Cheah Peng Hock *v* Luzhou Bio-Chem Technology Limited [2013] SGHC 32

Case Number	: Suit No 821 of 2010
Decision Date	: 06 February 2013
Tribunal/Court	: High Court
Coram	: Quentin Loh J
Counsel Name(s)	: Hee Theng Fong and Lin Ying Clare (M/s RHT Law LLP) for Mr Cheah; Yuen Djia Chiang Jonathan, James Lin Zhurong and Audrey Li (Harry Elias Partnership LLP) for the first defendant.
Parties	: Cheah Peng Hock — Luzhou Bio-Chem Technology Limited

Employment Law – employer's duties

Employment Law – contract of service – breach

Contract – contractual terms – implied terms

6 February 2013 Judgment reserved.

Quentin Loh J:

1 This case turns entirely on its facts. The question is whether the Plaintiff, Mr Cheah Peng Hock ("Mr Cheah"), was constructively dismissed by Luzhou Bio-Chem Technology Limited, the Defendant Company ("The Defendant"). Underlying this question is the issue of whether there had been a breach of an implied term of mutual trust and confidence amounting to a repudiation of the Employment Agreement between the parties.

The facts

2 Mr Cheah was a retired Chief Executive Officer ("CEO") with 18 years of experience in China. He was subsequently employed by the Defendant, first as a consultant, and later as its CEO. He left the Defendant's employment on 24th August 2009, claiming that he had been constructively dismissed. He issued proceedings on 25 October 2010, claiming contractual damages under the Service Agreement he had with the Defendant ("the Agreement").

3 The Defendant was founded in1988 by Mr Niu Jixing ("Mr Niu") as a private limited company in China. It is a corn refiner principally engaged in the business of producing and distributing various maltose related products and sweeteners such as corn syrup and liquid glucose to domestic and overseas customers. From 1988 to 2006, it was developed and expanded by Mr Niu, with the help of fellow executive directors Mr Wang Deyou ("Mr Wang") and Mr Gao Zhongfa ("Mr Gao"), from a small organisation with four or five staff members to a large company with 4,000 staff members. The Defendant was listed in China in 1994, with Mr Niu holding 80% of the shares.

4 On 24 February 2006, the Defendant listed on the Singapore Stock Exchange, with Mr Niu holding 39% of the shares in the Defendant after listing. Mr Niu was, at all material times, the managing director of the Defendant. The Defendant's production facilities are located in the Liaoning, Shandong, Shaanxi and Henan provinces in China. Prior to 2008, the Defendant's principal corporate

office was located in the Shandong province. Prompted by the Defendant's expansion, the principal corporate office moved to Beijing in March 2008 before Mr Cheah's employment with the Defendant.

5 As part of corporate governance and the need for proper corporate structure and greater transparency with independent directors on the Board, the idea of employing a CEO was floated at the time of the office move. It is unclear whose idea this was, or who was the main driver, but this is not an issue as it was accepted by the parties at the material time.

6 Around November to December 2008, Mr Du Xiangzhi ("Mr Du"), the Defendant's head of Human Resources, approached Mr Cheah to see if he would be interested in a position as a part-time management consultant for the Defendant. Mr Du recommended and introduced Mr Cheah to Mr Niu. As a result of this introduction, Mr Cheah was employed as a part-time consultant and started work on 5 January 2009.

7 Around late February or early March 2009, being satisfied with Mr Cheah's performance as a consultant, Mr Niu and Mr Du approached the Plaintiff together to ask him to take on a new role as CEO. Mr Cheah deposed that he was initially hesitant, as the Defendant's business in the food industry was outside his previous experience in the healthcare and pharmaceutical industry. He was also worried that his style of management would be unsuited to the Defendant's business and he had doubts about Mr Niu's ability to simply hand over the reins of the Defendant to him. [note: 1]

8 Letters of authority were issued on 25 February 2009 and 30 March 2009 which continued to give Mr Cheah increasing authority, and this went some way towards alleviating his concerns about taking on the position of being the Defendant's CEO. These letters mentioned, *inter alia*, the need for a CEO to take over management and operations and revamp the operation model, and the need to have explicit provision of the CEO's job scope in any future employment contract. [note: 2] Mr Cheah became the acting CEO from as early as March 2009. From 4 to 7 May 2009, a sales and management meeting was held ("the Jinan meeting"), where Mr Cheah made a speech as the incoming CEO. Mr Cheah rolled out a series of changes to the company's organisation structure at this meeting. These changes form the bulk of the dispute in the present case.

9 It is disputed whether these changes effected by Mr Cheah had obtained Board approval or been made in consultation with the Board or its representatives. It is common ground that these changes were implemented sometime between the Jinan Meeting and early June 2009, but the Defendant contends that they did not become aware of these changes until late June or early July 2009.

The Contract

10 On 11 May 2009, the Board of Directors Remuneration Committee (which consisted of executive and independent directors) met to discuss the role of the CEO and how it would impact the current organisation of the Defendant and, most notably, Mr Niu's role as Managing Director.

11 The findings of this committee were released on 21 May 2009 in a memo (referenced in the evidence and in this judgment as "The 11th May Memo"). [note: 3] Annexed to this memo was a document entitled "Roles and Responsibilities of Managing Director and CEO" ("the Roles and Responsibilities Document"), which provided a list of duties of the Managing Director, Mr Niu, and the CEO. The material items which would require approval by the managing director or the Board were any principal change in the internal management structure and any appointment or dismissal of senior management. The CEO's role was, *inter alia*, to

(a) Carry out the operational strategy of the group and implement its expansion plan, save for changes which required approval;

(b) take full responsibility for overall operation and management of the group and its subsidiaries;

(c) submit to the Board mid and long term plans and annual budget, as well as manage budgetary issues;

(d) formulate the internal management institution and fundamental management system of the group, including taking charge of the group organisation structure;

(e) lead the management team, facilitate performance, and make succession planning for senior management;

(f) propose the appointment or dismissal of senior management and key financial staff;

(g) decide the appointment and dismissal of management staff not requiring Board approval; and

(h) perform other roles and responsibilities requested and authorised by the Board.

12 Also annexed to this memo was a new organisation chart with the position of the CEO written in, Mr Cheah's curriculum vitae, and a draft Employment Contract which was later executed as the Agreement with a few numbering changes.

13 The Agreement was entered into on 1 June 2009. Clauses 3.1 and 3.3, which outlined the duties of the CEO reads as follows:

3.1 The Executive shall be appointed the Chief Executive Officer of the Company and shall be responsible for the management of the Group's overall operations and leading the management to ensure that the annual business operating targets and management targets set by the Board are achieved during his employment. The detailed responsibilities of the Executive are set out in Schedule 1 hereto.

3.3 Without prejudice to the provisions of Clause 3.1, the Executive shall during his employment under this Agreement:

3.3.1 perform the duties and exercise the powers which the Board may from time to time properly assign to him in his capacity as Chief Executive Officer in connection with the business of the Group;

3.3.2 in the absence of any specific directions from the Board, have the general control and responsibility for the management of the business of the Group in compliance with applicable laws and regulations and with a view to promoting the Group's interests;

3.3.3 do all in his power to promote, develop and extend the business of the Group and at all times and in all respects conform to and comply with the proper and reasonable directions and regulations of the Board; and

3.3.4 in pursuance of his duties hereunder perform such services for any Group Company and

accept such offices in such Group Company as the Board may from time to time reasonably require.

14 A more detailed list of the CEO's responsibilities was annexed at Schedule 1, and reads as follows:

1. With the exception of businesses required to be approved by the Board or the Executive Chairman, responsible for the overall management of the Group's business and operations.

2. Execution and implementation of resolutions and policies established by the Board of Directors.

3. Recommending the medium-term and long-term development plans and annual budgets for the Board's approval and managing resources within the budget guidelines.

4. Oversees fundraising planning and implementation.

5. Work out the internal management organization [sic] structure and basic management system of the Group.

6. Leading the management team, promoting effective performance, and successfully complete the succession plan of key management.

7. Recommending the appointment or dismissal of senior management and key financial executives.

8. Have the authority to appoint or dismiss the management except those that should be decided by the Board.

9. Executing or authorizing [sic] the execution of the documents for capital expenditures, agreement and other important documents of the Group.

10. Other works, responsibilities and powers required and authorized [sic] by the Board.

15 It is common ground that these responsibilities built on the earlier documents and in particular the 11th May Memo. Most notably, Schedule 1 refers to businesses requiring approval or decision from the Board (items 1 and 8), but a list of these items is provided only in the Roles and Responsibilities Document and not in the Agreement itself.

16 The relationship between the Board and Mr Cheah was outlined at Clause 3.2, which reads as follows:

3.2 The Executive shall submit to the Board the business operating targets and management targets for the following year at the end of every year. The Executive shall submit the business operating targets and management targets for the second half of 2009 by the end of June 2009 and the next three years' development plan by the end of 2009. Upon receipt of the Board's approval, those targets will be the basis and measures [sic] used by the Board for the performance assessment of the Executive. Any adjustments to the approved business operating targets, management targets and development plans will be subject to the Board's approval.

17 The Agreement also contained a Termination Clause (Clause 2 and 11). Clause 2.2 reads as follows:

> 2.2.1 the employment of the Executive may be terminated at any time by the Company paying to the Executive an amount equivalent to the aggregate basic salary (based on the Executive's last drawn monthly salary) which he would otherwise receive for the remaining period of the Initial Term or an amount equivalent to six (6) months' salary based on the Executive's last drawn monthly salary, whichever is the higher amount; and
>
> 2.2.2 the employment of the Executive may be terminated at any time by the Executive giving to the Company not less than six (6) months' notice in writing and paying to the Company an amount equivalent to the aggregate basic salary (based on the Executive's last drawn monthly salary) which he would otherwise receive for the remaining period of the initial Term or an amount equivalent to six (6) months' salary based on the Executive's last drawn monthly salary, whichever is the higher amount.
>
> For the avoidance of doubt, no further benefit or compensation is payable to the Company to the Executive if the employment is terminated in accordance with the terms of this Agreement.

18 Clause 11 allowed for summary termination of employment without notice or payment in lieu of notice according to Clause 2.2 under, *inter alia*, the following circumstances:

> 11.1 if the Executive is guilty of any *gross default* or *grave misconduct* in connection with or affecting the business of the Group; or
>
> 11.2 in the event of any serious or repeated breach or non-observance by the Executive of any of the stipulations contained in this Agreement.
>
> [emphasis added]

The other circumstances provided for under Clause 11 are not in issue here.

Background leading to the Dispute

19 Mr Cheah took on his role as the CEO without incident as he already enjoyed some authority as the CEO prior to the formal signing of the Agreement (see [8] above). He proceeded to implement changes to the organisation structure, and these changes became a point of dispute between the parties in late June or early July 2009. One of the main changes was a removal of the regional General Mangers ("GMs"), to be replaced by more specialised roles relating to sales, production and manufacturing. The reporting structure for each production factory was thus altered. There was also a disputed change to invoicing structure, which the parties agreed during the trial was not an issue.

20 Mr Cheah's version is that the implementation of the changes was merely a continuation of what he had been doing prior to his official appointment on 1 June 2009 and that this had been duly approved before the Jinan Meeting. The Defendant's account is very different. The Defendant alleges that, at all material times, Mr Cheah did not have the authorisation of the Board nor its representatives. Mr Niu claims that, while he had seen the documents detailing the changes from the Jinan meeting, he had not paid much attention to it and was waiting for additional documents submitted in the proper approval format. He further claims that he did not become aware that the changes had been implemented until July 2009, when the system stopped coping with the changes and went into chaos, with numerous complaints from the staff. He alleges that he then spoke to Mr

Cheah on at least two occasions in July to ameliorate the situation, but was told that the changes were already in the midst of being implemented and could not be stopped or reversed.

21 This became a full-blown dispute in August 2009. The Defendant's Mr Niu conducted a series of unofficial meetings from 8 to 11 August 2009 to discuss what was to be done about these changes. These included meetings with:

(a) the Defendant's two other executive directors, Mr Wang and Mr Gao, to discuss matters in advance of an official Board Meeting on 12 August 2009 ("the Board Meeting");

(b) the Defendant's senior management staff on 10 August 2009 at 9.00 a.m. to discuss the cessation of production in the Defendant's production facilities; and

(c) the Defendant's senior management staff on 10 August 2009 at 4.10 p.m. to discuss the bureaucratic practices of the Defendant.

22 Two further meetings were held on 12th August 2009: the Board Meeting at 9.00 a.m. and a meeting with the directors and managers of all centres at 6.00 p.m. to discuss the changes implemented after Mr Cheah became CEO ("the 12 August Crisis Meeting"). At the latter meeting, the senior management was encouraged to support the changes in the interim until a solution could be found.

23 Whether and why Mr Cheah was not at any of these meetings is disputed. The Defendant claims that Mr Cheah was not invited to the meetings because his presence was not necessary. It also claims that the reason why Mr Cheah was not present at the two meetings on 10 August 2009 was because Mr Cheah had absented himself from the office from 9 to 11 August 2009 without authorisation. The Defendant's Mr Niu further testified that Mr Cheah had been present at the Board Meeting, but had stormed out when the Board appointed Mr Niu as joint-CEO with him. He was thus not in the office when the 12 August Crisis Meeting took place.

24 Mr Cheah vehemently denies this, and claims that while he had applied for leave via email to Mr Niu, he had chosen to return to the office on those dates (10-12 August 2009) and had attended an Audit Committee meeting just before the Board Meeting on 12 August 2009. He avers that he was present in the office on 12 August 2009 but did not attend the meetings because he had not been invited to them. Mr Cheah claims that he called Mr Niu for an explanation and was told that he did not have a right to attend these meetings. Mr Cheah further alleges that this was a break from past practice where he had been invited to attend other Board meetings, including one in April 2009 to update the Board on his plans and budget for the group.

25 What happened during the Board Meeting is also in dispute. The Defendant claims that during the Board Meeting, Mr Cheah was asked about his plans in relation to the problems arising from his changes. Mr Cheah denies this and claims that he was not present at the Board Meeting at all. The defendant's case is that Mr Cheah's changes were discussed at the Board Meeting and Mr Niu was then appointed joint-CEO with Mr Cheah. Mr Cheah's version is that Mr Niu had already informed him prior to this meeting that he was going to share the position of the CEO. The Defendant contends that this was envisaged by Clause 3.4 of the Agreement, which reads:

> The Executive shall carry out his duties and exercise his powers jointly with any other person(s) appointed by the Board to act jointly with him and the Board may at any time for any period require the Executive to cease performing or exercising the said or any duties or powers.

Mr Cheah alleges that this term was never meant to cover a situation where the effect was the joint-CEO taking over the CEO's duties and position. The meeting minutes record that "Mr Niu noted that he had to take a more active role in the management", [note: 4] but did not specifically record that Mr Niu was to share the CEO position with Mr Cheah.

