financial help and resources to those entities. In turn, the affairs of the fifth defendant (as well as Beans Factory (HK)) were inextricably linked to the fourth defendant in that they had the direct effect of impacting the value (or lack thereof) of the fourth defendant as a pure holding company. In fact, the understanding of the parties at the time they entered into the joint venture *viz* the setting up of the fourth defendant was for the business to expand and for the share structure of the fourth defendant to apply to the entire group. It also bears highlighting that the first defendant was the very same (and in fact effectively the sole) directing mind and will behind all those entities.

99 Finally, I note that the plaintiff is the majority shareholder of the fourth defendant and could therefore have voted itself onto the board of directors of the fourth defendant (which it in fact later did). I also note that the plaintiff was on the Exco. However, in the context of the present case, those facts do not in any way detract from the commercial unfairness caused to the plaintiff. As noted in Margaret Chew, *Minority Shareholders' Rights and Remedies* (Lexis Nexis, 2nd Ed, 2007) at pp 219-220, the key issue is who had *effective* control over the affairs of the company:

There is no standing requirement that the applicant under section 216 of the Companies Act has to be a minority shareholder. The Malaysian court indicated in *Kumagai Gumi Co Ltd v Zenecon-Kumaigai Sdn Bhd*, in relation to the Malaysian oppression action, similar to section 216 of the Companies Act:

> Relief under [the oppression action] is available to majority shareholders who are not in control of the management of the company and who, for any given reason, are unable to control the board, [for example], because they have agreed to a management power sharing formula in a separate agreement among the shareholders.

The pertinent issue is to ascertain whether an applicant alleging oppression under section 216 of the Companies Act has control over the affairs of the company, for there is good sense in saying that an applicant ought to lack such control. Evidently, an applicant that is in control of the affairs of the company cannot convincingly allege to have been oppressed …

In this vein, it is submitted that majority shareholders cannot be considered to have effective management control by the mere fact of being in the majority. In particular, where wrongdoing by directors is concerned, it ought not to be a defence by the wrongdoing directors that their wrongdoing could have been restrained by injunction or addressed by an action for breach of duty by the company, because by virtue of being the majority shareholders, the majority could have moved the company to take action against the directors. Such an argument by counsel for the wrongdoer in *Re H R Harmer Ltd* was not well received by Jenkins LJ who said:

> [C]ounsel for the father said that the acts complained of might have been restrained by injunction so far as they were acts done without the authority of the board. As to this, I do not think that a wrongdoer in this field can well complain that the person wronged might have chosen another remedy.

[emphasis added]

100 Here, there was an understanding between the parties that the first defendant was to run and manage the fourth defendant (as well as the entities in the Singalab/Beans Group). In other words, while voting control of the fourth defendant laid with the plaintiff, the *effective* day-to-day control of the fourth defendant laid with the *first defendant*. The first defendant however concealed and lied about his misdeeds until the plaintiff began to unravel the truth. For those reasons, I reject the first defendant's attempts in his closing submissions to pin the blame on the plaintiff.

101 Having considered all the relevant factors, I find that the plaintiff had successfully established commercial unfairness within the meaning of s 216 of the Companies Act. I will now turn to address the issue of remedies.

Remedies

The remedies sought by the plaintiff

102 The statutory provision governing the issue of remedies in an action under s 216(1) of the Companies Act is found in s 216(2). The said provision reads as follows:

> (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;
>
> (*b*) regulate the conduct of the affairs of the company in future;
>
> (*c*) authorise civil proceedings to be brought in the name of or on behalf of the company by such person or persons and on such terms as the Court may direct;
>
> (*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;
>
> (*e*) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(*f*) provide that the company be wound up.

103 The plaintiff pleaded three heads of substantive remedies, namely: (a) a buy-out remedy; (b) authorisation to bring a derivative action; and (c) damages and/or equitable compensation. The details of the heads of reliefs are as follows:

(a) Buy-out remedy: An order that the first defendant purchase its shares in the fourth defendant at the price of S$6,773,080.92. The breakdown of this sum was given as follows:

(i) S$3,930,737.17 being the plaintiff's 53.625% share of the losses from the sale of Beans Group (SG) to HiSoft PL;

(ii) S$265,892.27 being the plaintiff's 53.625% share of the fifth defendant Payments;

(iii) S$2,293,451.42 being the plaintiff's 53.625% share of the fifth defendant Cash Withdrawals;

(iv) S$224,819.48 being the plaintiff's 53.625% share of the Malaysian Cash Withdrawals; and

(v) S$50,728.71, being the plaintiff's 53.625% share of the adjusted profits of S$94,599 made by the fifth defendant for the period between 1 April 2007 to 31 March 2008. The adjusted profits figure is arrived at by adding S$201,631 to the loss of S$107,032 reported in the unaudited financial statements of the fifth defendant for the financial year 2008.