26 From 13 to 17 August 2009, further discussions took place concerning these changes. Mr Cheah alleges that Mr Niu told him on 17August 2009 that he could no longer work with Mr Cheah, and suggested that Mr Cheah take a holiday. The Defendant denies that this happened.

27 On 18 August 2009, Mr Niu, Mr Wang, Mr Gao and independent director Mr Teoh Teik Kee took the decision on behalf of the Board to reverse Mr Cheah's changes. This reversal was announced at a key management team meeting the next day (19 August 2009). Mr Cheah alleges that he was not invited to this meeting. The Defendant's version is that Mr Cheah refused to attend this meeting. Mr Cheah further alleges that the Mr Niu gave him verbal notice to vacate his office on the same day.

28 On 20 August 2009, Mr Niu moved into Mr Cheah's office. Mr Niu claims that it was normal for him to use Mr Cheah's office when he was visiting the Beijing office, as Mr Niu was based in Shandong and did not have an office in Beijing. Mr Niu also avers that he used the small meeting table instead of the larger working table. While Mr Cheah concedes that Mr Niu did use his office while in Beijing, he alleges that it was different this time because Mr Niu started putting his things on the working table instead of in a corner by the meeting table. Coupled with the earlier verbal notice that he claims he had been given, Mr Cheah contends that this was an attempt by the Defendant's Mr Niu to take over the office of CEO.

29 On the same day, Mr Cheah found himself unable to log into his email account. He alleges that when he called the IT staff, he was told that his account had been terminated. Mr Cheah claimed that he was unable to send or receive things from his email until 26 August 2009. On 26 and 29 August 2009, two emails that he had been trying to send were sent. There was no further activity from his email account.

30 Mr Cheah further claims that he spoke to Mr Du on 20 August 2009 and that Mr Du had offered two months' salary to him in lieu of termination. Mr Niu followed up with this discussion the next day. Mr Niu claims that he had called this meeting in order to discuss new ways that the Defendant and Mr Cheah could continue to cooperate. However, his account is that Mr Cheah remained hostile, refused to accept Mr Niu's appointment as joint-CEO, and said that he wanted to leave the company. It was at this juncture that Mr Niu offered three months' salary in lieu of termination. Mr Niu claims that this offer was a goodwill gesture. Mr Cheah regarded this as an attempt to replace him as the CEO. Mr Cheah was given till 31 August 2009 to decide whether he would accept this offer. It is the Defendant's position that they had never wanted Mr Cheah to leave, despite the problems he had allegedly caused, because they were worried that dismissing the newly-appointed CEO would reflect badly on the company.

31 On that same day, the company car, which had previously sent Mr Cheah to and from work each day, did not pick Mr Cheah up for work. Mr Cheah contends that this was an attempt to further undermine his position as the CEO, as the privilege of having the company car at his disposal was a key indication of his status as the CEO. The Defendant claims to the contrary that the company did not offer cars for personal use, and that Mr Cheah never had the right to use this car exclusively.

Summary of Pleadings

32 On 24 August 2009, after almost five days of being unable to access his office email account, Mr Cheah sent in a notice of termination to Mr Niu via his personal email account. He followed this up with an email to the Board of Directors on 3 September 2009, setting out his allegations, namely that

(a) he had been deliberately excluded from meetings and consultations from 8 to 11 August 2009;

(b) Mr Niu had informed him that he was to share the CEO position, but nothing was reduced to writing, nor was sharing envisaged by the responsibilities of the CEO under Schedule 1 of the Agreement;

(c) he had been told to go on a holiday on 17 August 2009 and informed that Mr Niu could no longer work with him;

(d) he had been excluded from a Board meeting on 18 August 2009 where his employment as the CEO was a subject for discussion;

(e) Mr Niu had informed his direct subordinates on 19 August 2009, including Mr Wang and Mr Gao, that Mr Niu would be taking over day-to-day operations and reversing Mr Cheah's changes. This effectively prevented Mr Cheah from discharging his duties as a CEO; and

(f) he had been offered three months' salary *in lieu* of notice to terminate.

33 At trial, Mr Cheah raised three further points that showed that the Defendant had indeed repudiated the Agreement:

(a) The company car befitting his status as the CEO was withdrawn from his use;

(b) his email account was deactivated, making it impossible for him to carry out his duties; and

(c) his office was taken over by the Defendant's Mr Niu, leaving him no office to work out of.

34 The Defendant flatly denied these allegations, and made the following counter-claims:

(a) Mr Cheah had implemented a series of unauthorised changes to organisational structure, including a change in the role and functions of the GMs. This was a repudiation of the Agreement which gave the Defendant a right to terminate Mr Cheah's employment without notice;

(b) Mr Cheah had taken unauthorised leave on 10, 11, 12 and 31 August 2009, and refused to carry out his duties in the interim, leaving the Defendant no choice but to negotiate an alternative agreement and offer him three months' salary in lieu of notice;

(c) Mr Cheah had not been actively excluded from consultations, but Mr Niu had actively engaged him during July, and the only reason for his absence from certain meetings was his failure to turn up for work;

(d) the Defendant had every right to appoint Mr Niu as joint-CEO, and this was envisaged in the Agreement itself; and

(e) the Defendant had not repudiated the contract, but worked very hard to retain Mr Cheah as its CEO despite the problems faced with his working style and unauthorised changes.

Issues

35 The sole issue is whether Mr Cheah had been constructively dismissed. The test for constructive dismissal is a contractual one; see *Western Excavating (E.C.C.) Ltd v Sharp* [1978] QB 761 ("*Western Excavating*"). There are four main questions:

(a) Did the Defendant commit a repudiatory breach of the contract by breaching an implied term of mutual trust and confidence?

(b) Did Mr Cheah accept this breach?

(c) Did the breach cause Mr Cheah to leave?

(d) If so, what is the measure of damages that Mr Cheah should be awarded?

36 By way of counterclaim, a further issue arises: whether there was a wrongful repudiation of the service agreement by Mr Cheah which entitled the Defendant to terminate his contract.

37 The following factual issues also arise for determination:

(a) Had Mr Cheah introduced unauthorised changes which made the Defendant's reversal of them reasonable?

(b) Did the Defendant deliberately exclude Mr Cheah from his duties from 17-24 August and prevent him from defending the choices that he had made as the CEO?

(c) Did Mr Niu's appointment as joint-CEO make Mr Cheah's position in the Defendant redundant?

(d) Did the Defendant discontinue or block Mr Cheah's email?

(e) Did the Defendant remove the company car which was meant for Mr Cheah's use as the CEO?

(f) Did Mr Niu take over Mr Cheah's CEO office in Beijing?

(g) Did Mr Cheah take leave without approval?

Did the Defendant commit a repudiatory breach of the contract by breaching an implied term of mutual trust and confidence?

38 Whilst cases like *Western Excavating* and *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 ("*Wong Chee Hong*") considered constructive dismissal within the context of legislation like the English Trade and Union and Labour Relations Act 1974 and the Malayan Industrial Relations Act 1967, I find that the principle of constructive dismissal is sufficiently well established in common law, regardless of its connection with statute. The court in *Wong Chee Hong* recognised this, stating that

> The common law has always recognized the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or

shown an intention not to be bound by it any longer.

39 Constructive dismissal was accepted outside any statutory context in *Tullet Prebon (Singapore) Ltd v Chua Leong Chuan Simon* [2005] 4 SLR 344 at [5]. However as the matter was at the interlocutory stage, the final determination was left to the trial judge. The doctrine of constructive dismissal was also applied in the common law context in *Ramzi Toufic Fares v Aidec Management Company Pte Ltd* [1998] SGHC 208 ("*Ramzi*"). Tan Lee Meng J quoted Lord Denning MR in *Western Excavating* at 226:

> If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case sufficiently serious to entitle him to leave at once.

Tan Lee Meng J also relied on the Canadian case of *Poulos v Murphy Oil Company Ltd* [1990] 5 WWR 696 at 711 for two rules: first, the burden of establishing such a breach going to the root of the contract of employment is on Mr Cheah, and secondly, the test for constructive dismissal is an objective test and not how the employee views the changes.

The scope and content of an implied term of mutual trust and confidence

40 Mr Cheah does not aver the breach of an express term; he relies squarely on the breach of an implied term of mutual trust and confidence. Both parties accept the existence of this implied term. Such an implied term was assumed to be a part of Singapore law in the High Court case *Chan Miu Yin v Philip Morris Singapore Pte Ltd* [2011] SGHC 161 ("*Chan Miu Yin*"). While the Defendant accepts the existence of this term, I note that their submissions do not give this implied term any practical effect. I find it therefore necessary to state my understanding of such an implied term of mutual trust and confidence and what its content is before considering if there was a breach going to the root of the contract of employment.

41 As a starting point, a contract of employment is a special kind of agreement with special attributes. In *Aldabe Fermin v Standard Chartered Bank* [2010] 3 SLR 722, Steven Chong J, as he then was, said, at [54]:

> It is important to recognise that an employment contract is not a commercial contract. It involves a continuing relationship of trust and confidence between employer and the employee.

However, there seems to be some doubt whether the term to be implied is one of mutual trust and confidence or what I consider to be the higher duty of good faith.

42 There have been some references to a duty of *good faith* and fidelity in the employment context. In *Wong Leong Wei Edward & Anor v Acclaim Insurance Brokers Pte Ltd* [2010] SGHC 352 ("*Wong Edward")* Steven Chong J, as he then was, citing *Rickshaw Investments Ltd & Anor v Nicolai Baron von Uexkell* [2007] 1 SLR(R) 377 ("*Rickshaw Investments*") and *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [193] ("*Man Financial*"), stated at [45]:

> [T]he law is clear that a term will be implied into all employment relationships such that an

employee owes his or her employer a duty of *good faith* and fidelity..

[emphasis added]

43 Similarly, the New South Wales Court of Appeal in *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2008] NSWCA 217 ("*Russell*") used mutual trust and confidence as a synonym for a good faith obligation. This was a case concerning allegations of sexual abuse by a priest, which were eventually dropped. The priest was summarily dismissed and the question arose as to whether this dismissal was a breach of contract. The trial judge had considered the implied duties of good faith and mutual trust and confidence separately as two implied terms. The New South Wales Court of Appeal found (at [32]) that it was "probably sufficient to identify them as a single obligation".

44 In England, the implied duty of mutual trust and confidence has also been likened to good faith. Lord Steyn in *Johnson v Unisys Ltd* [2003] 1 AC 518 at 536 ("*Johnson*") opined:

> The interaction of the implied obligation of trust and confidence and express terms of the contract can be compared with the relationship between duties of good faith or fair dealing with the express terms of notice in a contract.

Lord Steyn also made reference to Lord Browne-Wilkinson's dicta in *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589 at 597, which went further, describing the implied term of mutual trust and confidence as an "implied obligation of good faith".

45 I find that the interchangeable use of the obligation of good faith and mutual trust and confidence is to go down a slippery slope. As alluded to earlier, the duty of good faith is a wider duty than that of mutual trust and confidence. In New Zealand, where the duty of good faith has been statutorily incorporated in the Employment Relations Act 2000, it has been recognised that the duty of good faith is not to be confused with the implied duty of mutual trust and confidence, but encompasses a positive duty to inform, invite comments, and maintain the employer-employee relationship. Section 4(1A) of the New Zealand Employment Relations Act 2000 reads as follows:

> The duty of good faith in subsection (1)—
>
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
>
> (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
>
> (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
>
> (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
>
> (ii) an opportunity to comment on the information to their employer before the decision is made.

46 The danger of implying a duty of good faith into contracts of employment is to introduce a potentially far reaching concept which may impose positive duties and fetters the freedom of parties,

particularly those of equal bargaining power who are not protected under the Employment Act (Cap 91, Rev Ed 2009) or under the common law, to contract. It will probably also conflict with written terms.

47 The Court of Appeal has cautioned, with good reason, against too readily implying a term in law. As Phang JA opined in *Ng Giap Hon v Westcomb Securities Pte Ltd and others* [2009] SGCA 19 ("*Ng Giap Hon*") at [46]:

> Put simply, the implication of such term into a contract would entail implying the same term in the future for *all* contracts of the *same* type. This would, in and of itself, require that caution should be exercised on the part of the court before implying a "term implied in law" (which, upon being implied into the particular contract at hand, would also, *ex hypothesis*, be implied into all future contracts of the same type as well). Indeed, the fact that broader policy considerations are (as just mentioned) involved where "terms implied in law" are concerned furnishes a *further* reason for caution as well.
>
> [emphasis original]

48 In *Ng Giap Hon*, the Court of Appeal, in a detailed examination of implying a duty of good faith in law, refused to imply a term of good faith into an agent-principal contract for the primary reason that it was a "fledgling doctrine" which required much clarification, even on a theoretical level, and could not thus be practically applied (see [44] to [60]). This caution appears, with respect, to make very good sense because a good faith obligation is of greater import and reach than one of mutual trust and confidence. While the Court of Appeal's findings were made in the context of formation of contract, it applies *a fortiori* in an employment contract because, for example, relationships do not remain static as the employee gets promoted, assumes greater responsibilities and may serve his employer for fairly long periods. It starts getting into murky waters when we come to termination of the employment contract, especially when there are express terms requiring only a specified period of notice or payment *in lieu* and no necessity to give reasons for the termination.

49 Even in Australia, the duty of good faith has more often been applied to the formation of the employment agreement and used as a tool of interpretation to read down more onerous clauses; see *Walker v Citigroup Global Markets Australia Pty Ltd* [2006] FCAFC 101. Where the notion of good faith has been imported into the more general employment relationship, this doctrine has been kept narrow. Even in *Russell* (see [43] above), the New South Wales Court of Appeal found that there was no breach of an implied duty of mutual trust and confidence *or* good faith (see *Russell* at [37]); it was not necessary to collapse the two duties into one. Commenting on the case law on good faith in the employment context, Prof Joellen Riley comments in *Good Faith in Employment Relationships*, The Debate: Good Faith and the Employment Relationship (Australian Institute of Employment Rights, April 2009 No. 2):

> In many respects, the good faith obligation requires no more than decent, respectful behaviour at the workplace.

If this is all that is required, this is already covered under the implied duty of mutual trust and confidence and there is no need to make matters more uncertain by introducing a concept of good faith which brings with it all the connotations of a contract *uberrmae fidei*, *ie.*, one of the fullest confidence or of the utmost good faith, which normally govern contracts between insurer and insured, solicitor and client, guardian and ward and partnership.

50 In light of the Court of Appeal's dicta in *Ng Giap Hon*, I also make three observations about

Steven Chong J's (as he then was) use of the words "duty of good faith and fidelity" in *Wong Edward* (see [42] above).

51 First, it is important to note in *Wong Edward* that the implied duty of good faith and loyalty was applied in the specific situation where the Plaintiff, the head of the employer's strategic wealth management division with a team of financial advisers under him, was also in breach of his fiduciary duties to the defendant employer. The Plaintiff, aware that he was behaving illegitimately, had deliberately instigated a mass exodus of the financial advisers under him and had instructed these advisers to transfer their clients to a competitor while he was still employed by the defendant (see *Wong Edward* at [46] and [47]). The Court found that this was a breach of his fiduciaries duties in relation to the defendant within the context of the insurance industry, insurance intermediaries and trustees who hold client's monies, where obligations of good faith are well accepted and applicable. Like *Russell*, the supposed duty of good faith merely reinforced the finding that the Plaintiff held a fiduciary position in relation to the defendant employer and thus owed specific duties of honesty, integrity and loyalty to his employer. Moreover, I note that the Plaintiff in *Wong Edward* seemed to accept the existence of a duty of good faith and had argued that the Plaintiff's actions were consistent with such a duty. Therefore, the question as to the source and content of a duty of good faith and fidelity did not really arise.

52 Secondly in *Rickshaw Investments*, the fiduciary relationship first arose from a principal-agent relationship; the respondent being orally appointed a freelance marketing agent to market the second appellant's Tang dynasty artefacts salvaged from Indonesian waters. This 'agency agreement' was terminated and then revived. Later, the second appellant and respondent entered into a written agreement which stated that the second appellant and respondent had agreed on freelance employment, but it was for the same activity of finding buyers for the second appellant's Tang Dynasty artefacts. It is thus not surprising to find the court referring to a breach of fiduciary duties which, on the facts of the case, arose from a principal-agent relationship. The terms of the agreement in relation to this issue are not referred to in the judgment. The principal issues in *Rickshaw Investments* concerned the choice of law rules governing equitable claims, whether there were any exceptions to the double actionability rule in tort and *forum non conveniens*.

53 Thirdly, *Man Financial*, centred on the enforceability of restrictive covenants, a non-solicitation clause and its breach by the employee, who was the managing director and CEO of a brokerage company. However, I accept that at the end of its judgment, the Court of Appeal stated, at [193]:

> It is trite law that there is an *implied* term in the employer's favour that the employee will serve the employer with good faith and fidelity, and that he or she (the employee will also use reasonable care and skill in the performance or his or her duties pursuant to the employment contract.
>
> [emphasis added]

54 These statements, although expressed as an employee's duties to his employer, must logically apply to the employer as well. In fact the standard formulation of this implied term is the duty on both employer and employee not to undermine or destroy the *mutual* trust and confidence. These passages in the judgments refer to a term implied by law, not just fact, and consequently have a significant consequence. As stated in *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [1006] SGHC 3 at [42]

> … once a term has been implied [in law], such a term will be implied in *all future* contracts of *that particular type*… [T]he central idea is clear: it is that the term implied is implied in a *general* way

for *all* specific contracts that come within the purview of a broader umbrella category of contracts.

[emphasis original]

55 For the reasons set out above, including the later Court of Appeal decision, *Ng Giap Hon*, I do not accept that there is an implied duty of good faith and confine the term implied by law to one of mutual trust and confidence. This includes a duty of fidelity, *ie*, a duty to act honestly and faithfully.

56 The duty of mutual trust and confidence has been consistently applied even before it was accepted by the House of Lords in *Malik v Bank of Credit and Commerce International S.A. (In compulsory liquidation)* [1998] AC 20 ("*Malik v BCCI*"). It has been applied in the following contexts to include:

(a) *Malik v BCCI*: a duty not to act in a corrupt manner which would clearly undermine the employee's future job prospects;

(b) *Woods*: a duty not to unilaterally and unreasonably vary terms (although on the facts it was found that the employer's behaviour in this case did not rise to the level necessary to breach this duty);

(c) *WA Goold (Pearmak) Ltd v McConnell* [1995] IRLR 516: a duty to redress complaints of discrimination or provide a grievance procedure;

(d) *Gogay v Hertfordshire CC* [2000] IRLR 703: a duty not to suspend an employee for disciplinary purposes without proper and reasonable cause;

(e) *Bracebridge Engineering Ltd v Darby* [1990] IRLR 3: a duty to enquire into complaints of sexual harassment;

(f) *Isle of White Tourist Board v Coombes* [1976] IRLR 413: a duty to behave with civility and respect;

(g) *Hilton International Hotels (UK) v Protopapa* [1990] IRLR 316: a duty not to reprimand without merit in an humiliating circumstance; and

(h) *British Aircraft Corporation v Austin* [1978] IRLR 322: a duty not to behave in an intolerable or wholly unacceptable way.

57 The House of Lords in *Malik v BCCI* also rejected the three limitations on the implied term proposed by the Respondent Bank, namely (1) that the conduct complained of must be conduct involving the treatment of the employee in question, (2) that the employee must be aware of such conduct while he is an employee, and (3) that such conduct must be calculated to destroy or seriously damage the trust between the employer and employee. Lord Steyn found at 47 that any conduct "objectively considered… likely to cause serious damage to the relationship between employer and employee" gives rise to a breach of the implied obligation, such that the conduct may not even involve the treatment of the employee in question. He further found that the awareness of the employee as to the employer's conduct was only relevant to the choice of whether or not he should terminate his employment, but was irrelevant to whether there was a breach of the implied duty. Finally, Lord Steyn found that the intention of the employer was irrelevant as the test of breach of the implied term was an objective one.

58 The duty of mutual trust and confidence, through long use, has acquired a clearer meaning and application than that of good faith. Lord Nicholls aptly observed in *Malik v BCCI* at 35 that the implied term of mutual confidence was a "portmanteau, general obligation" necessary for the continuation of the employment relationship "in the manner the employment contract implicitly envisages". It can be flexibly applied to different employment situation but is subject to an objective test and limited to the manner of treatment within the employment relationship. Unlike the doctrine of good faith, the House of Lords observed that this was a "workable" and "sound" doctrine. It is a narrower doctrine than the doctrine of good faith and is the natural corollary of an implied duty of faithful service (of which there is little dispute in the common law). While this term may not be capable of precise definition, it is not a fledgling doctrine incapable of practical application like the doctrine of good faith advocated for in *Ng Giap Hon*. I accept that there is an inherent risk of terms implied in law necessarily involving a measure of uncertainty; see *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR(R) 769 where the Court of Appeal stated at [90] that "the category of 'terms implied in law' does tend to generate uncertainty – not least because of the broadness of the criteria used to imply such terms".

59 In my judgment unless there are express terms to the contrary or the context implies otherwise, an implied term of mutual trust and confidence, and fidelity, is implied by law into a contract of employment under Singapore law. As stated in *Malik v BCCI* at 45, the implied term of mutual trust and confidence operates as a default rule. Parties may thus exclude or modify them to limit its content. It also follows that express terms may modify the scope of the implied term. For example, in the context of an analogous implied duty not to knowingly put the employee's health at risk, Lord Browne-Wilkinson had this to say in *Johnstone v Bloomsbury H.A.* (1990) 1 QB 333 ("*Johnstone*") at 350:

> Therefore, if there is a term of the contract which is in general terms (e.g. a duty to take reasonable care not to injure the employee's health) and another term which is precise and detailed (e.g. an obligation to work on particular tasks notwithstanding that they involve an obvious health risk expressly referred to in the contract) the ambit of the employer's duty of care for the employee's health will be narrower than it would be were there no such express term. In the absence of such express term, an employer would be in breach of the normal obligation not knowingly to put the employee's health at risk. But the express term postulated would demonstrate that, *in that particular contract*, the duty was *restricted* to taking such care of the employee's health as was consistent with the employee working on the specified high-risk tasks. *The express and the implied terms of the contract have to be capable to co-existence without conflict*.
>
> [emphasis added]

60 The content of that implied term can thus vary greatly depending on the facts in each case; this includes but is not limited to the type of employer and employee, the business or activity of the employer, the position or nature of the appointment of the employee, the employee's level within the hierarchy of employees, the express and other implied terms of employment and the termination provision. These factors are obviously not exhaustive and there will be as many factors as there are types of employment contracts and individual facts and circumstances. Ian Smith and Gareth Thomas, *Smith &Wood's Employment Law* (Oxford University Press 2007, 9th Ed) describes the implied term in the following way at p 151:

> Reliance on the implied term… can arise on a wide variety of facts, to such an extent that it can constitute something of a 'wild card' in employment law, often requiring the employer to think in terms not just of whether contemplated or proposed conduct (for example changes to working practices or terms and conditions) is strictly lawful under the wording of the individual contracts,

but whether objection could legitimately be made by affected employees to the *manner* in which the management propose to pursue their goals.

[emphasis in original]

The applicability of this implied term to the constructive dismissal context

61 Although this issue does not arise in this case, I nonetheless flag an interesting question: does the duty of mutual trust and confidence apply when it comes to the employer dismissing its employee?

62 Prior to the decision in *Johnson*, the implied term of mutual trust and confidence has been applied in constructive dismissal cases; see *eg*, *Post Office v Roberts* [1980] IRLR 347, where a junior clerical assistant who had been appraised as acceptable for a few years, found that her application for a transfer had been denied as her last appraisal, of which she had not been told, had rated her negatively. She resigned. The Employment Appeal Tribunal agreed that there had been a breach of an implied term of mutual trust and confidence amounting to a repudiation of the employment contract, and the employee had been constructively dismissed. Also, in *Woods v W.M. Car Services (Peterborough) Ltd* [1982] ICR 693 ("*Woods*") the English Court of Appeal dealt with a similar issue but agreed with the tribunal's finding that the facts did not justify the employee's claim of being constructively dismissed. Lord Denning MR, in discussing the implied term of mutual trust and confidence said, at 698:

> It is the duty of the employer to be good and considerate to his servants. Sometimes it is formulated as an implied term not to do anything likely to destroy the relationship of confidence between them: see *Courtaulds Northern Textiles Ltd v Andrew* [1979] I.R.L.R. 84. But I prefer to look at it this way: the employer must be good and considerate to his servants. Just as a servant must be good and faithful, so an employer must be good and considerate. Just as in the old days an employee could be guilty of misconduct justifying his dismissal, so in modern times an employer can be guilty of misconduct justifying the employee in leaving at once without notice. In each case it depends on whether the misconduct amounted to a repudiatory breach as defined in *Western Excavating (E.C.C.) Ltd. v. Sharp [1978] I.C.R. 221*.
>
> The circumstances are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not. It is a question of fact for the tribunal of fact … Thus when the manager told a man: "You can't do the bloody job anyway," that would ordinarily not be sufficient to justify the man in leaving at once. It would be on a par with the trenchant criticism which goes on every day. But if the manager used those words dishonestly and maliciously — with no belief in their truth — in order to get rid of him, then it might be sufficient: because it would evince an intention no longer to be bound by the contract.

63 However, in 2001, the House of Lords held in *Johnson* that although it was possible to conceive of an implied term which the common law could develop to allow an employee to recover damages for loss arising from the *manner* of his dismissal, it would be an improper exercise of judicial function in light of the Employment Act of 1996 which provided an employee a limited remedy for the conduct complained of in that case. Lord Hoffman opined at [46]:

> It may be a matter of words, but I rather doubt whether the term of trust and confidence should be pressed so far. In the way it has always been formulated, it is concerned with preserving the continuing relationship which should subsist between employer and employee. So it does not seem altogether appropriate for use in connection with the way that relationship is terminated.

Lord Steyn dismissed the appeal on grounds of remoteness and disagreed with the majority's reasoning on the implied term. He opined at [26]:

> Counsel for the employers also argued that the implied obligation of trust and confidence is restricted to unacceptable conduct by the employer during the relationship. It is a legalistic point. It *ignores the purpose of the obligation*. The implied obligation aims to ensure fair dealing between employer and employee, and that is *as important* in respect of disciplinary proceedings, suspension of an employee and dismissal *as at any other stage of the employment relationship*. In my view this argument ought not to be accepted.
>
> [emphasis added]

64 *Johnson* has been criticised; see *e.g.*, Douglas Brodie, *Fair Dealing and the Disciplinary Process* (2002) 31 ILJ 294; Mark Freedland, *Claim For Unfair Dismissal* (2001) 30 ILJ 309. A later House of Lords decision, *McCabe v Cornwall County Council and another* [2005] 1 AC 503 ("*McCabe*") distinguished *Johnson* and Lord Steyn commented on the difficulties of the *Johnson* approach at [39] and [40]:

> This dichotomy [between the continuing relationship between the employer/employee and acts of termination] will often give rise to questions whether earlier events do or do not form part of the dismissal process. After all, such problems in relationships between an employer and an employee will often arise because of a continuing course of conduct. In practice this will inevitably lead to curious distinctions and artificial results…
>
> … An employee confronted with a repudiatory breach of contract by an employer who elects to treat the contract as continuing may still have a claim for breach of contract. But in practice an employee may often not have much choice but to accept the repudiation. If the employee accepts the repudiation, the claim becomes one of unfair dismissal and the *Johnson* exclusion zone comes into play.

65 Resolution of this question, interesting as it may be, does not arise on the facts of this case. If, as is often the case, there is an express term allowing termination of employment without having to give reasons and a notice period or payment *in lieu*, speaking for myself, I would have found it difficult to imply such a duty without more. English cases after the Employment Act 1996 came into force should be read carefully as they have a statutory regime as their backdrop. As Lord Hoffman said in *Johnson*, at [35]:

> But in the last 30 years or so, the nature of the contract of employment has been transformed. It has been recognised that a person's employment is usually one of the most important things in his or her life. It gives no only a livelihood but an occupation, an identity and a sense of self esteem. The law has changed to recognise this social reality. Most of the changes have been made by Parliament. The Employment Rights Act 1996 consolidates numerous statutes which have conferred rights on employees.

Whether the implied term is overridden or qualified by express terms

66 I now turn first to examine whether there are any express terms which will negative the implied term or modify its content.

Clause 3.1, read with Schedule 1

67 Clause 3.1 gives Mr Cheah responsibility for the management of the Group's "overall operations" and "leading the management to ensure that the annual business operating targets and management targets set by the Board are achieved." This is supplemented by Schedule 1, which lists the responsibilities of the Executive. The Defendant argues that the proper interpretation of this clause was not that Mr Cheah was "overall-in-charge", but that his role was merely as an implementation arm of the Board. [note: 5] The Defendant further points out that Mr Cheah had admitted this during cross-examination, when he agreed that he was subordinate to the Board. [note: 6]

68 I cannot agree with the interpretation placed upon clause 3.1 by the Defendant. The fact that Mr Cheah is subordinate to the Board does not mean that he was only an execution or implementation arm of the Board. Mr Cheah admitted to the former, but firmly denied the latter. [note: 7] The management staff, including the CEO, of every company is subject to Board decisions because it is the Board which is accountable to the shareholders. The inclusion of a phrase to say that business targets were set by the Board is merely a restatement of the Board's supervisory functions in law. To say that this has the effect of reducing the management authority of the CEO, particularly where the clause has stated in no uncertain terms that he should be "responsible for the management of the Group's overall operations and leading the management", is disingenuous. I find that the words "responsible for the management of the Group's overall operations" is clear. It means that Mr Cheah was to oversee the general management of the Group's operations; he was overall in charge of matters and was *not* merely an implementation arm of the Board with no executive or management autonomy.