(b) Derivative action: An order that proceedings in the name of the fourth defendant be brought by the plaintiff or such other persons this court deems fit against the first and sixth defendants in relation to the affairs of the fourth and fifth defendants. In particular, the plaintiff sought, *inter alia*, the following orders:

(i) that the Transfer be set aside;

(ii) an account of the monies, profits, gains or benefits directly and/or indirectly retained, received or drawn from the fourth and fifth defendants;

(iii) an account into what property (or part thereof) had been acquired by the use of or otherwise represents (ii) above, the Singalab/Beans Group, and the sale proceeds of the S&P Agreement;

(iv) that the first and sixth defendants do pay, deliver up or otherwise return to the fourth defendant such sums and/or property referred to in (ii) and (iii) above; and

(v) that the first and sixth defendants be declared constructive trustees of the fourth defendant in respect of (ii) and (iii) above.

(c) Damages and/or equitable compensation: Damages and/or equitable compensation to be assessed.

Decision on remedies

104 Subject to the general limitation of making an order "with a view to bringing to an end or

remedying the matters complained of", the court's jurisdiction to make an order under s 216(2) of the Companies Act is very wide, and much depends on the matters complained of and the circumstances prevailing at the time of the hearing (see *Kumagai* at [71]). I am clearly not confined to the plaintiff's pleaded remedies as set out in [103] above. Having regard to all the relevant factors, I am minded to grant the following sequential orders.

105 First, I order that the Deed of Assignment be set aside and declare that the first defendant holds all the monies and shares originally owing to Beans Group (SG) under the S&P Agreement on trust for Beans Group (SG). I then order that the first defendant do the following within 30 days of this judgment:

(a) give an account of all the monies and shares originally owing to Beans Group (SG) under the S&P Agreement;

(b) give an account of what property or part thereof had been acquired by the use of or otherwise represents all the monies and shares originally owing to Beans Group (SG) under the S&P Agreement; and

(c) pay, deliver up, or otherwise return to Beans Group (SG) such monies, shares and/or properties.

Upon compliance with the above, I declare that Beans Group (SG) holds the monies and shares under the S&P Agreement on trust for the fifth defendant.

106 Secondly, I order that the first defendant compensate the fifth defendant for the losses caused to it within 30 days of this judgment. In other words, the first defendant is to make good to the fifth defendant the following sums:

(a) RM1,433,383.80 being the Malaysian Cash Withdrawals;

(b) S$4,276,646.00 being the fifth defendant Cash Withdrawals;

(c) S$495,836.40 being the fifth defendant Payments; and

(d) the adjusted profits of S$94,599 made by the fifth defendant for the period between 1 April 2007 to 31 March 2008. This figure is arrived at by adding S$201,631 to the loss of S$107,032 reported in the unaudited financial statements of the fifth defendant for the financial year 2008.

107 Thirdly, I order that the Transfer be set aside.

108 Finally, I order that the first defendant purchase the plaintiff's shares in the fourth defendant within 30 days of compliance with my orders in [105]–[107] above. It is not a legal requirement that the shares subject to a buy-out remedy must be valued as each case invariably depends on its own particular facts (see *Tullio Planeta v Maoro Andrea G* [1994] 2 SLR(R) 501 at [20]). In my view, having regard to the circumstances of this case and in particular the nature of the fourth defendant, it is not necessary to subject the value of the plaintiff's shares in the fourth defendant to a valuation. Fairness in this case will be achieved by ordering the buy-out to be on the basis of the plaintiff's shareholding in the fourth defendant, taking into account the remedies I have ordered in [105]–[108] above. In the event that the first defendant does not comply with the buy-out order within the stipulated time-frame, then the plaintiff may proceed to wind up the fourth defendant. The costs of

such winding-up will be borne by the first defendant.

Conclusion

109 Accordingly, I allow the plaintiff's claim against the first defendant but dismiss it against the sixth defendant. In addition to the orders made above, I also award the plaintiff the costs of this action against the first defendant to be taxed on a standard basis unless otherwise agreed, but with disbursements on an indemnity basis given his disregard for his disclosure obligations and his unreasonable and dishonest conduct of his defence.

110 Although I find that the sixth defendant was not liable for his breach of his duties as a director of the fifth defendant, he was nonetheless culpable as he should not have blindly followed the instructions of the first defendant without more. That being the case, there is no order for costs for the sixth defendant.