69 Schedule 1 (laid out in full at [14] above) further clarifies that this is the correct interpretation of Clause 3.1. Para 1, schedule 1, gives Mr Cheah responsibility "for the *overall management* of the Group's business and operations" [emphasis added], with the exception of business requiring approval. Mr Cheah was to oversee fundraising planning and implementation (para 4), recommend development plans and budgets, and manage resources in line with the budget (para 3). The only mention of Mr Cheah executing and implementing policies is in para 2, which states that Mr Cheah is responsible for "execution and implementation of resolutions and policies established by the Board of Directors". In the context of his other responsibilities, and in particular the reference to "overall management" in the preceding paragraph, I am unable to read para 2 as limiting Mr Cheah's role to one of mere implementation and execution. Para 2 does not say that this is his *only* role. In fact, there are numerous roles in schedule 1 which necessitate management autonomy: leading the management team and deciding on the succession plan of key management (para 6), appointing or dismissing management staff except appointments which should be decided by the Board (para 8), and executing or authorising the execution of capital expenditures, agreements, and other important documents (para 9).

70 Most importantly, para 5 gives Mr Cheah authority to "work out the internal management organization [sic] structure and basic management system of the Group". This is the very act which the Defendant claims was outside of Mr Cheah's authority. If Mr Cheah's role had *only* been to execute and implement the Board's policy, as the Defendant claims, then para 5 is redundant. I find that para 5 is also clear: Mr Cheah had management autonomy to re-organise the management structure.

71 The 11th May Memo, read with Schedule 1, supports this interpretation of Clause 3.1. In *addition* to carrying out the operational plan and policy of the Board, Mr Cheah was to "take charge of group organisation structure, management system and performance building", [note: 8] "and to take full responsibility for the overall operation and management of the group and its subsidiaries". [note: 9]

Moreover, the 11th May Memo seems to have been drafted with the assumption that the CEO job was partially a "replacement job" which would enable "MD Niu Jixing [to]… assume the position of Executive Chairman of the Board, and focus on the Board of Directors" and for Mr Gao to "not work as Group GM and… focus on government affairs". [note: 10] It is clear from the 11th May Memo that Mr Cheah was not being brought in as a CEO merely to implement the decisions taken by Mr Niu and the Board, but that many of his functions were *in replacement of* Mr Niu's and Mr Gao's general managerial functions. This supports the plain and natural reading of Clause 3.1, *i.e.*, that Mr Cheah had general managerial autonomy and was overall in charge of the Defendant's operations. He was not meant to supersede the Board, but neither was his role limited to merely implementing and executing the instructions of the Board.

72 I do not find that an implied term of mutual trust and confidence is incompatible with Clause 3.1, read with Schedule 1. I find that the general tenor of Clause 3.1, granting overall managerial autonomy to Mr Cheah for daily operations and organisational structure, fleshes out the content of the implied term. The implied term of mutual trust and confidence should safeguard Mr Cheah's general managerial autonomy. Attempts to sideline or undermine Mr Cheah as overseer of daily operations and organisational change would be a breach of the implied term of mutual trust and confidence.

Clause 3.2

73 Clause 3.2 reads as follows:

> The executive shall submit to the Board the business operating targets and management targets for the following year at the end of every year. The executive shall submit the business operating targets and management targets for the second half of 2009 by the end of June 2009 and the next three years' development plan by the end of 2009. Upon receipt of the Board's approval, these targets will be the basis and measures sued by the Board for the performance assessment of the Executive. Any adjustments to the approved business operating targets, management targets and development plans will be subject to the Board's approval.

74 I find that the meaning of Clause 3.2 is also clear. Clause 3.2 is about Board approval of business and management *targets* and development plans *for the performance assessment* of the CEO. It is clear from Clause 3.2 that the Board was to be kept informed of the overall direction and growth of the company, and to approve these targets and plans accordingly. I find that Clause 3.2 does not have the effect of diminishing or taking away Mr Cheah's responsibility of oversight over daily operations and organisation.

75 In any event, the Board's "overriding power and control" [note: 11] is not incompatible with the implied term of mutual trust and confidence. The Board's power and discretion to override should be exercised *subject to* its ordinary duty not to undermine Mr Cheah's position so as to destroy the relationship of mutual trust and confidence. The implied term does not contradict the express term of the Agreement; it merely regulates the *manner of exercise* of the powers given to the Board under Clause 3.2.

Clause 3.3

76 Clause 3.3 provides for assignment of duties to the CEO by the Board and in the absence of specific directions gives the CEO "general control and responsibility for the management of the business of the Group" (3.3.2) to "promote, develop and extend the business of the Group" (3.3.3). It also calls for the CEO to "conform to and comply with the proper and reasonable directions and regulations of the Board" (3.3.3) and gives the Board the power to make changes to the office of the

CEO (3.3.4). It is thus similar to both Clauses 3.1 and 3.2 in that it gives Mr Cheah general powers of oversight and management, and a considerable amount of autonomy in developing the Defendant's business, but retains the Board's residual power, allowing the Board to perform a general supervisory function. As I have observed (at [68] above), the general function of supervision and powers of overriding given to the Board is part of every company's structure. If the Board is meant to have a more intrusive management role impinging on the ordinary functions of the CEO, then this should be stated clearly. Clause 3.3 not only does not state this clearly, it affirms Mr Cheah's managerial autonomy and authority in para 3.3.2, by giving him "general control and responsibility" subject only to complying with "applicable laws and regulations" and the "proper and reasonable directions and regulations of the board".

77 I do not find that such a clause is incompatible with an implied term of mutual trust and confidence. In fact, this implied term supports the affirmation of Mr Cheah's "general control and responsibility" by ensuring that his employer does not take away with its left hand what it has given to him with its right. This is particularly so as Clause 3.3.3, which refers to the Board's general supervisory function, subjects Mr Cheah's authority to the "*proper and reasonable* directions and regulations of the Board" [emphasis added]. There is nothing incompatible between an express term of reasonableness and an implied term which has been used traditionally to control unreasonable or negligent behaviour of an employer (see [56] above).

Clause 3.4

78 Clause 3.4 gives the Board the power to appoint a joint-CEO to "act jointly with [the CEO]… and for any period require the Executive to cease performing or exercising the said or any duties or powers." The Defendant rightly points out that, unlike Clause 3.6, which requires Mr Cheah to consent to any secondment to another Group company, clause 3.4 does not contain such a qualification. [note: 12] The Board's discretion to appoint a joint-CEO would only be incompatible with an implied term of mutual trust and confidence if this implied term forbade the Defendant from appointing a joint-CEO or suspending Mr Cheah's duties or powers. Clause 3.4 thus limits the scope of the implied term.

79 However, I am unable to read Clause 3.4 as giving an absolute and unqualified right to the Defendant to replace Mr Cheah in *all* his functions as CEO or to appoint a joint-CEO to take over all his managerial functions. An absolute right of this nature does not sit well with Clauses 3.1 to 3.3 and Schedule 1 of the Agreement. I have already found that these clauses give Mr Cheah overall control of management and organisation structure of the Defendant. If Clause 3.4 is read as widely as the Defendant submits, then Mr Cheah's functions under Clauses 3.1 to 3.4 may be effectively changed or even made otiose without the Defendant's needing to pay the penalty provided for termination under Clause 2.2.1, or without Mr Cheah's having committed any of the offences justifying termination under Clause 11. The only option available to the CEO in such a position would be to terminate the contract and for the CEO himself to pay the penalty. This effectively pre-empts *any* claim for constructive dismissal and gives the employer *carte blanche* to deal with the employee. Such a far-reaching power can only be given to an employer if it is a necessary and unequivocal interpretation of the clause.

80 In *Johnstone*, the employer had a discretionary right under contract to have its employee doctor work for 88 hours a week (48 hours overtime) on average and to call on its employee to work for more than 88 hours on some weeks. The Court found that this discretion was not an absolute right. Lord Browne-Wilkinson opined at 351:

> How far can this go? Could the defendants demand of the plaintiff that he worked 130 hours (out of the total of 168 hours available) in any one week even if this would manifestly involve injury to his health? In my judgment the defendants' right to call of overtime under clause 4(b) is *not an*

absolute right but must be limited in some way. There is *no technical legal reason* why the defendants' discretion to call for overtime should not be exercised in conformity with the normal implied duty to take reasonable care not to injure their employee's health.

[emphasis added]

81 Similarly, I find that there is no reason why the Defendant's discretion to appoint a joint-CEO and require the CEO to cease performing his duties should be an absolute one. I find that there is no incompatibility between Clause 3.4 and an implied term of mutual trust and confidence which governs the *manner* in which the Defendant's exercise their discretion to appoint a joint-CEO or require the CEO to cease performing his duties. I do not find that it is a necessary or unequivocal interpretation of Clause 3.4 that it should be given as wide an interpretation as the Defendant urges upon me. I find that the word "joint" in "joint-CEO" means exactly what it says, *viz* that the appointment of another CEO should be alongside Mr Cheah's appointment as CEO and should not effectively overtake or replace Mr Cheah's functions as CEO but perhaps take over *some* of his functions, for example, because the demands of the job are beyond one person or that person is temporarily ill or otherwise indisposed.

82 It may be argued that the implied obligation to safeguard an employee's health is more important than the implied obligation of mutual trust and confidence. However, the argument in *Johnstone* was not that the implied obligation to safeguard health had an overriding effect because of its relative importance to other terms, but that this implied term was *not incompatible* with the express term. I do not find it a useful exercise to compare the importance of terms within a contract, or to decide which term should have precedence. The more important exercise and the exercise that I have conducted here is to ask whether the terms are compatible, or if they may be read in a way which gives effect and mutual compatibility to the terms. I find that the Defendant's discretion to appoint a joint-CEO can be given full effect even with the limitations put upon it by the implied term of mutual trust and confidence. The Defendant cannot appoint a joint-CEO or require the CEO to cease performing his duties in such a manner as to make the CEO redundant or make it impossible for him to continue to carry out his responsibilities under Clauses 3.1 to 3.3 and Schedule 1 of the Agreement.

Was there a breach of the implied term by the Defendant?

Unauthorised Changes

83 I must now examine the evidence. Mr Cheah's evidence was that the changes he made to the organisational structure were authorised by the Defendant's Mr Niu verbally and by conduct. The Defendant denies this, and claims instead that he had not given any authorisation for these changes, but had recommended that Mr Cheah submit documents for approval.

84 It is first necessary to consider whether Mr Cheah's changes were authorised, as this is the crux of the Defence. If the changes were unauthorised and Mr Cheah had thus repudiated the employment contract and such repudiation had been accepted by the Defendant, then the Defendant's subsequent behaviour would not be relevant as it could not repudiate an already repudiated contract.

85 Mr Cheah was a credible witness. He was consistent in the way he answered each question, and explained what he did and why he did not do certain things especially in relation to the series of meetings in August 2009. He gave straight answers, even when these answers were not clearly favourable to him and he did not attempt to hedge or squirm his way out of difficult questions. For

example, when he was challenged on documents that he had not adduced into evidence, he admitted their relevance without demur. [note: 13]

86 Mr Wang, Mr Niu and Ms Zhang were not impressive witnesses. All three witnesses were evasive and constantly changed their positions. To varying degrees, these witnesses often refused to give a straight answer to the questions asked during cross-examination, but gave irrelevant answers, did not answer the question or attempted to use cross-examination as a means of mounting their defence. This was especially so in the case of Mr Niu. Even giving these witnesses the benefit of a cultural clash, I find that these witnesses were inconsistent and not very credible.

87 In particular, Mr Niu's evidence that he refused to acknowledge or approve the proposed changes to organisational structure was not credible. He was evasive and omitted to explain key facts in his evidence. He did not and could not explain why he did not mention the change in the role and functions of the GMs during the Board Meeting on 12 August 2009. When pressed on the issue, he made vague reference to "the problem" but could not say what he had discussed at the Board Meeting. He evaded the question by drawing attention to the lack of documentation:

> Q: It's airy-fairy. Can you be more specific? Did you tell the board of directors about the removal of GM function?
>
> A: No.
>
> Q: Then you were not telling the board of directors about any unauthorised change in relation to the management structure.
>
> A: You mean during this meeting?
>
> Q: Yes, 12th August 2009.
>
> A: I didn't use those specific words but I really described the problem.
>
> Q: Did you tell the board of directors about the removal of GM function in this board meeting?
>
> A: I didn't have that notion.
>
> Q: You didn't have the?
>
> A: Notion. I didn't have that thought in mind.
>
> Q: Yes. Are you telling the Court that by 12th August 2009, you didn't have the idea that Michael Cheah has removed the GM function?
>
> A: For personnel changes, documents will be required by---by the company. However, there were no documents issued by the human resources department. [note: 14]

This was typical of his characterisation of that meeting throughout cross-examination; he made reference to having discussed "a portion" of the problems, [note: 15] "issues that pertain to the unauthorised issues" [note: 16] or "contents that were in relation to the unauthorised changes," [note: 17] but could not or would not elaborate on what was discussed. I find that Mr Niu understood the questions that were put to him but was being deliberately vague. The minutes of the meeting state

that the Board had been briefed on Mr Cheah's performance and noted his failure to consult the Board or other senior management in the termination of key management staff and his failure to anticipate rising raw material prices. [note: 18] The accuracy of these minutes has not been disputed. I find the truth to be that the change in role and functions of the GM and the attendant change in Group Department head functions had not been discussed at the Board Meeting.

88 I further find that the lack of documentation for the change in role and function of the GMs or the change in the Group Department head functions could not have been the real reason for Mr Niu's failure to bring these specific issues to the attention of the board. Mr Niu did not need any documentation in order to know that the GMs were being removed. He effectively conceded this when he mentioned under cross-examination [note: 19] that it was the complaints from the department heads at the end of June 2009 which had alerted him to these changes. He testified that the GMs had also complained of these changes at the end of July 2009, well in advance of the Board Meeting.

> Q: I put it to you that you knew that the role and function of GMs have been changed. Just to avoid confusion, I put it to you that in the month of June and July 2009, you were already aware that the role and function of GMs have been changed.
>
> A: There were no issuance [sic] of these documents. It's just that some general managers have approached me. [note: 20]
>
> …
>
> A: I disagree although as I've said, I've seen some signs.
>
> Q: Seen some signs of change of role and function of GMs? Is that what you're saying?
>
> A: Yes, I could see the changes in the functions although I did not see any documents. [note: 21]
>
> …
>
> Ct: So he's clarifying when you said, "Although I had seen some signs." So---so is it signs of the changes in the role and functions of GM? "Yes" or "No"?
>
> A: Yes. [note: 22]

89 More importantly, he had been having discussions with Mr Cheah about these changes as early as June 2009 "because it was a period in the middle of the changes." [note: 23] He followed this up with two more discussions in July. [note: 24] Mr Niu claimed that there was no need for further action at that juncture because the proposed changes were only minor. [note: 25] However, he later contradicted himself by stating that the documents sent to him after the Jinan Meeting showed a completely new organisation structure but was missing the work processes required to implement that structure. [note: 26] Mr Niu was very evasive when asked when he had read the documents, how he had read them, or why he had not read them in detail. During cross-examination, Mr Niu vacillated between saying that he had not taken notice of the documents, [note: 27] saying that he had read them but not in detail, [note: 28] saying that he had received the email but not read the attachment at all, [note: 29] and saying that he had read the attachment and decided that he needed

supplementary documents. [note: 30] For the most part, he proceeded on the basis that he had glanced through the documents. [note: 31] Accordingly, when Mr Cheah started implementing these changes in June and July, I find that Mr Niu must have known that these changes were being made pursuant to the proposed new structure. When I sought clarification as to what Mr Niu meant, his responses were telling:

> Ct: Is it your case that once he started coming aboard, he started implementing changes in the management structure?
>
> A: He didn't do that at the beginning.
>
> Ct: In June, he didn't do anything?
>
> A: He did a portion of it.
>
> Ct: Yes. That's what you told me. So he did some changes in June. I'm not saying he did everything on 1 June, but he started some of his changes in June; correct?
>
> A: Yes.
>
> Ct: These changes were unauthorised?
>
> A: Yes.
>
> Ct: And at first, when they were being implemented, you didn't know about them?
>
> A: I wouldn't know because he didn't change – make any changes to the management personnel.
>
> Ct: Yes. I know. You don't have to give me a reason. That is your case. At first when he made changes you didn't know. There is nothing wrong in that. Now, you tell me if I understand your case correctly: you first started knowing something was going wrong when your old staff come to see you and complain to you, that changes are being done, it's either not right or it's confusing or I don't know how to make it work; is that correct?
>
> A: Yes, it's correct, your Honour. [note: 32]

90 I am unable to believe Mr Niu's claim that he did not notice these changes until July. Mr Wang testified that the change in role and functions of the GMs and the Group department heads would have been a big change. [note: 33] He also testified that the GMs had worked with the Defendant for a long time, and knew Mr Niu and Mr Wang well. [note: 34] Given the close relationship between Mr Wang and the GMs and the fact that some of them (e.g. Zhao Yu Dong of the Shaanxi Factory) had been with the company since the 1990s, [note: 35] I find it highly improbable that these GMs would not have at least informally told Mr Wang or Mr Niu about their discontent the moment they found themselves moved to a different job and long before July. I do not believe Mr Wang's evidence that the GMs would have waited until the full effects of the change were felt before surfacing their complaints to Mr Niu and Mr Wang, [note: 36] particularly since this allegation was made in the context of Mr Wang's attempt to retract his evidence after realising the import of his evidence that the change to the role and function of the GMs was a major one. [note: 37]

91 Mr Niu's silence at the Board Meeting is deafening. Mr Niu had testified that the cause of the Defendant's problems was Mr Cheah's change to the GM's and Group Department's functions. [note: 38] He knew this when he came into the Board Meeting. Yet he chose not to mention these changes and was deliberately vague and evasive when asked what he had mentioned at that meeting. Given that the company was in "chaos", [note: 39] it simply does not make sense for him not to at least mention the change in role and function of the GMs or the department heads if this was indeed the cause of the problem. Mr Cheah's termination of key management staff without consultation and his failure to anticipate rising raw material prices were irrelevant to Mr Niu's explanation of the "chaos" in the company, yet these were the matters which found their way into the Board Meeting minutes. It is inconsistent with Mr Niu's account of the "chaos" in the company that it should be these matters and not the change in GM's and Group Department's functions that were mentioned at the Board Meeting. I find that Mr Niu's explanation does not ring true. He claims that he was unable to give a full airing to Mr Cheah's changes because the Board did not decide until 18th August 2009 that these changes were unauthorised and their status was uncertain at the Board Meeting. [note: 40] This contradicts his earlier statements that he had told Mr Cheah that these changes were unauthorised. Even then, Mr Niu was equivocal as to what he had said in relation to authorisation:

> Q: Did you tell him that the changes are unauthorised?
>
> A: I've told him before.
>
> Q: June meeting, did you tell him that these changes are unauthorised?
>
> A: I've said so before.
>
> …
>
> Q: So my question to you is: did you tell Mr Cheah in June, in the June meetings, in the two weeks that, "Look, these changes are unauthorised"?
>
> A: Mr Cheah is familiar with our management documents. We have standard procedures for approval of documents. So during these two weeks, I've been teaching him on who to submit documents to, who to get approval for documents, and who should be reporting to him and when should the submission deadlines be. [note: 41]

Even if the status of these changes were uncertain, there is no reason why they should not have been mentioned at the Board Meeting as, on Mr Niu's version, this meeting was to discuss "the problems caused by the Plaintiff's unauthorised changes and what is the best solution to assist the Plaintiff in running the business operations of the Defendant". [note: 42] I find the truth to be that Mr Niu chose not to bring up the specific changes at the Board meeting because he had already given his verbal approval, or at least acquiesced, to the new organisational structure and was hedging his bets and avoiding taking a firm position. If the venture succeeded, he could claim credit for it and if it did not, he could always turn around and say 'I told you so'.

92 I further find that these changes had been duly authorised. Mr Niu agreed that the document he had read and approved [note: 43] was closer to the new structure submitted to him after the Jinan meetings [note: 44] than it was to the original chart. [note: 45] This directly contradicted his later evidence that the chart was the same as the original structure and did not need approval, [note: 46]

or had been approved before Mr Cheah's appointment as CEO on 1 June 2009. [note: 47] When pressed on this issue, Mr Niu's only response was the bare assertion that the documents had not been approved according to the Defendant's "fixed operating procedure". His performance on the stand is, again, telling:

> Q: And this is, therefore, an important document that you need BOD approval?
>
> A: The board has already approved this document. And the approval has been done before the 1st of June.
>
> Q: Answer my question: therefore this is an important document?
>
> A: Yes. [note: 48]
>
> …
>
> Q: …The other two documents attached to the first on, therefore, they are all important documents.
>
> A: It belongs to the -- this document belong [sic] to the chairman of the board. It does not belong to the board of directors.
>
> Q: So you are the chairman of the board? Do you recall that in the role and responsibilities for chairman and CEO, you are to communicate with the directors?
>
> A: It has not been approved.
>
> Q: Then all the more so when you saw this on 18 June 2009, showing something that have not been approved, all the more so the first thing you would jump up to do is to send an email out to every board of director that, look, this has not been approved?
>
> A: We have our own usual operating procedures just like traffic regulations; it's a designated regulation. [note: 49]

I find that his testimony that what had been approved was the old organisation structure did not make any sense. Notably, in one of the pages forming the corpus of these attachments, [note: 50] two of the four pre-change GMs, Tan Qingde and Zhao Yudong, are absent from the organisation chart. This should have alerted Mr Niu to the fact that this was not the old structure, but a different structure absent those GMs. I find that the changes proposed at the Jinan meeting were new organisational changes. This is consistent with the report of the meeting ("Hudson Teh's report") which states that this was an "introduction of the structure of the entire *brand-new* sales organization" [emphasis added]. [note: 51] That this was a new chart prepared for board approval was corroborated by Mr. Koh Pee Keat, the group financial advisor, under cross-examination. [note: 52] Mr Niu also conceded that these documents were initially prepared for board approval. [note: 53] For someone so adamant on going through all the right channels and getting all documents in for formal approval, [note: 54] Mr Niu was inexplicably remiss in acting on irregularities and admitted that he did nothing to inform the Board that there were changes sought to be implemented which did not have their authorisation. [note: 55] I therefore find that Mr Niu had not only acquiesced to these changes, but had given his approval. Without this approval, Mr Cheah would not have been able to present the

changes at the Jinan meeting as a *fait accompli*.

93 Mr Wang claimed that Mr Cheah's presentation of these changes were merely his opinions [note: 56] rather than a proposed new structure. I find this a rather implausible suggestion. The presentation of these changes was included in Hudson Teh's report which was eventually presented to the board. If these had merely been opinions, they would not have been accompanied by detailed charts and documents showing a plan of implementation which were then included as attachments and forwarded to the Board. This was also a meeting involving executive Directors Mr Niu and Mr Wang, yet the changes were presented as a *fait accompli*. If the changes had been mere opinions and had not been hitherto raised for approval with Mr Niu and Mr Wang, this would have caused some alarm to Mr Wang who would be keen to discuss these opinions. Given the fact that Mr Wang had admitted earlier in his testimony that a removal of the GM function was not a normal event, [note: 57] it is strange that Mr Wang would not have thought to at least bring this up with Mr Cheah or Mr Niu, at least by way of warning him that these were not changes that were appropriate to the Defendant. There is no evidence that such a discussion ever happened. It is unlikely that these changes would have been announced and treated so lackadaisically had they not already been brought to the notice of and approved by the executive directors. I find that Mr Wang's insistence that these were merely Mr Cheah's "personal viewpoints" was an attempt to wriggle his way out of answering some difficult questions about the rolling out of the changes at the Jinan meeting. He had earlier attempted to evade these questions by saying that he had not been present for the entire duration of the meeting, [note: 58] but when he was pressed on when he was absent and discovered that some of these changes were announced on a day when he was present, he further added that he had "left for some time during the meeting". [note: 59] I am unable to believe Mr Wang's testimony that the Jinan meeting was not a presentation of changes which had already been approved.

94 Even if these changes had not been approved before the Jinan meeting, it is clear that the Defendant had adopted them. For the reasons given at [90] above, I do not believe that Mr Niu and his lieutenants Mr Wang and Mr Gao did not find out about the changes until July. Mr Wang sits at the top of production in the new organisation structure. [note: 60] Even if he had not received any complaints from the GMs, he would have been receiving an abnormal quantity and type of paperwork and would have been alerted to the changes before the end of June/beginning of July which he claims was the date he became aware of the changes. [note: 61] I find that it is more probable than not that the changes had been approved and adopted by the Defendant and they were not unauthorised as the Defendant claims.

95 In contrast to the prevarication and evasiveness of Mr Wang and Mr Niu, I find that Mr Cheah's testimony was largely consistent and made sense. I have already found (at [92] above) that Mr Cheah had submitted a new organisation chart which had been duly authorised by Mr Niu. I also believe Mr Cheah's evidence that Mr Cheah and Mr Niu had had extensive discussions about who should take on which role within the new organisation structure. [note: 62] This explains why there were names in the document, despite Mr Niu's testimony that organisation structure charts did not usually have names on them. [note: 63]

96 I find the truth to be that while the relevant paperwork was not properly filed (as Mr Cheah conceded during cross-examination [note: 64]), Mr Niu had given verbal approval to the changes as Mr Cheah claimed. [note: 65] Later instructions from Mr Niu that formal documents should be in written form instead of "being conveyed in oral format" [note: 66] were too little and too late, and was effectively a concession that oral approval had been given. It was Mr Niu's role to mediate between

the CEO and the board, and he admitted this on cross-examination. [note: 67] This is consistent with the 11 May Memo which stated that Mr Niu had a role to "maintain the communication between the Board and the company management." [note: 68] As far as Mr Cheah was concerned, submitting the charts to Mr Niu and obtaining Mr Niu's verbal approval would have sufficed as proper approval. I find the truth to be that Mr Niu's insistence on written approval was an afterthought, and that the need for formal documentation was a recent thing arising from the Defendant's being listed in Singapore. Mr Cheah thus announced these changes at the Jinan meeting and implemented them soon after. The Defendant, by its actions and through Mr Niu, elected to adopt the changes notwithstanding the lack of formal documentation. I find that Mr Niu's offer of 2-3 month's salary in lieu of termination (granted without board approval) was also an afterthought.

97 Given that the changes had been duly authorised, I find that Mr Cheah had not repudiated the contract. Even if the changes had been unauthorised, the Defendant elected to treat the contract as continuing. All of the Defendant's key officers' behaviour subsequent to the introduction of these changes are thus relevant in assessing whether the Defendant had repudiated the contract by breaching the implied term of mutual trust and confidence, thereby allowing Mr Cheah to claim constructive dismissal.

Exclusion of Mr Cheah from the August 2009 meetings

98 I find that Mr Cheah was improperly excluded from the 10 August Meeting, and the Board Meeting.

99 Mr Niu's evidence is that Mr Cheah was not a part of the meetings discussing these changes because "we need to understand the situation before we talk to the person involved". [note: 69] This is a rather curious statement, since Mr Niu gave clear evidence that by the time he met with the staff on 10 August 2009, he had already had discussions with Mr Cheah in relation to these changes on multiple occasions in June, and twice in July. [note: 70] He further testified that he had identified Mr Cheah's changes to the organisational structure as problematic and had asked him to stop these changes [note: 71] and in particular to stop the removal of the GMs and their functions. [note: 72] I find that Mr Niu would have had a clear idea of what the situation was by the 10 August Meeting and if his only objection was that he needed to "understand the situation" before talking to Mr Cheah, he should have invited Mr Cheah to the meeting.

100 I am unable to believe Mr Niu's evidence that Mr Cheah was at the Board meeting but stormed out when Mr Niu was appointed Joint-CEO. Mr Cheah's work performance and Mr Niu's appointment as Joint-CEO was the last thing discussed. If Mr Cheah had indeed attended the meeting and stormed out at this point, he would have stormed out at the *end* of the meeting, not in the middle or beginning. It follows that he would have been present for most of the meeting and there is no reason for his attendance not to have been recorded. Mr Niu made no effort to correct the impression made by the minutes that Mr Cheah was absent from the meeting. His explanation for why he did not do so is wholly implausible. He claims that auditors and personnel from the inspection bureau would have to check their records, [note: 73] but could not explain why this would have necessitated hiding Mr Cheah's presence at the Board Meeting. I find this to be a rather pathetic excuse used to shore up the baseless claim that Mr Cheah had been at the Board Meeting. I believe Mr Cheah's version of events that he had asked to be included in the Board Meeting but had been given the brush off. [note: 74] If Mr Cheah had been present, and his performance was being discussed, I find it completely implausible that none of the directors would have asked him to explain the changes and the decisions that he had made, as Mr Niu claims. [note: 75]

101 I have already found (at [91] above) that Mr Niu had not in fact raised the changes to the role and functions of the GMs or Group Department heads at the Board meeting. Yet, the Board Meeting had been used to appoint Mr Niu as joint-CEO on the basis of Mr Cheah's management style, [note: 76] his termination of key management staff and his failure to anticipate rising raw material prices. [note: 77] None of these accusations had been made known to Mr Cheah. In fact, Mr Niu barely mentions these factors in his Affidavit and during cross-examination, choosing instead to focus on Mr Cheah's changes to the role and functions of the GMs and Group Department heads.

102 I further find that it is a clear breach of the implied term of mutual trust and confidence for meetings to be held discussing the employee's decisions without at least informing him of the accusations being made against him at that meeting. The situation is not unlike that in *Post Office v Roberts*, where the employee had had a bad report lodged against her without her knowledge and was subsequently refused a promotion. A relationship of mutual trust and confidence requires that the employer inform the employee of charges levelled against him, and give him the opportunity to rectify any problems or clarify any misunderstandings. This is particularly so where the employee is in a high level executive role and makes complex decisions on behalf of the company. The more complex an issue, the more discretion is needed and hence the greater the need to clarify an issue with the employee. In light also of my findings on the unauthorised changes, I find the truth to be that Mr Niu was always aware of the organisational changes and of the problems they were causing, but failed to bring these concerns up with Mr Cheah as required by the implied term of mutual trust and confidence. He instead brought these changes up during the 11 August staff meeting in the absence of Mr Cheah and without consulting him, thus also undermining Mr Cheah's authority as the man who had implemented these changes and was overall in charge of operations and management (see [68]-[74] above). I find that Mr Cheah had asked to be involved in the meetings but had been rejected by Mr Niu whose actions as well as words indicated that Mr Cheah's views and opinions would not be welcome. This would plausibly have, for example, deterred Mr Cheah from asking to attend further meetings which he was not informed about, or from volunteering his opinions straight to the Board and thus bypassing Mr Niu. Mr Cheah testified that these were his concerns [note: 78] and I believe him.

Discontinuing of Email

103 I find that Mr Cheah has not discharged his burden of proof that his email account had been discontinued. Mr Cheah conceded under cross-examination that it was possible that the emails complained of were stuck in his outbox because his computer was not connected to the internet. [note: 79]

104 However the sharp drop in the number of emails that were sent and received by Mr Cheah during this period was not challenged. The Defence proceeded on the basis that the screen capture was accurate, and only disputed Mr Cheah's case theory on deactivation of the email account. [note: 80] The Defendant also accepted that Mr Cheah received a total of 91 emails from 11 to 19 August 2009. [note: 81] The drop from receiving an average of 10 emails a day to none is drastic. When cross-examined on this issue, Mr Niu was deliberately evasive, even though he acknowledged that the reduction in the number of emails was abnormal.

> Q: So you accept that either by coincidence or by plan, the staff in your company have altogether stopped sending email [sic] to the CEO or have reduced sending emails to your CEO? Do you agree?
>
> A: I don't know, because we didn't announce that we are going to fire off the CEO.

Q: Question: based on the screen capture, your staff have either stopped or have reduced sending the number of emails to the CEO since 14 August 2009?

A: I don't know.

Q: Question to you: based on the screen, can you confirm that this is the observation -- this is the correct observation?

A: This was what I saw.

Q: So you accept my question, that you accept that from 14 August 2009 onwards, your staff have either stopped or reduced sending their emails to the CEO? Do you accept that?

A: This was what -- this was reflected on the screen shot. [note: 82]

...

Q: Then, next question is: you accept that these three incidents are all abnormal? Based on the screen capture, these three incidents are all abnormal; you accept?

A: Yes, from the screen shot, it's not normal. [note: 83]

I do not expect Mr Niu to have knowledge of the reasons why there was such a drop in the level of emails sent to Mr Cheah. There is no evidence that Mr Niu gave instructions to the staff to stop sending emails to Mr Cheah. However, it is undisputed that the company continued to run normally during that time and there would have been matters requiring the approval of the CEO. By this time, Mr Niu had been appointed joint-CEO and would have been able to grant the necessary approvals. I find the truth to be that the channels of communication and approval had been diverted to Mr Niu and that this is the most likely explanation for the reduction of emails.

105 Mr Niu's explanation that the system would not allow for changes such as the closing and re-opening of the email account over the time period complained of [note: 84] disproves Mr Cheah's case theory that the account was deactivated, but does not challenge the alternative explanation put forward by Plaintiff's counsel, Mr Hee Theng Fong ("Mr Hee"), that Mr Niu had diverted routes of approval to himself. The only evidence given that this was not the case was a 10 August 2009 Meeting Minute requesting company staff to "cooperate and support GM Xie's work and implement GM Xie's instructions" and that "in the future, GM Xie's procedures shall continually be adopted". [note: 85] However, the message was mixed; while the memo paid lip service to Mr Cheah's leadership, practical changes such as having Mr Niu as a joint-CEO eroded Mr Cheah's authority. The absence of Mr Cheah from the meeting would have confirmed to the managers that the true seat of authority was with Mr Niu. These events must also be seen in light of the draft meeting minutes, [note: 86] which further indicates:

(a) That GM Xie should take work tasks of the group only after the current year (para 1);

(b) That "GM Xie's management model does not apply to this special period" (para 1);

(c) That there should be clear work division between Mr Niu and Mr Cheah, and that Mr Niu would "jointly work with GM Xie after communicating with him" (para 2); and

(d) That business processes documents were to be examined and verified by Mr Niu, assisted by the manager of enterprise planning departments (para 5).

106 While I do not place much probative weight on the draft meeting minutes, I find that, together with the abnormal drop in emails to Mr Cheah, it provides the necessary context to understand what was communicated to the managers during the 10 August Meeting, as well as the nature and effect of Mr Niu's appointment as joint-CEO.

Appointment of Mr Niu as Joint-CEO

107 I have already found (at [78]-[82] above) that the implied term of mutual trust and confidence within the context of Mr Niu's appointment as joint-CEO concerns the manner in which Mr Niu is so appointed and performs his duties. Mr Niu may not be appointed a joint-CEO in such a way as to make Mr Cheah's position redundant. The word "joint" in joint-CEO means precisely what it says: it is not a taking over of the role of CEO, but a complement to Mr Cheah's CEO role.

108 I find that while there was no discontinuation of Mr Cheah's email account, the lack of emails coupled with the exclusion of Mr Cheah from the 10 August Meeting and the general tenor of the meeting itself shows, on a balance of probabilities, a deliberate undermining of Mr Cheah's authority as the CEO. I find the truth to be that Mr Niu had been aware that Mr Cheah was receiving fewer emails as the necessary approvals which needed to be made had been diverted to him as joint-CEO. Mr Niu never once averred during the course of the trial that he had communicated with Mr Cheah on these matters. His appointment as joint-CEO was substantially a taking over of the role of CEO rather than sharing or complementing of that role. Indeed, the Defendant cannot plead that Mr Niu had not taken over the day to day operations of the Defendant as claimed by Mr Cheah [note: 87] as its case is that Mr Cheah *never had* the power to carry out the day-to-day operations of the Defendant. [note: 88] On a balance of probabilities, I find that Mr Cheah had simply been cut out of the loop and the Defendant's behaviour in relation to the company car and office affirms this (see [113]-[121] below).

Exclusion from duties from 17-18 August 2009

109 Mr Niu relies on the fact that Mr Cheah refused to work with him and had not been in the office to excuse his failure to consult with Mr Cheah as joint-CEO. Mr Cheah's case is that he had been actively excluded from his duties from 17-18 August 2009. I find that Mr Cheah has not discharged its burden of proof that he was actively excluded from his duties on these dates.

110 Counsel for the Defendant, Mr Jonathan Yuen, rightly pointed out during cross-examination and Mr Cheah admitted to the following:

(a) The defendant's staff continued to involve Mr Cheah in tasks consistent with his job as CEO; [note: 89]

(b) Mr Cheah failed to respond to an email from Gao Zhongfa dated 17 August 2009; [note: 90]

(c) the board of directors still asked Mr Cheah for instructions, and he was carbon copied in an important company document; [note: 91]

(d) he was allowed to continue meeting with the staff and the staff did not refuse to meet him; [note: 92]

(e) he did not ask to come to the staff meeting he was allegedly excluded from, thus accounting for his exclusion; [note: 93] and

(f) he was not prevented from proffering his opinions to the board). [note: 94]

The Defendant also rightly points out in its submissions that Mr Niu would have had full access to the information and documents necessary for him to carry out his executive duties, and this was unchallenged by Mr Cheah. [note: 95]

(g) I find, however, that there is also no evidence that Mr Niu had consulted with Mr Cheah on those dates and before Mr Cheah went on leave on 24 August 2009. Mr Niu does not even claim that he had consulted Mr Cheah. The Defendant instead relies on Mr Cheah's having gone on leave without approval on 10 and 24 to 31 August 2009, [note: 96] and on the fact that clause 3.4 permitted the appointment of a joint-CEO. [note: 97] However, even if I were to take the Defendant's account at face value (which I do not, for the reasons given at [142]-[146] below), this would not excuse Mr Niu from not having consulted with Mr Cheah as joint-CEO during the time that Mr Cheah had been at work to the time Mr Cheah went on leave on 24th August.

111 I also find that there is not much to Mr Niu's allegation that he had been willing to consult with Mr Cheah had Mr Cheah not been absent. If Mr Niu had been so eager to consult with Mr Cheah as joint-CEO, I find that he would have done so *before* Mr Cheah had gone on leave. There is no evidence that this was the case. I do not believe Mr Niu's testimony that he and Mr Du had tried to call Mr Cheah when he had gone on leave without notice. Mr Niu inexplicably did not ask the driver to contact Mr Cheah. [note: 98] This is peculiar since Mr Niu never disputed that the driver regularly fetched Mr Cheah from his home to the office (his only objection was that the driver was also used for other purposes). If Mr Niu's account that he did not withdraw the driver from Mr Cheah's use is right, then the driver would have been the first person who would have had notice of Mr Cheah's leave, either because he would have been told not to pick Mr Cheah up that morning, or because he would have turned up as usual and been sent back to the office.

112 I find the truth to be that Mr Niu was in no particular hurry to find Mr Cheah or to consult with him. Instead, Mr Niu made the decisions as CEO, and the word "joint" simply fell out of the picture. This is not to say that Mr Cheah could not have asserted his own authority by way of all the potential actions he could have taken at [110] above. The evidence on exclusion of Mr Cheah from the day to day operations of the company does not *in itself* point unequivocally to a breach of an implied term of mutual trust and confidence. Nevertheless, it may still figure in the final analysis as part of a cumulative series of events (see [131] below).

Removal of company car

113 I find that the company car was more likely than not given to Mr Cheah for his daily use, but the Defendant reserved the right to withdraw the car from him when the occasion called for it.

114 Mr Niu and Mr Wang both testified that the company car was not for the exclusive use of one person [note: 99] and this was not effectively challenged under cross-examination. However, both Mr Niu and Mr Wang stopped short of saying that the car was not regularly used by Mr Cheah. In fact, Mr Niu let slip under cross-examination that barring "some overseas business affairs", the car was used by its executive officers. He testified:

I have to say that in my company, we do not issue cars to staff for personal use. So, for instance, if let's say the car is not involved in some overseas business affairs, I would call the company and ask for the car to pick me up to and from work. *If I didn't go to work, then the car will be at the disposal of the company*. If you have to force me to answer, then I have to differentiate between having a car for the com---for company's use or having a car for personal use. If it's for personal use, then, yes, I will tell you I will be embarrassed. If it's for company use, then I have to say that my staff will complain about the way I do things. [note: 100]

[emphasis added]

This is consistent with Mr Cheah's evidence that the car was used regularly to send him to and from work. [note: 101]

115 Even though the company car was not for Mr Cheah's exclusive use, the distinction Mr Niu draws between cars for personal use and company use is untenable. He seems to make this distinction based on the rights that an employer would have against the company for removal of the car; he testified that if the car had been for personal use, he would sue the company if it was taken back, as the company would have "no right to take it back". [note: 102] However, this is a misunderstanding of Mr Cheah's claim. The claim is not that the Defendant had no right to take back the car, but that the car had been removed in a deliberate attempt to lower his standing in the eyes of the staff he oversaw, and was thus a breach of the implied term of trust and confidence by undermining his position as CEO within the company. [note: 103] This argument would hold whether or not Mr Cheah had a legal right to the car. Mr Cheah clarified this position on cross examination:

Q: You disagree, so can you find, you know, since this is your case, why don't you flip to your service agreement and show me where in your service agreement, it obliges my clients to provide a car and driver for you?

A: Yes, it's not stated in the service agreement, but it's the statute [sic] that go along as a CEO of the company.

Q: There's a statute that goes along with that?

A: Yup.

Q: What statute, Mr Cheah?

A: Because the CEO are [sic] provided right from the day one with a car and driver, and the fact that the defendant take away is in other words trying to show the world that he is no longer a CEO.

Ct: I think you mean stature.

Q: Stature.

A: Stat---sorry, stature. [note: 104]

…

Q: So basically your position to the Court is that "I admit it's not in my contract, but other

senior people have it and therefore I should have it as well", correct?

A: Er, correct and right from the day one, I already have a driver and a car.

Q: Okay. So on the one hand, you talk---you have admitted to the Court that there is no legal obligation for my clients to provide this to you, but on the other hand, you are saying that "I still must have it because it is"---to use your own words---"commensurate with my position". Agree?

A Agree. [note: 105]

116 When Mr Niu was pressed on the removal of the company car as a means of undermining Mr Cheah's position within the company, he was again very evasive, testifying rather tangentially and mystifyingly that if the same had happened to him, he would not be embarrassed but would apologise for wasting the company's resources. [note: 106] He finally testified that he would have felt embarrassed if the same had been done to him.

Q: Now listen to this situation very carefully, this CEO make changes in the company and that changes have been reversed by you---by the---by the compan---by the board of directors and this CEO is excluded from the senior management staff's meeting. This CEO's email account either has been terminated or the emails have come to zero and his room has been taken away. His car and driver have been taken away. On the face of it, would you agree that this is embarrassing for the CEO? Can you let the interpreter translate portion by portion?

A: I disa---I agree to most parts of what you had just said but I disagree to a minority of the portion.

Q: Can I intervene? You put all these events collectively together. On the face of it, would you agree that it is embarrassing for the CEO?

A: Is it an example?

Q; Example first.

A: I agree.

Q: Don't you think it will give people the impression that the CEO did not do a good job, on the face of it?

A: I can view this from many angles so which is the angle you are looking at.

Q: Collectively with all these events happening, would you agree that on the face of it, it will give people the impression that the CEO did not do a good job?

A: The question you asked last week were based on---were targeted at my personal thoughts. So is this question also based on my personal thoughts?

Q: Yes.

A: If that's the case, I will feel embarrassed. [note: 107]

...

Q: Why do you say that the CEO would be embarrassed?

A: I'm excluded from meetings and the office has been taken away from me. Furthermore, the changes that I had made were reversed, so if I were in that position, I would feel embarrassed. As for the issue in relation to the car, I will not talk about it because---as for the issue in relation to the car, I will not talk about it because that is an issue of principle. [note: 108]

117 While Mr Cheah did not have a right to the car and the car could be removed when it was needed elsewhere (and specifically to pick up overseas guests) there was no reason proffered throughout the trial or in the affidavits as to why the car had been withdrawn at this particular moment. Mr Niu had testified that the car might be withdrawn for other company business and could have shown what this business was in order to put his claim on a sure footing. He did not do so. I find the truth to be that there was no reason for the car to be withdrawn other than to cause embarrassment to Mr Cheah and to undermine his position in the company. This is consistent with Mr Cheah's claim that Mr Niu had told him that he was unable to work alongside him any longer and had asked him to go on a holiday. [note: 109] Having expressed this sentiment to Mr Cheah, there was no need for the company car to pick him up from work as Mr Niu had effectively taken over Mr Cheah's duties and was functioning as the replacement CEO, and not a joint-CEO.

Removal of Office

118 Mr Cheah admitted under cross-examination that Mr Niu did, from time to time, use the smaller meeting table in Mr Cheah's office to conduct meetings. [note: 110] Mr Cheah's evidence was that Mr Niu told him to vacate his office on 19 August 2009. [note: 111] He further testified under cross-examination that it was significant that Mr Niu put his things on the working table as his usual practice was to put his things in a corner by the meeting table. [note: 112] This was Mr Cheah's only evidence that Mr Niu had, in fact, removed his office. Mr Cheah fell short of saying that Mr Niu then went on to start *using* the working table.

119 Mr Cheah's evidence was contradicted by Mr Wang's evidence that he had seen Mr Niu work at the small table during the material period. [note: 113] Given that it is common ground that there was no other office for Mr Niu to use, the use of Mr Cheah's office and the small meeting table, as well as putting his things in Mr Cheah's office was consistent with the appointment of Mr Niu as joint-CEO. This did not constitute a removal of the office, and I find that Mr Cheah has not proven his claim [note: 114] that Mr Niu had taken over his office.

120 However, I find that Mr Cheah has shown on a balance of probabilities that Mr Niu's actions in relation to the office had undermined Mr Cheah's position in the company and made it very difficult for him to carry out his duties as CEO. I am not convinced by the Defendant's submission that Mr Cheah had no basis for complaint because Mr Wang, a director of the company and therefore of a higher rank than Mr Cheah, also had a shared office. [note: 115] As Mr Hee pointed out, Mr Wang may have been a director, but his role was that of a Production Director and he was made to share an office in that capacity and not as a Director of the Board; his position in the organisation chart was below that of the CEO. [note: 116] The fact that Mr Wang also had a shared office does not mean that the sharing of Mr Cheah's CEO office would not have undermined his position in the eyes of the staff, making it difficult for him to exercise the authority granted to him under Clause 3.2 of the Agreement.

121 Mr Cheah's evidence that Mr Niu usually put his things by the meeting table but that he now put it on the working table was unchallenged. [note: 117] Mr Niu carefully stopped short of saying that he had not told Mr Cheah to vacate the office, [note: 118] and instead stated that Mr Cheah still had an office to work from. Mr Cheah's evidence that he had been told to vacate the office also stands unchallenged. When taken together, these acts would have made it difficult for Mr Cheah to carry out his duties as CEO, particularly given his earlier concerns that being a CEO would be practically impossible if Mr Niu continued to exercise the same influence and control as previously. [note: 119] Mr Niu's presence in the room on a more permanent basis, marked by having his things on the working table, would have been obvious to the senior level management, particularly since all documents and archives were kept in this room [note: 120] and senior management would be coming in and out of the room on a regular basis. This was more than likely a source of embarrassment known to all the members of the office.

122 Mr Niu's actions in relation to the office are not in themselves a breach of the implied term of mutual trust and confidence. I do not think that this implied term goes that far, as it would place employers in an impossible situation should it need to take drastic measures where there were space constraints. However, I find that this was part of a slow and systematic means of undermining Mr Cheah's position as CEO.

The Reversal of Mr Cheah's changes

123 The Defendant is right to point out that the Board has the ultimate authority and can reverse Mr Cheah's changes. [note: 121] However, the implied term of mutual trust and confidence limits the *manner* in which any overriding of changes may be done. I find that the implied term of mutual trust and confidence required the Defendant to at least inform Mr Cheah of the accusations levelled against him and to clarify what these changes were and why they had been made *before* taking the decision to reverse these changes. Instead, the reversal of changes was done in a cloak and dagger way, with the Executive directors and Mr Teoh (an independent director) meeting on 19 August 2009 without Mr Cheah and without even informing Mr Cheah that they were thinking of reversing these changes. The power of the Board to reverse these changes is also limited by Clause 3.3.3, which states that such power should be exercised properly and reasonably. I find that the Defendant's reversal of these changes on the basis that they were unauthorised was not entirely above board given my findings in [87]-[96]. A proper and reasonable exercise of the Board's authority in accordance with Clause 3.3.3 should have involved consultation with Mr Cheah as the author of these changes, as well as an investigation into whether the changes had been duly authorised or not. Instead, there is little indication that there had been any such investigation or that the documents from the Jinan meeting had even been brought up. I find that, in the context, the manner of reversal breached both the implied term of mutual trust and confidence and Clause 3.3.3.

The totality of circumstances

124 The totality of circumstances show that the Defendant, mainly through the person of Mr Niu and other senior officers who owed their allegiance to Mr Niu, deliberately and systematically undermined Mr Cheah's position in the company and thus breached the implied term of mutual trust and confidence.

125 Mr Niu admitted on cross-examination that the removal of the office, exclusion from meetings and reversal of changes would have made him embarrassed had he been in an analogous situation because it would have communicated to him that he was no longer needed by the company (see

[116] above). The caveat to this was that this would apply only in normal circumstances, and these were not normal circumstances through the fault of Mr Cheah. Mr Cheah seems to have accepted that he had a role in causing these problems. However, the Defendant's actions were not limited to what would be required to avert the supposed impending disaster. The Defendant's Mr Niu and Mr Wang, despite knowing at an early stage (as early as May, during the Jinan Meetings and in any event, by the middle of June when the changes were well underway) that these changes would take place or were taking place, did precious little to stop them. The Defendant's actions were not targeted at solving or understanding the problem. The removal of the company car, the exclusion of Mr Cheah from meetings discussing his changes and the reversal of these changes under cover of night were not actions that needed to be taken even in abnormal circumstances.

126 I have not excluded from my deliberations the possibility that Mr Cheah's changes caused chaos in the production lines of the Defendant or that he had misunderstood the Defendant's manufacturing strategies and business. However, if that were the case, I would have expected there to be a flurry of meetings between Mr Niu, Mr Cheah and the senior management to find out the reasons for the chaos and discussions on what should be done.

127 Any proper investigation of the changes would have required Mr Cheah to at least explain himself. In *McCabe*, it was held that the failure to inform an employee of allegations made against him and a failure to carry out a proper investigation before dismissing him was a breach of the implied duty of mutual trust and confidence. I find that the Defendant's failure to inform Mr Cheah of the allegations made against him (that he was the sole cause of the "chaos" despite his efforts to get approval from Mr Niu as representative of the Board) is analogous to the *McCabe* situation. That alone would have sufficed to show that the Defendant's had breached their implied duty of mutual trust and confidence. However, this was not an isolated incident, but part of a series of events which undermined Mr Cheah's authority within the Defendant.

128 This is quite unlike the situation in *Ramzi*, where the court found at [49] that the plaintiff "expected far too much from his contract of employment… [and] started on the wrong footing when he assumed that he was the second in command." For the reasons given at [67]-[77] above, I find that Mr Cheah was given general oversight of the Defendant and that he did have overall charge. His ability to carry out his job properly depended on his ability to command the respect of the senior management.

129 This respect was continually being eroded: the senior management met with Mr Niu, the founder and executive director of the company, in Mr Cheah's absence, they saw the company car being taken away from Mr Cheah, and they saw Mr Niu come sweeping in like a knight to the rescue as joint-CEO, taking over the reins from Mr Cheah and starting to use Mr Cheah's office. In those circumstances, it is no wonder that the senior management stopped communicating with Mr Cheah and stopped sending him emails. I find that, as Mr Niu explained, Mr Cheah was simply kept on formally as sacking him would reflect badly on the company, [note: 122] but he did not enjoy the same privileges, status, or mutuality of trust as before. In reality, routes of approval had already been diverted to Mr Niu, who did not then consult with Mr Cheah as joint-CEO.

130 The reversal of the changes, although legitimate in itself, was the final straw. The "last straw" doctrine is clearly restated in *Omilaju v Waltham Forest London Borough Council* [2005] ICR 481 ("*Omilaju*") at 487-488:

> A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase

> "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

I find that the reversal had that "essential quality" of contributing significantly to the breach of an implied term of mutual trust and confidence. It completed the picture painted of a man who could not be trusted with the Defendant's affairs but who needed supervising instead of being the supervisor or CEO.

131 While Mr Cheah could have asserted himself from 17 to 24 August 2009 (see [110] above) when the reversal of his changes was being discussed and routes of approval were being diverted from him to Mr Niu, I am mindful that this would have been in what was by then a very hostile and uncertain situation. Mr Niu, supported by his lieutenants Mr Wang and Mr Gao, was a force to be reckoned with and seemed to have the full support of the management and staff. Mr Cheah would have had little over a week to decide on an action plan of dealing with what was essentially an unknown and amorphous problem, and there were constant new challenges being put to him each day. I find that it smacks of unreality to expect Mr Cheah to come actively back into management meetings when he had just been unceremoniously sidelined and was not even certain how and why this had happened or what could be done. By the time the reversal took place on 19 August 2009, it was already too late: the relationship of mutual trust and confidence between Mr Cheah and the Defendant had already been substantially destroyed.

132 As Glidewell LJ opined in *Lewis v Motorworld Garages Ltd* [1986] ICR 157 at 169, "the question is, does the cumulative series of acts taken together amount to a breach of the implied term?" I find that it is clear that, when taken together, the Defendant's behaviour was calculated and likely to destroy or seriously damage the relationship between the employer and employee. The Defendant, through Mr Niu and his lieutenants, acted capriciously by attempting to wrest back from Mr Cheah the authority given to him under the Agreement. They did so in what they thought to be a subtle way, removing the privileges that set Mr Cheah apart as the CEO (his office, the car, his inclusion in Board and other important meetings, the fact that he was the only CEO with the power to make day to day managerial decisions). The embarrassment caused by the Defendant's acts was not unlike a reprimanding in humiliating circumstances for which the court in *Hilton v Protopapa* found a breach of the implied term of mutual trust and confidence. I find that the Defendant clearly breached the implied term of mutual trust and confidence.

Was the breach of the implied term a repudiatory breach?

133 The question of whether there has been a repudiation is a question of mixed law and fact; Fox LJ opined in *Woods* at 703:

> The question whether there has been repudiation is, I think, one of mixed law and fact. But for present purposes it does not, I think, matter whether that characterisation is correct or whether the question should be regarded as one of law. Let it be supposed that it is a question of law. The law *provides no exhaustive set of rules for determining whether a particular set of facts does or does not constitute repudiation*. The law provides some general principles and numerous examples of the working of those principles in the reported cases. But the boundaries of the law, as thus stated and exemplified, are imprecise… *It is essentially a matter of degree*.
>
> [emphasis added]

134 The court in *Omilaju* further opined at 487 that "repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence."

135 Having found (at [124]-[131] above) that the Defendant had breached the implied term of mutual trust and confidence, I now find that this was also a repudiatory breach. It went to the essence of the contract. Mr Cheah's initial hesitation to take up the job because he was concerned that Mr Niu would be unable to give up the reins of his company [note: 123] had been ameliorated by the 11 May Memo and the draft of the employment contract attached (which was substantially adopted as the Agreement). The basis for his having taken up the position was that he would be accorded general authority in the daily management of the company *and* in revamping the organisational structure (see [70] above). The Defendant's actions went to the basis of the employment relationship by actively stymieing Mr Cheah's efforts to carry out his duties as outlined in the Agreement.

Acceptance of breach

136 In *Western Excavating*, it was found that any breach would have to be accepted in order for a claim of constructive dismissal to arise. The Defendant does not really challenge that Mr Cheah had accepted this repudiation. I find that Mr Cheah's email of 3 September 2009 to the Board (see [32] above), outlining his grievances as a repudiatory breach of the Agreement suffices as acceptance of this breach.

Causation

137 I further find that it was the Defendant's repudiatory breach of the Agreement which resulted in the Defendant's resignation on 24 August 2009. But for the actions taken by the Defendant, Mr Cheah would have been able to continue on in his role as CEO. Mr Cheah had been aware of, and consistently agreed without demur during cross-examination that the Board had the authority to reverse his changes at anytime.

> Q: So that means that do you agree with me, generally, you have the---let me read it out:
>
> [Reads] "…general control and responsibility"
>
> In the absence of specific directions. That means that Mr Cheah, when the board specifically makes a direction, it overrides you. Agree?
>
> A: Er, that's right. [note: 124]

138 Mr Cheah also agreed, again without demur, that the Board could appoint another person to act jointly with him as CEO, and could direct him to change his service scope without reasonable limits. [note: 125]

139 I find that Mr Cheah was at all times cognisant of, and agreeable to, the Board's supervisory power over him. This would have been commensurate with his previous experience as a CEO. I find that Mr Cheah would not have resigned had this been a simple case of the Defendant overriding his changes in a reasonable way. I find that it was the breach of the implied term of mutual trust and confidence which had caused Mr Cheah to leave the Defendant's employment.

Was there a repudiatory breach by Mr Cheah?

Unauthorised changes

140 For the reasons given at [87]-[96] above, I find that there were no unauthorised changes and accordingly no repudiatory breach by Mr Cheah. In any event, even if the changes had been authorised, the Defendant elected to treat the Agreement as continuing and had not accepted any repudiation.

Taking leave without approval

141 I now turn to deal with whether Mr Cheah had taken leave without approval on 10 and 24 to 31 August. If the Defendant is right, then Mr Cheah would have been in breach of his Agreement.

142 I find that the Defendant has not proved, on a balance of probabilities, its claim that Mr Cheah had taken leave without approval. I do not base my decision on Mr Cheah's failure to read the internal documents of the company in relation to leave process. The internal policies of companies are often impliedly incorporated into the employment agreements; employees have constructive knowledge of these internal policies and a duty to keep themselves informed of the basic policies and approval processes.

143 However, I find that there is no evidence that no approval had been given. The chief Defence witness on this matter, Ms Zhang Wei Wei, did not have firsthand knowledge of Mr Cheah's leave approval. Her testimony was wholly based on her faith in the Defendant's work processes in the face of other evidence. She was unable to explain the approval process when leave was applied for legitimately on an earlier occasion, testifying instead that the email stating that Mr Niu would be on leave would only be sent out if Mr Niu agreed. [note: 126] This assumes the fact, but was not evidence of it which I could use.

144 Ms Zhang further testified that there was no application form for Mr Niu to fill up, and she was unsure whether Mr Niu's approval needed to be given in writing. She admitted that it was possible for Mr Niu to have given his approval verbally. [note: 127] The approval documents annexed in her affidavit do not specify whether approval from Mr Niu was to be given verbally or in writing. There was no indication that in the previous instance of applying for leave, Mr Cheah had obtained Mr Niu's written approval. If written approval existed, Mr Niu would have had access to it and could have adduced it into evidence to discharge his burden of proof. He has not done so. I find that it is more likely than not that approval for Mr Cheah's earlier leave date (about which there is no dispute) had been given verbally by Mr Niu.

145 Mr Niu himself admitted that he did not tell Mr Cheah, in writing, that his leave for 10 and 24 to 31 August 2009 had been rejected. [note: 128] Mr Niu was unable to explain away Mr Cheah's emails asking for approval for leave on 10 August 2009, [note: 129] and for 24 to 31 August 2009. [note: 130] Mr Niu instead testified that he made some feeble attempts to call Mr Cheah to find out where he was on those dates. I find the truth to be that Mr Niu never attempted to find out Mr Cheah's whereabouts on those dates (see [111] above) because he had more likely than not approved Mr Cheah's leave as he did not want Mr Cheah in the office. I find that his account that he had tried to get in touch with Mr Cheah was an afterthought. I also note that part of Mr Niu's excuse seemed to be that he did not even know the alphabet and so could not really read his emails, [note: 131] but he later admitted that he knew enough to have an understanding of when emails were being sent to him. [note: 132] This too did little to establish Mr Niu as a reliable or credible witness.

146 The presence of leave requests, coupled with the Defendant's failure to effectively challenge Mr Cheah's plausible and consistent contention that verbal approval was sought and had been given, makes it more likely than not that the Defendant's claim that Mr Niu had taken leave without approval is unfounded.

Plaintiff's refusal to work jointly with Mr Niu

147 The Defendant submits that Mr Cheah stubbornly refused to cooperate with having Mr Niu appointed as joint-CEO. [note: 133] I find, however, that the evidence on this score is rather thin. Mr Cheah's testimony under cross-examination was that the decision had upset him and he personally disagreed to the appointment. However, he never challenged the Board's ability to appoint Mr Niu as joint-CEO and seemed to accept the decision.

Q: Well, you said---you told the Court you refused to accept Mr Niu as a joint CEO. Isn't that your evidence? Is that your evidence, Mr Cheah?

A: Where about in the---say that I---

Q: I'm asking you now. Is it your evidence before the Court that you agree or you do not agree with Mr Niu being appointed as a joint CEO, because you say---

A: *I was upset, I didn't disagree*.

Q: Because if you say you agree with Mr Niu being the joint CEO, then we can all pack up and go home now. So do you agree or disa---did you agree or disagree?

A: I disagree him to be appointed as a CEO. That is my---

Q: And so Mr Cheah, if you disagree with Mr Niu being appointed as a joint CEO, I'm putting it to you that you are in fact disobeying a direct order from the board.

A: No, I just upset and disagree. I---that doesn't mean that the---the---the clause 3.4 say that he can do it. Mr Niu can actually do it. Whether my opinion is a secondary thing, okay. [note: 134]

…

Q: And you are agreeing or rather you are telling this Court that you did not agree to Mr Niu, correct?

A: That's right.

Q: You did not agree, let's be very clear. So that's why based on what you are telling me and I am only reacting to you, I am putting my client's case to you, therefore, that when you disagree, you are directly disobeying a direct order from the board of directors. Yes or no?

A: No, *I disagree doesn't mean that I disobey*. [note: 135]

[emphasis added]

148 This is the only piece of evidence that Defendant points to in order to show that Mr Cheah had

wrongfully repudiated his service agreement by refusing to comply with lawful direction from the Board of Directors in appointing Mr Niu as Joint-CEO. I find Mr Cheah's opposition to the appointment did not constitute a refusal to work jointly with Mr Niu. For the reasons given at [110(g)]-[112] above, I find that it was more likely than not that it was Mr Niu who presumed himself to be the acting CEO and had simply stopped involving Mr Cheah substantially in any of the work.

149 In the final analysis, I find that Mr Cheah had not wrongfully repudiated the Agreement. There is no basis for the Defendant's counter-claims. Rather, I find that it was the Defendant who had repudiated the Agreement and Mr Cheah accepted the repudiation.

The measure of damages

150 The contractual measure of damages is set out at Clause 2.2.1 of the Agreement, which reads as follows:

> the employment of the Executive may be terminated at any time by the Company paying to the Executive an amount equivalent to the aggregate basic salary (based on the Executive's last drawn monthly salary) which he would otherwise receive for the remaining period of the Initial Term or an amount equivalent to six (6) months' salary based on the Executive's last drawn monthly salary, whichever is the higher amount; and

151 The appropriate measure of damages is thus for Mr Cheah's salary for the remaining term of his fixed term contract (1 September 2009 to 31 May 2012) of RMB 8,580,000. There is no need to offset the salary paid while Mr Cheah was on leave from 24 to31 August 2009 from this sum, as the Defendant has not made out its case that the leave was unapproved.

Conclusion

152 For the reasons set out above, I find that Mr Cheah was constructively dismissed and is entitled to the sum of RMB 8,580,000 which I so award. The Defendant's counterclaims are dismissed in their entirety. I will hear the parties on interest and costs.

[note: 1] Cheah Peng Hock's Affidavit of Evidence-in-Chief, [12]-[13].

[note: 2] CPH-4, Cheah Peng Hock's Affidavit of Evidence-in-Chief.

[note: 3] Cheah Peng Hock's Affidavit of Evidence-in-Chief, 06/09/2011, CPH-5.

[note: 4] NJX-5, Niu Jixing's Affidavit-of-evidence-in-chief, p 76.

[note: 5] Defendant's closing submissions, 29 February 2012, [59].

[note: 6] Notes of Evidence, 17 October 2011, p 41.

[note: 7] *Ibid.*, p 36.

[note: 8] Cheah Peng Hock's Affidavit-of-evidence-in-chief, p 61.

[note: 9] *Ibid*.

[note: 10] *Ibid.*, p 63, [4].

[note: 11] Defendant's submissions, 29 February 2012, [71].

[note: 12] Defendant's submissions, 29 February 2012, [126].

[note: 13] Notes of Evidence, 25 October 2011, p 82.

[note: 14] Notes of Evidence, 12 January 2012, p 50.

[note: 15] *Ibid.*, p 65.

[note: 16] *Ibid.*, p 66.

[note: 17] Notes of Evidence, 13 January 2012, p 13.

[note: 18] NJX-5, Niu Jixing's Affidavit-of-evidence-in-chief, p 76.

[note: 19] Notes of Evidence, 25 October 2011, p 26.

[note: 20] Notes of Evidence, 16 January 2012, p 8.

[note: 21] *Ibid.*, p 9.

[note: 22] *Ibid.*, p 10.

[note: 23] *Ibid.*, p 11.

[note: 24] *Ibid.*, p 12.

[note: 25] *Ibid.*, p 13.

[note: 26] *Ibid.*, p 19.

[note: 27] Notes of Evidence, 13 January 2012, p 16.

[note: 28] Notes of evidence, 12 January 2012, p 13.

[note: 29] Notes of Evidence, 25 October 2011, p 18.

[note: 30] Notes of Evidence, 25 October 2011, p 11; Notes of Evidence, 15 January 2012, p 19.

[note: 31] Notes of Evidence, 25 October 2011, p 19; Notes of Evidence, 12 January 2012, p 13.

[note: 32] Notes of Evidence, 25 October 2011, pp 20-21.

[note: 33] Notes of Evidence, 17 January 2012, p 17.

[note: 34] *Ibid.*, pp 28-30.

[note: 35] *Ibid.*, p 29.

[note: 36] Notes of Evidence, 17 January 2011, p 26.

[note: 37] *Ibid.*, p 22.

[note: 38] Notes of Evidence, 12 January 2012, p 63.

[note: 39] Notes of Evidence, 25 October 2011, p 48.

[note: 40] Notes of Evidence, 12 January 2012, p 60.

[note: 41] Notes of Evidence, 25 October 2011, pp 14-15.

[note: 42] Niu Jixing's Affidavit-of-Evidence-in-Chief, pp12-13, [46].

[note: 43] Koh Pee Keat's Affidavit-of-Evidence-in-Chief, p 55.

[note: 44] Cheah Peng Hock's Affidavit of Evidence-in-Chief, p 108.

[note: 45] Notes of evidence, 24 October 2011, p 111.

[note: 46] Notes of Evidence, 12 January 2012, pp 15-16.

[note: 47] Notes of evidence, 24 October 2011, p 128.

[note: 48] *Ibid.*, p 128.

[note: 49] *Ibid.*, p 129.

[note: 50] Cheah Peng Hock's Affidavit of Evidence-in-Chief, p 254.

[note: 51] Cheah Peng Hock's Affidavit of Evidence-in-Chief, p 244.

[note: 52] Notes of Evidence, 24 October 2011, p 35.

[note: 53] Notes of Evidence, 20 October 2011, p 62.

[note: 54] See, for e.g, Notes of Evidence, 24 October 2011, p 131; Notes of Evidence, 25 October 2011, p 11; Notes of Evidence, 15 January 2012, p 19.

[note: 55] Notes of Evidence, 24 October 2011, p 130.

[note: 56] Notes of Evidence, 17 January 2012, p 46.

[note: 57] *Ibid.*, p 35.

[note: 58] *Ibid.*, p 38.

[note: 59] *Ibid.*, p 42.

[note: 60] Cheah Peng Hock's Affidavit-of-evidence-in-chief, p 69 (Annex 2 of Hudson Teh's report).

[note: 61] *Ibid.*, p 16.

[note: 62] Notes of Evidence, 19 October 2011, p 92.

[note: 63] Notes of Evidence, 16 January 2012, p 59.

[note: 64] Notes of Evidence, 18 October 2011, p 57.

[note: 65] *Ibid.*, p 43.

[note: 66] 12 Aug 2009, 18:00 Meeting minute with management staff.

[note: 67] Notes of Evidence, 24 October 2011, p 148.

[note: 68] Cheah Peng Hock's Affidavit-of-evidence-in-chief, pp 100-103, para 4.

[note: 69] Notes of evidence, 25 October 2011, p 100.

[note: 70] *Ibid.*, pp 11-13.

[note: 71] *Ibid.*, pp 12-13

[note: 72] *Ibid.*, p 50.

[note: 73] Notes of Evidence, 12 January 2012, p 47.

[note: 74] Cheah Peng Hock's Affidavit of Evidence-in-Chief, p 15; Notes of Evidence, 17 October 2011, p 22.

[note: 75] Notes of Evidence, 13 January 2012, p 11.

[note: 76] *Ibid.*, pp 11-12.

[note: 77] NJX-5, Niu Jixing's Affidavit-of-evidence-in-chief, p 76.

[note: 78] Notes of Evidence, 19 October 2011, p 32.

[note: 79] Notes of Evidence, 18 October 2011, p 117.

[note: 80] *Ibid.*, p 114; Notes of Evidence, 25 October 2011, p 71.

[note: 81] Cheah Peng Hock's Affidavit-of-evidence-in-chief, pp 167-171; Notes of Evidence, 19 October 2011, p 18.

[note: 82] Notes of Evidence, 25 October 2011, p 72.

[note: 83] *Ibid.*, p 74.

[note: 84] Notes of Evidence, 25 October 2011, p 69.

[note: 85] Niu Jixing's Affidavit of Evidence-in-Chief, p 8; Cheah Peng Hock's Affidavit of Evidence-in-Chief, p 145 (Meeting Minute, 12 Aug 2009, 18:00).

[note: 86] Niu Jixing's Affidavit of Evidence-in-Chief, p 9; Cheah Peng Hock's Affidavit of Evidence-in-Chief, p 146 (Draft Meeting Minute, 12 Aug 2009, 18:00).

[note: 87] Plaintiff's closing submissions, 29 February 2012, p 91, [182].

[note: 88] Defendant's closing submissions, 29 February 2012, p 32, [72].

[note: 89] Notes of Evidence, 19 October 2011, p 43.

[note: 90] *Ibid.*

[note: 91] *Ibid.*, p 42.

[note: 92] *Ibid.*, p 44.

[note: 93] Notes of Evidence, 10 October 2011, p 32.

[note: 94] Notes of Evidence, 19 October 2011, p 44.

[note: 95] Defendant's closing submissions, 29 February 2012, pp 66-67.

[note: 96] *Ibid.*, pp 84-87.

[note: 97] *Ibid.*, pp 48-50.

[note: 98] *Ibid.*, pp 82-84.

[note: 99] Notes of Evidence, 13 January 2012, p 72; Notes of Evidence, 18 January 2012, p 64.

[note: 100] Notes of Evidence, 13 January 2012, p 73.

[note: 101] Cheah Peng Hock's Affidavit of Evidence-in-Chief, p 22, [46]; Notes of Evidence, 18 October 2011, p 4.

[note: 102] Notes of Evidence, 13 January 2012, p 72.

[note: 103] Plaintiff's reply to closing submissions, p 28, [54].

[note: 104] Notes of Evidence, 18 October 2011, p 4.

[note: 105] *Ibid.*, p 5.

[note: 106] Notes of Evidence, 13 January 2012, p 76; Notes of Evidence, 16 January 2012, p 2.

[note: 107] Notes of Evidence, 16 January 2012, p 3.

[note: 108] *Ibid.*, p 4.

[note: 109] Cheah Peng Hock's Affidavit of Evidence-in-Chief, p 20, [42].

[note: 110] Notes of Evidence, 19 October 2011, p 103; Notes of Evidence, 18 January 2012, p 79.

[note: 111] Cheah Peng Hock's Affidavit of Evidence-in-Chief, p 21, [45].

[note: 112] Notes of Evidence, 19 October 2011, p 103.

[note: 113] Notes of Evidence, 18 January 2012, p 80.

[note: 114] Plaintiff's Reply to Closing Submissions, p 42, [82].

[note: 115] Defendant's closing submissions, p 79, [222].

[note: 116] Plaintiff's Reply to Closing Submissions, p 43, [85].

[note: 117] Notes of Evidence, 19 October 2011, p 103.

[note: 118] Niu Jixing's Affidavit of Evidence-in-Chief, p 20, [71].

[note: 119] Cheah Peng Hock's Affidavit of Evidence-in-Chief, p 6, [12].

[note: 120] Notes of Evidence, 18 January 2012, p 79.

[note: 121] Defendant's closing submissions, p 34, [83].

[note: 122] Notes of Evidence, 13 January 2012, p 25.

[note: 123] Cheah Peng Hock's Affidavit of Evidence-in-Chief, p 6, [12].

[note: 124] Notes of Evidence, 17 October 2011, p 43.

[note: 125] *Ibid.*, p 44.

[note: 126] Notes of Evidence, 19 January 2012, p 48.

[note: 127] Notes of Evidence, 20 January 2012, p 18.

[note: 128] Notes of Evidence, 25 October 2011, p 81.

[note: 129] Cheah Peng Hock's Affidavit of Evidence-in-Chief, p 190.

[note: 130] *Ibid.*, p 193.

[note: 131] Notes of Evidence, 16 January 2012, p 20.

[note: 132] *Ibid.*, pp 48-49.

[note: 133] Defendant's Closing submissions, 29 February 2012, p 81, [226].

[note: 134] Notes of Evidence, 17 October 2011, p 47-8.

[note: 135] *Ibid.*, p 48.